"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

104

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 25, 1908—DECEMBER 22, 1908

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1909

THE LAWYER'S PRAYER

"Almighty God, the Giver of Wisdom, without Whose help Resolutions are vain, without Whose blessing study is ineffectual, enable me if it be Thy will, to attain such Knowledge as may qualify me to direct the doubtful and instruct the ignorant, to prevent wrongs and terminate contentions; and grant that I may use that knowledge which I shall attain to Thy glory and my own salvation; for Jesus Christ's sake. Amen."

DR. SAMUEL JOHNSON.

September 26, 1765.

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THE PROFESSION

"Craft is the vice, not the spirit of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and of the Bar."

EDWARD G. RYAN.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. LUCILIUS A. EMERY, CHIEF JUSTICE
HON. WILLIAM PENN WHITEHOUSE
HON. ALBERT R. SAVAGE
HON. HENRY C. PEABODY
HON. ALBERT M. SPEAR
HON. LESLIE C. CORNISH
HON. ARNO W. KING
HON. GEORGE E. BIRD

Justices of the Superior Courts

HON. LEVI TURNER, CUMBERLAND COUNTY
HON. OLIVER G. HALL, KENNEBEC COUNTY

ATTORNEY GENERAL

HON. WARREN C. PHILBROOK

ASSISTANT ATTORNEY GENERAL

HON. CHARLES P. BARNES

REPORTER OF DECISIONS

GEO. H. SMITH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1909

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: EMERY, C. J., PEABODY, SPEAR, CORNISH, KING, BIRD, JJ.

TABLE OF CASES REPORTED

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TABLE OF CASES CITED

BY THE COURT

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

CHARLES C. STUART *vs.* GEORGE M. CHAPMAN.

SAME *vs.* HENRY F. ANDREWS.

Somerset. Opinion February 25, 1908.

Statutes. Amendments. Construction. Disclosure Commissioner. Jurisdiction. Execution Creditor. Liability of Disclosure Commissioner and Execution Creditor. Statute 1905, chapter 131; 1905, chapter 134. Revised Statutes chapter 114, sections 23, 38.

The numbering of statutes is not a legislative act, but it is purely a ministerial act performed by executive officers in the office of the Secretary of State, and no presumption as to the order of time in which statutes were passed can arise from their numbering.

The approval of the Governor is the last legislative act which breathes the breath of life into a statute and makes it a part of the laws of the State.

Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously.

Statutes in pari materia are to be construed together so as to ascertain and carry out the legislative will.

Revised Statutes, chapter 114, section 23, was amended by Public Laws, 1905, chapter 131 and Public Laws, 1905, chapter 134. Both of the amendatory Acts were approved by the Governor the same day. *Held:* That these two Acts must be construed together and Revised Statutes, chapter 114 section 23, is to be read, as amended by both Acts, with the words stricken out by chapter 131 and the words inserted by chapter 134.

When a disclosure commissioner does not act within the limits of his jurisdiction, he is answerable in law for what he does without those limits and wholly outside of his powers and duties.

When a disclosure commissioner, acting in a disclosure matter, without jurisdiction, refuses the execution debtor the benefit of the oath provided by Revised Statutes, chapter 114, section 55, and indorses upon the execution the certificate required by Revised Statutes, chapter 114, section 38, and annexes to the execution the capias required by said section 38, and such debtor is arrested and committed to jail on such capias and execution, such disclosure commissioner is liable in an action for false imprisonment.

When an execution debtor has been committed to jail on a capias annexed to an execution by a disclosure commissioner who acted without jurisdiction in the matter, and the execution creditor sends to the keeper of the jail money to pay for the support of the execution debtor while in jail and states to such keeper that more money will be sent for that purpose, if necessary, it is an approval, adoption and ratification of the unlawful acts of the disclosure commissioner and makes such execution creditor liable in an action for false imprisonment.

Each wrong doer is liable for the whole amount of an injury sustained although a plaintiff can have but one satisfaction.

Rush v. *Buckley*, 100 Maine, 322, distinguished.

On agreed statement of facts. Judgment for plaintiff.

Actions of trespass for false imprisonment. The agreed statement of facts in the first named case is as follows:

"On November 9, 1905, one Henry F. Andrews a resident of Bangor in the County of Penobscot, applied, through his attorney, H. H. Patten, also a resident of Bangor, to the defendant a disclosure commissioner within and for the County of Somerset, duly qualified as such, for a subpœna summoning the plaintiff before defendant as said commissioner to make, on oath, a full and true disclosure of all his business and property affairs. Said Henry F. Andrews was then the owner of an execution against the plaintiff, of which "Exhibit A" (omitted from this report) hereto attached is a copy.

"Acting on said petition the defendant issued under his hand and seal as said commissioner a subpœna commanding the plaintiff to appear before him at his office in Fairfield in said County of Somerset, on November 15, 1905, at ten o'clock in the forenoon, to make on oath a full and true disclosure of all his business and property affairs. At said time and place the plaintiff appeared before said Chapman for disclosure but on examination was refused the benefit of the oath. On the afternoon of that day the defendant issued the capias of which 'Exhibit B' (omitted from this

report) hereto attached is a copy, and attached to the execution the certificate, of which 'Exhibit C' (omitted from this report) hereto attached, is a copy.

"The capias was delivered to William W. Nye of said Fairfield, a deputy sheriff for said County of Somerset, who arrested the plaintiff at about two o'clock that afternoon, detaining him in the town lock-up at Fairfield until eight o'clock that evening when he was committed to the county jail at Skowhegan. 'Exhibit D' (omitted from this report) hereto attached is a copy of the return of said William W. Nye.

"Immediately on being committed to jail, the plaintiff procured counsel relative to his discharge, and a petition for habeas corpus was at once presented to A. M. Spear, a Justice of the Supreme Judicial Court of Maine. On this petition the plaintiff was discharged from custody, the following Tuesday, the 21st of November, 1905, having been confined in Somerset jail since his commitment thereto, with the exception of the day at Augusta when the hearing on habeas corpus occurred, when he was in the custody of the sheriff, but not in jail. From the order of Judge Spear discharging the respondent the defendant appealed to the Law Court, where the case was argued by counsel orally, the appeal being finally dismissed.

"The plaintiff is, and was at the date of the disclosure proceedings referred to, a resident of Saint Albans in the County of Somerset. Both the said Henry F. Andrews and his attorney are, and were at the date of said disclosure proceedings, residents of Bangor in the County of Penobscot. The town of Fairfield is not the shire town of the County of Somerset.

"Plaintiff is engaged in the business of sawing lumber in the said town of Saint Albans, and has a wife and one daughter, nine years of age. Plaintiff's expense in procuring his release on habeas corpus, including counsel fees, was approximately $80.00.

"If upon the foregoing facts the plaintiff is entitled to recover, damages are to be assessed by this court; if not, judgment to be for the defendant."

The agreed statement in the second named case alleges that "on November 9, 1905, the defendant, being the owner of the execution of which 'Exhibit A' (omitted from this report) hereto attached, is a copy, running against the plaintiff, applied in writing to George M. Chapman, Esq., of Fairfield, a disclosure commissioner within and for said County of Somerset, duly qualified as such, for a subpœna summoning the plaintiff before said Chapman as said commissioner to make, on oath, a full and true disclosure of all his business and property affairs," and then in substance recites the facts alleged in the first aforesaid agreed statement, and in addition thereto contains the following paragraph:

"During the confinement of the plaintiff in the Skowhegan jail the defendant sent to the keeper thereof money to pay for the support of the plaintiff in said jail, at the same time stating to said keeper that more money would be forthcoming if needed." Stipulations same as in the first aforesaid agreed statement.

Memorandum. Chapters 131 and 134, Public Laws, 1905, were repealed by chapter 2, Public Laws, 1907, and section 23 of chapter 114, Revised Statutes, was amended by said chapter 2 so as to read as follows:

"Section 23. Such magistrate shall thereupon issue under his hand and seal a subpœna to the debtor, commanding him to appear before such magistrate within said county, in the town in which the debtor, the petitioner or his attorney, resides, and in case there is no such magistrate in the town where the debtor, the petitioner or his attorney resides, then in a town where there is such a magistrate nearest to the place of residence of the debtor, the petitioner or his attorney, at a time and place therein named, to make full and true disclosure, on oath, of all his business and property affairs. The application shall be annexed to the subpœna. No application or subpœna shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, when the person and the case can be rightly understood. Such errors and mistakes may be amended on application of either party."

Note. The opinion in this case was prepared by Mr. Justice

POWERS while he was a member of the Bench but was not announced until several months after his resignation.

Gould & Lawrence, for plaintiff.

H. H. Patten, for defendants.

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

POWERS, J. Actions of trespass for false imprisonment.

November 9, 1905, defendant Andrews, a resident of Bangor in Penobscot County, and the owner of an execution against the plaintiff, applied, through his attorney who was also a resident of Bangor, to the defendant Chapman, a disclosure commissioner for the County of Somerset, for a subpœna summoning the plaintiff, a resident of St. Albans in the County of Somerset, before said commissioner to make, on oath, a full and true disclosure of all his business and property affairs. Thereupon the commissioner issued a subpœna commanding the plaintiff to appear before him at his office in Fairfield in the County of Somerset on Nov. 15, 1905, at ten A. M. At that time and place the plaintiff appeared, but upon examination was refused the benefit of the oath. The commissioner thereafterwards indorsed upon the execution the certificate and annexed to the execution the capias required by R. S., chapter 114, section 38. The plaintiff was arrested and committed to jail on said capias and execution, and there remained until discharged on habeas corpus six days later.

No question is raised as to the regularity of the proceedings except in one particular. The plaintiff contends that under the provisions of R. S., chapter 114, section 23, as amended by chapter 131 of the Public Laws of 1905, the commissioner had no power to summon him to a disclosure at Fairfield, a town in which neither the debtor, the petitioner nor his attorney resided, and which was not the shire town of Somerset County. As said section stood prior to its amendment it provided that "where plaintiff or his attorney of record resides in one county and the defendant in another the debtor may be commanded to appear before such magistrate in

any town in the county where the defendant resides." By said chapter 131, approved March 22, 1905, said section twenty-three was amended by striking out the words above quoted so that said section as amended would read, so far as relates to the question here involved, as follows:

"Section 23. Such magistrate shall thereupon issue under his hand and seal a subpœna to the debtor, commanding him to appear before such magistrate within said county, in the town in which the debtor, the petitioner or his attorney, resides or, in the shire town of said county, at a time and place therein named, to make full and true disclosure, on oath, of all his business and property affairs."

It is obvious that if this statute controls the plaintiff's contention cannot be gainsaid. The defendants, however, say that chapter 131 of the laws of 1905 was repealed by chapter 134 of the laws of that year which was also approved on the same day as chapter 131. Chapter 134 amended said section twenty-three by inserting after the word "county" in the "fifth" (fourth) line the words "and any town in which regular sessions of the Supreme Judicial Court are held, shall be considered a shire town for the purpose of this act so that said section as amended shall read as follows." Then followed a recital of section twenty-three with the above definition of a shire town following the word "county" in the fourth line but in all other respects the same as before amendment, and containing therefore the words stricken from the section by said chapter 131.

It is a familiar principle of statutory construction that a statute providing that a certain section of a prior act shall be amended "so as to read as follows," repeals by necessary implication all of the section of the prior act which is not re-enacted. Accordingly the defendants contend that chapter 134, being the last expression of the legislative will, must be deemed to be a substitute for all previous enactments, including chapter 131, and the only one which has the force of law. If the premise is sound, namely that chapter 131 is a prior act within the meaning of the principle above stated, the conclusion claimed logically follows. The rule invoked has heretofore been applied in cases of statutes enacted at different dates. In the case at bar the two statutes under consideration

were approved upon the same day, and went into effect the same moment of time. It is true that one bears a later or larger number than the other. The numbering of a statute, however, is not a legislative act. The legislature never undertakes to supervise or control it in any way. It is purely a ministerial act, performed by executive officers in the office of the secretary of State, when the laws of the session are collected and published after the legislature adjourns. No presumption as to the order of time in which statutes were passed can arise from their numbering. The last legislative act is the approval of the governor. When approved and not till then they became existing acts. *Palmer* v. *Hixon*, 74 Maine, 447. There is nothing to show when this was done, except that they were both approved on the same day. It is urged by the plaintiff that the legislative journals show that chapter 134 was introduced into the legislature several days before chapter 131, and that, while both acts had their final passage on the same day, chapter 134 appears before chapter 131 in the list of bills passed and sent to the governor for approval. We cannot regard this as of any special significance because they were still incomplete statutes. The approval of the governor was the last legislative act which breathed the breath of life into these statutes and made them a part of the laws of the State. Moreover, as said by this court in *Weeks* v. *Smith, et al*, 81 Maine, 547, "No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and president of the senate and approved by the governor is a statute or not."

Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously. *Harrington* v. *Harrington*, 53 Vt. 649. This rule, easy to understand and simple in its application, allows statutes, which like those under consideration are in pari materia, to be construed together so as to ascertain and carry out the legislative will, that primary rule of statutory interpretation to which all others, including that so strenuously invoked by the defendants, are but corollaries. It avoids the absurdity of holding that the legislature, whose proceedings are presumed to be conducted with wisdom and deliberation, enacted and

repealed a statute upon the same day; or that the house and senate gravely and solemnly passed through all their several stages two inconsistent acts, either one of which would repeal the other, and sent them at the same time to the governor, intending that, and that alone, should become a law of the land to which he happened last to affix his signature.

It is perfectly evident that the legislature intended to make two amendments to section twenty-three. This it did by two separate acts, each one of which in reciting the section as amended necessarily recited it as though the other act did not exist, because such other act had not become a law and non sequitur that it ever would become one. Both, however, finally by the approval of the governor became statutes of the State at the same time. There is nothing inconsistent in the two amendments, one defining a shire town and the other striking out that part of the old statute which, where the plaintiff or his attorney resided in one county and the debtor in another, allowed the debtor to be cited for a disclosure in any town in the county in which the debtor resided. Force and effect can, and therefore should, be given to both amendments, and both must stand as statutes of the State. Section twenty-three reads, as thus amended by both statutes, with the words stricken out by chapter 131 and the words inserted by chapter 134. We apprehend that no man can have any doubt that this is precisely what the legislature intended to accomplish. The means it adopted were appropriate to the end, and we know of no iron rule of statutory interpretation which, under the circumstances of this case, must render its efforts abortive.

The defendant Chapman was a disclosure commissioner for Somerset County. When holding his court in the shire town of the county he had jurisdiction over the persons of all debtors within the county and power to hear and determine all disclosure cases of such debtors. When holding it in any other town in the county he had jurisdiction over the persons of such debtors only as resided in said town, or of debtors whose creditors or their attorneys resided in said town, and to hear and determine only such disclosure cases as those in which these jurisdictional facts were shown to exist. Neither the

debtor, creditor nor his attorney resided in Fairfield where the disclosure commissioner held his court. He had no power to hear and determine the case, no jurisdiction over the debtor's person, and no authority to issue a capias commanding his arrest and commitment to jail, and for so doing he is liable. The case at bar is clearly distinguishable from *Rush* v. *Buckley*, 100 Maine, 322, where a magistrate, who had the power to hear and determine cases of the general class to which the proceeding in question belonged, was held not liable for ordering the commitment of the plaintiff whom he had found guilty of an offense created by a void city ordinance. It more nearly resembles *Stilphen* v. *Ulmer*, 88 Maine, 211, where a trial justice of Knox County issued a warrant commanding the arrest of the plaintiff for an offense alleged to have been committed in Lincoln County. The disclosure commissioner was acting illegally, without any authority to hear or determine disclosure cases like the one in question, where neither the debtor, creditor nor his attorney resided in the town where he held his court, and without any jurisdiction over the person of the debtor. All this appeared by the undisputed facts recited by himself in the capias which he issued and which he himself delivered to the officer. He was not acting within the limits of his jurisdiction, and must therefore answer for what he did without those limits and wholly outside of his duties and powers.

In regard to the liability of the defendant Andrews it does not appear that he ordered the arrest or commitment, but the case does disclose that he approved, adopted and ratified those acts by sending to the keeper of the jail where the plaintiff was confined money to pay for the support of the plaintiff in jail and stated to the keeper that more money would be forthcoming if needed for that purpose. By so doing he made himself as liable for the arrest and unlawful detention as if he had ordered them in the first instance. "It never has been doubted that a man's subsequent agreement to a trespass done in his name for his benefit amounts to a command so far as to make him answerable." *Dempsey* v. *Chambers*, 154 Mass. 330. In the case at bar the defendant Andrews, by furnishing the money for the plaintiff's board in jail, not only ratified the

arrest and commitment as acts done in his behalf; but such conduct on his part necessarily resulted in prolonging the plaintiff's confinement in jail, and such was his purpose in furnishing the money and offering to furnish more. Here is something more than a mere failure to disavow the wrongful act of an agent, as in *Tucker* v. *Jerris*, 75 Maine, 184. The intention to affirm is clear. He is presumed to have known the law, and if he did not in fact know that the imprisonment was unlawful, an examination of the papers upon which his debtor was committed would have shown it. In any event in furnishing the money necessary to insure his debtor's continued deprivation of liberty, he acted at his peril, and, it proving unlawful, he must now abide the consequences.

The plaintiff's expense in procuring his release on habeas corpus was $80 and he was confined in jail from November 15, to November 21. He is entitled to some compensation beyond this for the disgrace and mental suffering which would naturally follow from his imprisonment.

Each wrong doer is liable for the whole amount of the injury sustained, although the plaintiff can have but one satisfaction. In each case

Judgment for the plaintiff for $100.

C. L. HUTCHINS *vs.* ANDREW LEWIS.

Androscoggin. Opinion February 26, 1908.

Written Contracts. Construction. Real Estate Brokers. Commissions.

All written contracts are to be read in the light of surrounding circumstances. The relations of the parties and the subject matter are always to be taken into consideration.

In the case at bar, the defendant placed real estate in the plaintiff's hands in July 1905, for sale under a written contract in which he agreed to pay the plaintiff who was a real estate broker "a commission of one hundred dollars in case of sale." *Held:* That this did not limit the broker to a commission only in case of actual sale by himself, that it was not necessary that he should complete the entire negotiations, but if he had placed a purchaser in communication with the owner and subsequent negotiations resulted in a sale by the owner, then the broker was entitled to recover.

On exceptions by defendant. Overruled.

Assumpsit by plaintiff, a real estate broker doing business as C. L. Hutchins Real Estate Company, to recover a commission of $100 for sale of defendant's real estate under a written contract. Tried at the September term, 1906, Supreme Judicial Court, Androscoggin County. Verdict for plaintiff for $103.27. The defendant excepted to certain rulings made by the presiding Justice during the trial.

The case appears in the opinion.

Newell & Skelton, for plaintiff.

Oakes, Pulsifer & Ludden and John Merriman, for defendant.

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

CORNISH, J. The single question is the construction of a contract of which the following is the important part:

"C. L. Hutchins Real Estate Co.

Gentlemen:

I hereby place the property, of which the above is a description, in your hands for sale and agree to pay you a commission of one hundred dollars in case of sale.

his
Andrew x Lewis
cross."

The defendant's interpretation of this contract is that it compelled payment of commission only in case of sale by the broker himself. The exceptions show that the property was placed in the plaintiff's charge in July 1905, the price to be $1000; that it was never withdrawn: that the plaintiff endeavored to sell the property to the International Paper Company for that sum but received an offer of only $600, which he communicated to the defendant who refused it; that a few months later the same company, through its own attorney, closed the trade with the defendant personally for $900 and paid him that sum; and the plaintiff took no part in the final transaction.

If the defendant's interpretation is correct, this action fails. But the presiding Justice construed the contract to have the ordinary meaning of such agreements between real estate owners and brokers and instructed the jury that it was not necessary for the plaintiff to complete the entire negotiations himself, but if he had placed a purchaser in communication with the owner and subsequent negotiations resulted in a sale by the owner at any price, then he would be entitled to recover in the same manner as if he had himself participated in all the negotiations.

We think the construction put upon the contract by the court was correct. All written contracts are to be read in the light of surrounding circumstances. *Snow* v. *Pressey*, 85 Maine, 408. The relations of the parties and the subject matter are always to be taken into consideration. So read, this contract does not admit of the narrow construction claimed by the defendant. The defendant agreed to pay a commission of one hundred dollars "in case of sale," not necessarily a sale completed personally by the plaintiff, but a

sale negotiated by the plaintiff as a broker or brought about by such services on his part as a broker would be expected to render under like circumstances. This is the reasonable and natural interpretation of the contract and such as must have been in the contemplation of both parties when it was made. In fact the defendant seemed to have retained the same idea at the time of the final sale because he then asked the attorney of the purchaser as to his liability to the plaintiff for commissions.

The instructions to the jury as to the grounds of the plaintiff's recovery were in accordance with the settled law of this State. *Garcelon* v. *Tibbetts*, 84 Maine, 148; *Hartford* v. *McGillicuddy*, 103 Maine, 224.

Exceptions overruled.

LOUISA M. TRIPP *vs.* INHABITANTS OF WELLS.

York. Opinion February 26, 1908.

Town. Defective Way. Injuries. Burden of Proof. Due Care.

1. To maintain an action against a town for injuries alleged to have been caused by a defect in a highway, it is incumbent on the plaintiff to prove affirmatively his own due care in the premises. It is not enough that there was no evidence of want of due care.
2. Even though from the evidence it could be inferred that the plaintiff was observing due care, yet, if it could be inferred with equal reason that he was not observing due care he fails to sustain his burden of proof.
3. Where the plaintiff's horse, which he was driving, left the traveled part of the highway, went across the sidewalk and fell over the outer edge of the sidewalk into a swale below, to the injury of the plaintiff, and no explanation is given for such conduct, the plaintiff has failed to prove affirmatively his own due care in the premises, and hence cannot maintain his action.

On motion by defendants. Sustained.

Special action on the case brought under the provisions of Revised Statutes, chapter 23, section 76, to recover damages for

injuries alleged to have been received by the plaintiff through a defect in a public way which the defendant town was obliged by law to keep in repair. Plea, the general issue.

Tried at the January term, 1907, Supreme Judicial Court, York County. Verdict for plaintiff for $1,210.08. Defendants then filed a general motion to have the verdict set aside.

The case appears in the opinion.

William M. Tripp and Geo. F. & Leroy Haley, for plaintiff.

E. P. Spinney and Cleaves, Waterhouse & Emery, for defendants.

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

EMERY, C. J. This was an action upon the statute to recover damages for injuries alleged to have been received by the plaintiff through a defect in a public way which the defendant town was obliged by law to keep in repair. The practically uncontroverted situation was substantially this: The public way was a highway from Ogunquit to Wells Village. At one place it crossed over a brook called Goodale's Brook bridged by a culvert covered with earth. The road for most of the way was some fifty-five feet between fences, with a wrought way of the usual width. The culvert was thirty-one and a half feet long. On the westerly side of the road was a plank sidewalk across the end of the culvert and extending some seventy-five feet each way from it. This sidewalk was four or five feet wide, and was bordered on the inner or road side with small bushes or vines. Its surface was nearly even with the surface of the traveled part of the road. On the outside the sidewalk was bordered by a railing. At the culvert, and for some distance either side, the wrought part of the road was of the usual width. The road was graveled and was free from defects in the part used by teams, automobiles, etc. It was nearly straight, curving a trifle to the right as one passed the culvert going to Wells Village. The plaintiff was familiar with the road at this locality, having passed over it many times. She knew the sidewalk was there.

After dark on the evening of Nov. 26, 1905, the plaintiff was driving her horse and single buggy along this road in the direction of Wells Village, and was approaching this culvert, the sidewalk and the railing beyond it being on her left. In some way, from some cause, the horse left the traveled part of the road, crossed the sidewalk and fell over into the brook or swale below, dragging the buggy and the plaintiff after him to her injury. The place where the horse fell was at or a little beyond the end of the culvert. A witness (for the plaintiff) who observed the wheel tracks of the buggy the same evening testified that they came along the road "a natural sweep" to near the place of the accident and there left the traveled part of the road at an angle of forty-five degrees.

The plaintiff claimed that at the place where her horse went over the sidewalk into the brook or swale below, the railing was defective, and that that defect was the proximate cause of her injury. Before considering that question, however, it is expedient to inquire whether the plaintiff has presented enough evidence to sustain a preliminary proposition of fact essential to her case, viz: that she was herself in the exercise of the requisite degree of care. The burden is on her to prove that proposition affirmatively. It is not enough that there is no evidence of her want of such care. If there is no evidence either way, the plaintiff fails to sustain her burden. *Crafts* v. *Boston*, 109 Mass. 519, 521; *Mosher* v. *Smithfield*, 84 Maine, 334, 336.

The plaintiff's horse that she was driving left the road, crossed the sidewalk and fell off the outer side of that walk into the brook or swale below. Had the horse kept the road which was safe, there would have been no falling off the sidewalk and no injury. Clearly the burden is on the plaintiff to account for this conduct of the horse and to show affirmatively that she exercised due care to prevent it. The only evidence she offered was her own testimony as follows: "Well, as far as I know, I drove out of Mrs. Littlefield's yard on the highway and drove along until I found myself tumbling; that is all I know. Without a moment's warning I went over this bank. I supposed I was in the middle of the road."

On cross-examination she testified that she was able, despite the

darkness, to drive out from Mrs. Littlefield's place into the highway and turn in the highway toward her home, and after that she knew nothing more until she was tumbling over the bank, except that she "was driving the horse."

This evidence manifestly does not sustain the plaintiff's burden of affirmatively proving her own due care in the premises. Even if from this evidence it could be inferred that she was using due care to guide her horse and keep him in the road, it could be equally well if not more reasonably inferred that she was inattentive and not minding her horse. The circumstances are as consistent with negligence as with care in the manner of her driving at the time of the accident. "Where different inferences are deducible from the same facts which appear and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition upon which alone she would be entitled to recover." *Mosher* v. *Smithfield*, 84 Maine, 334, 337. The cause of the horse leaving the road is not explained, but left to conjecture. The evidence does not indicate any one cause more than another. Even if it does not show that the plaintiff was inattentive, and hence careless, it does not show affirmatively that she was not, and this latter lack in the evidence is fatal to her action. *McLane* v. *Perkins*, 92 Maine, 39, page 48.

The legal conclusion is that for want of evidence showing affirmatively her own due care in the premises, the verdict cannot be sustained.

Motion sustained.
Verdict set aside.

ELIZA A. MCCLEERY *vs.* WOODARD LEWIS.

Franklin. Opinion February 26, 1908.

Evidence. Deeds. Execution and Delivery. Records. Office Copies. Grantees and Heirs. R. S., chapter 84, section 125.

1. In an action involving the title to real estate, the record in the Registry of Deeds of what purports to be a deed of conveyance of the land is no evidence that such a deed was in fact executed and delivered when the party offering such record claims as the grantee, or as heir of the grantee, named in the record. The statute, R. S., chapter 84, section 125, making such records evidence does not include cases where the party offering the record claims as the grantee or as heir of the grantee in such deeds.
2. The rule that deeds shown to be thirty years old or more may be received in evidence without proof of execution, applies only to original deeds, not to copies, nor records of such deeds.
3. The rule that copies of records of deeds may be received in evidence when the originals are lost, applies only to cases where it is made to appear aliunde that there was in fact an original deed executed and delivered.
4. As the law is today in this State, grantees in deeds, and their heirs, cannot depend upon the record of deeds direct to them. If unable to produce the deed itself, they must produce evidence, aliunde the record, that such a deed was in fact executed and delivered.
5. The mere fact that a person is occupying a parcel of land is not evidence that he is claiming title under any particular deed.

On exceptions by defendant. Sustained.

Real action brought by the plaintiff to recover one-half part in common and undivided of certain real estate in New Vineyard, Franklin County, from the defendant, who was the cotenant thereof, together with the sum of $300 for rents and profits during the six years preceding the date of the writ. Plea, the general issue with brief statement as follows: "And for brief statement of special matter of defense the defendant says: "That he does not admit any title in the plaintiff to the premises set forth in the plaintiff's writ and declaration; nor that the plaintiff ever obtained title to the same; nor that the said plaintiff ever held title to the same or any part there-

of, and if she did hold a deed thereof the defendant calls for proof of the same and of the execution thereof." The defendant also filed a claim under the statute for betterments.

The plaintiff claimed title under a supposed deed dated October 27, 1855, and duly recorded in the Franklin County Registry of Deeds, Book 32, page 167, given by one Joshua Miller purporting to convey to Rispah Hewey, the mother of the plaintiff, a life estate in the premises with remainder to the plaintiff and others. Rispah Hewey died several years before the commencement of the plaintiff's action.

The plaintiff was not able to produce the original deed, if any such ever existed, neither was she able to produce any witness that ever saw such a deed or ever heard such an one read. Revised Statutes, chapter 84, section 125, reads as follows: "In all actions touching the reality, or in which the title to real estate is material to the issue, and where original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." In accordance with the provisions of this statute, the plaintiff then produced an attested copy of the supposed deed from Joshua Miller and offered the same in evidence. When the copy was offered, the following conversation between the presiding Justice and counsel was had.

Mr. Holman. "I now offer a quitclaim deed from Joshua Miller to Rispah Hewey, Eliza Hewey (the plaintiff), Woodard Lewis and Thomas Lewis.

The Court. "That is a copy I suppose.

Mr. Holman. "Yes, a certified copy from the record.

Mr. Butler. "I object.

Mr. Holman. "It is dated the 27th day of October 1855.

Mr. Butler. "I object.

The Court. "I will hear you on that proposition.

Mr. Butler. "My objection is, your Honor, that in all cases, both under the statute and rules of court, that where the party claims under an original deed, or as the heir of a grantee in an

original deed, that before an office copy is admissible that plaintiff must prove the execution and genuineness of the original deed, and that the same has been lost, and that he or she has used every reasonable effort to produce it.

Mr. Holman. "My reply to that is that this deed was given in 1885, a good many years ago. The witnesses, as far as we know, are all dead, and one of them we know is dead, and it wasn't executed here, hence it becomes an ancient deed. We have proved the death of the party under whom we claim. We have been to the expense to see every one of her children and talk with them and brought them here to court. I have done everything I know how to do. It is entirely impossible for me to prove the deed any more than it is now. I don't know any imaginable way. I have tried to think of every way possible to prove the deed further than what I have done, and I don't know how I can do it any more.

The Court. "Have you investigated, Mr. Holman, to see whether the witnesses were dead, or the magistrate was alive or dead?

Mr. Holman. "Yes, we have, every one of them. Plamentine Daggett was one of the witnesses, and died a great many years ago, and the deed was executed in Penobscot County. I know nothing about that. The deed was executed 52 years ago. As I understand the law, the presumption is that a man — the average man thirty years of age when he would be old enough to execute a deed, that he would be very aged, and as I understood the authorities, and I have looked them up carefully in that respect in my office, and my judgment was that I didn't have to go so far as that on so ancient a deed.

The Court. "You don't produce an ancient deed.

Mr. Holman. "The record of it.

The Court. "It is a copy of what may have been an ancient deed, or would be if it was found.

Mr. Holman. "Mr. Daggett was one of the witnesses. We can show he has been dead a great many years.

The Court. "Let's see your copy. How about George W. Whitney? Oh, that is the justice.

Mr. Holman. "We don't know anything about him. He must be over eighty years of age, if living, and probably was dead years ago, and my woman was poor and I didn't feel like going to the expense, and didn't think it would be necessary.

The Court. "Of course an ancient deed, if you have shown it is in existence, and the parties purporting to have executed it as parties, or attested it as witnesses are not producible, the deed prima facie proves itself. That is, the very fact of its ancientness. But you don't produce it. You only produce what purports to be an office copy.

Mr. Holman. "I gave them notice to produce the deed, and have shown that the deed went into the hands and possession of Mr. Woodard Lewis.

Mr. Butler. "This deed never went into his hands, and he has never seen it.

Mr. Holman. "It hasn't been testified to.

Mr. Butler. "I can put him on the stand.

The Court. "It presents a rather curious phase. It affords pretty strong moral proof that there is a deed, the fact of finding it on record.

Mr. Holman. "The deed was recorded, as I remember, about the time it was executed.

The Court. "Well, the parties are all here, and there are other issues which may have to be tried out sometime. I think I will admit the deed subject to exception, and then you can try out the other issues, and the whole matter can be heard at once if it has to be. However, I frankly say to you I think there is some doubt about it."

After the foregoing copy of the deed had been admitted for the purposes as expressed by the presiding Justice the plaintiff abandoned all claim for rents and profits and the defendant abandoned all claim for betterments and the jury returned a general verdict for the plaintiff. The defendant excepted to the ruling admitting the copy of the supposed deed.

The case appears in the opinion.

Joseph C. Holman, for plaintiff.

Frank W. Butler, for defendant.

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

EMERY, C. J. This was a real action. The plaintiff claimed and sought to prove title only under a deed of conveyance which she claimed was executed and delivered to her mother in 1855, and conveying a life estate to her mother with remainder to herself. The mother was deceased.

The essential proposition of fact to be proved by the plaintiff was that such a deed had been in fact executed and delivered. She was not able to produce any witness that ever saw such a deed or ever heard such an one read. She did, however, produce an office copy of what purported to be the record of such a deed in the proper Registry of Deeds, and offered it as admissible evidence that an original deed corresponding to the record had been executed and delivered prior to the date of the record.

We are constrained to hold that by the settled law of this State neither the copy of the record nor the record itself is admissible evidence to prove the existence of an original, the plaintiff being a grantee in the supposed deed. The statute, R. S., ch. 84, sec. 125, authorizing the use of records and copies of records of deeds as evidence of the existence, execution and delivery of originals, only applies to deeds prior to that in which the party is the grantee or heir of a grantee. It does not include the deed produced by the plaintiff. *Elwell* v. *Cunningham*, 74 Maine, 127; *Webber* v. *Stratton*, 89 Maine, 379.

The plaintiff urges that the age of the record, an age of more than half a century, together with the fact that her mother occupied the land for a time after the date of the record, creates a presumption that there was in fact an original of the record duly executed and delivered. It is true that when a document, apparently an original deed and shown to be thirty years old or more, is produced, it may be received in evidence without other proof of execution. But this presumption of due execution applies only to originals, not to copies. Further, the mere fact that the mother occupied the land, there being no evidence that her occupation was under any

claim of title, creates no legal presumption that her occupation was under any particular deed. If neither the copy nor the occupation creates any presumption, both together cannot. Zero plus zero is still zero. In *Elwell* v. *Cunningham*, 74 Maine, 127, the record was nearly seventy-five years old, yet the court held it was not evidence of the execution and delivery of an original.

The plaintiff's counsel cites several cases to the effect that an office copy of a deed is admissible in evidence upon proof that the original is destroyed, or lost, or is in the possession of the opposite party who will not produce it. In those cases there was evidence aliunde that an original had been executed and delivered. In this case there is no such evidence. This circumstance shows the inapplicability of the cases cited.

As the law is today in this State, grantees in deeds, and their heirs, cannot depend upon the record of deeds direct to them. If unable to produce the original deed, they must produce evidence aliunde the record that there was in fact such a deed executed and delivered. The pro forma ruling admitting the copy in this case must be reversed.

Exceptions sustained.

JOSEPH DENIS

vs.

LEWISTON, BRUNSWICK AND BATH STREET RAILWAY COMPANY.

JOSEPHINE DENIS *vs.* SAME.

Androscoggin. Opinion February 26, 1908.

Ways. Travelers. Teams. Street Railways. Public Street Junctions. Negligence. Husband and Wife.

Those operating street cars and travelers with teams have equal rights on the highway, and the rights of each class must be exercised with due regard to the rights of the other, proper consideration being given to the difference in motive power and to the fact that the cars run on a fixed track and rapidly acquire a greater momentum. All who have occasion to use the highways whether by the old or new modes of travel are governed by the same rule of reasonable use and reasonable care.

In view of the frequency with which teams in the ordinary course of travel and traffic must pass across a street railway at public street junctions, the motorman of a car when approaching such junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at a junction in season to prevent collision with teams that may suddenly turn to drive over the track.

While it cannot be declared as a matter of law that it is negligence per se for a traveler to cross the tracks of a street railway without first looking and listening for an approaching car, yet he is required to exercise all reasonable and ordinary care, prudence and vigilance to avoid collision with a car, and the exercise of this degree of care may impose upon him in many situations the duty to look and listen for an approaching car before attempting to cross the track. He must do for his own safety and for the safety of the passengers in a car, what ordinarily, careful and prudent persons are accustomed to do under like circumstances.

Whether or not the failure of a traveler to look and listen, when about to cross a street railway track, is to be deemed negligence, must be determined by all the facts and circumstances disclosed by the evidence.

It does not necessarily follow that a wife who is riding with her husband, and who is herself in the exercise of reasonable care, is legally responsible for the negligence of her husband as to acts over which she has no control

Where a wife was riding with her husband, who was an experienced and competent driver, along a street in which was a street railway, and the wife had nothing to do about driving the horse, and did not make any suggestions about the railroad track or the cars, and neither assumed nor felt any responsibility for the management and control of the team, but deferred entirely to the judgment and experience of her husband, and the team collided with a street car, the collision being caused in part by the contributory negligence of the husband, and the wife sustained personal injuries and brought suit against the street railway company to recover damages for such injuries and the verdict was for the wife, *held:* that the jury did not commit a manifest error in finding that the wife was not justly chargeable with culpable negligence for failing to look or listen for an approaching car or for any other acts of omission or commission on her part connected with the drive.

In the cases at bar, which were actions by a plaintiff husband and a plaintiff wife to recover damages for personal injuries sustained by them caused by the collision of their team, in which they were riding, with a street railway car and the verdict was for the plaintiff in each action, *held:* (1) That the defendant railway company was negligent in the management of its car. (2) That the plaintiff husband was guilty of contributory negligence, and that the verdict in his favor must be set aside. (3) That the plaintiff wife was not guilty of contributory negligence, and that the verdict in her favor, be sustained.

On motions by defendant. Sustained in first named action. Overruled in second named action.

Two actions on the case to recover damages for personal and property injuries sustained by the plaintiff Joseph Denis and for personal injuries sustained by the plaintiff Josephine Denis, caused by a collision of their team, in which they were riding, with a street car of the defendant company at the junction of Main and Pettengill streets in Lewiston. The plaintiffs are husband and wife.

Tried together at the September term, 1907, of the Supreme Judicial Court, Androscoggin County. Plea, the general issue in each action. Verdict for plaintiff husband for $299. Verdict for plaintiff wife for $550. The defendant then filed general motions to have the verdicts set aside.

The cases are fully stated in the opinion.

Harry Mansur and Enoch Foster, for plaintiffs.

Wm. H. Newell, for defendant.

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

WHITEHOUSE, J. The plaintiffs in these two actions are husband and wife, and each recovered a verdict for injuries received from a collision of their team with the defendant's car at the junctions of Main and Pettengill streets in Lewiston. The two cases arose from the same state of facts and were tried together upon the same evidence. They come to the Law Court on motions to have the verdicts set aside as against the evidence.

The following uncontroverted facts appeared in evidence.

The plaintiffs resided in Auburn, and on the evening of March 4, 1907, with their little daughter, six years of age, rode over to Main street in Lewiston with a horse and sleigh, to the house of Henry Brooks, situated on the south side of the street, arriving there soon after eight o'clock. They remained there until about a quarter before nine when they started with their horse and sleigh to drive down Main street to Pettengill street for the purpose of calling at the house of Frank Brooks who lived on that street.

Opposite the residence of George Bearce is a curve in Main street, and for a distance of 72 rods from that curve down to the center of Pettengill street at its junction with Main, the railroad track, as well as the street runs in a straight line and on a descending grade of three per cent practically all the way. The railroad track is located on the south side of Main street very near the sidewalk and across the mouth of Pettengill street, which enters, but does not intersect Main street. The driveway just below the house of Henry Brooks, from which the plaintiffs started to drive down to Pettengill street, is 40 rods below the curve in Main street above mentioned, and 32 rods above the center of Pettengill street. There was a side track or turn-out 330 feet long opposite the house of Henry Brooks, and although it was not in use at that season of the year, the trolley and track switches remained in place. The night was quite dark, but an electric arc light was located on the north side of Main street, opposite the mouth of Pettengill street, and was shining on the evening in question. The section of Main

street mentioned is a residential portion of the city, and the street was illuminated to some extent by the artificial lights in the dwelling houses situated on both sides of the street.

On this line of railway the cars run from the head of Lisbon street up Main street two miles to the State Fair Grounds, and return, making the four miles in twenty minutes, including all stops and changes. It also appeared that a short time before the running schedule had been shortened from thirty minutes to twenty minutes.

When the plaintiffs left the house of Henry Brooks that evening as above stated, and went down Main street toward Pettengill street, the car was on its return trip from the Fair Grounds and went down behind the plaintiffs' team. Denis was driving down the street "not quite in the center" but nearer the railroad track, traveling at the rate of about six miles an hour, and when he had turned to go into Pettengill street, and the horse had passed substantially across the track, the defendant's car struck the team, threw out the occupants and carried them some distance beyond Pettengill street, causing the injuries complained of in the plaintiffs' writs.

1. It is alleged in the plaintiffs' declarations and contended in argument that the evidence warranted the jury in finding that at the time in question the defendant's car was negligently run at an unreasonable and dangerous rate of speed on the descending grade of Main street toward the junction with Pettengill street, and that due care was not exercised by the motorman to have his car under such control as it approached the junction that he would be able to stop it in season to avoid a collision with the plaintiffs' team in the event that the latter should be turned and driven across the track into Pettengill street.

It has been seen that the schedule time on this trip involved an average speed of twelve miles an hour. This rate was necessarily diminished somewhat in taking the trolley switch near the house of Henry Brooks, but the remaining distance of twenty-five rods from the lower end of the switch to Pettengill street was on a descending grade. When the plaintiffs came out of the driveway at the Brooks house onto the railroad track, their view was unobstructed

for a distance of 40 rods up to the curve in the street above mentioned, and they both testify that they looked up the track to see if the car was coming and that none was in sight at that time. Traveling at the rate of six miles an hour they only required one minute to traverse the distance of 32 rods to Pettengill street. But the team was overtaken by the car and if the latter had not reached the curve at the time the plaintiffs started, it must have run at the rate of about fourteen miles an hour in order to traverse the distance of 72 rods during the one minute required for the team to travel 32 rods.

The great momentum which the car had acquired when it reached the crossing, as shown by the distance covered by it after the collision, tends strongly to support the conclusion that it had attained a high rate of speed. The motorman states that he reversed the power when about thirty feet distant from the crossing, as soon as he saw the plaintiffs turn to cross the track, and the witnesses for the defense agree that this was the most effective means of stopping the car. Although there is a sharp conflict of testimony in regard to the exact distance traversed by the car after the collision, there was evidence which would have authorized the jury to find that the injured plaintiffs and the sleigh were carried by the car 110 feet beyond the crossing.

The motorman also admits that he saw the plaintiffs' team when the car was 25 rods distant from the crossing, and it is established by the weight of evidence that he immediately commenced sounding the gong to warn the driver of the plaintiffs' team. There is no evidence, however, that the speed of the car was slackened until the power was reversed thirty feet from the crossing. It is suggested on the part of the defense that the plaintiffs paid no attention to the sounding of the gong and gave no indication of their purpose to cross the track at Pettengill street, and hence that there was no occasion to moderate the speed of the car. But it is not in controversy that the street was so well lighted by the lights in the dwelling houses, the arc lights opposite the mouth of Pettengill street, and by the head light of the car that the team was plainly visible to the motorman, and the color of the horse distin-

guishable. The evidence warranted the jury in finding that by reason of the jingling of their sleigh bells the sound of the gong was not heard by the plaintiffs, and that by the exercise of reasonable care and vigilance the motorman might have drawn the inference from their conduct that the gong was not heard by them. In the exercise of due care he would have seen that they were driving along near the railroad in ignorance of the rapidly approaching car, and he should have considered that if they intended to cross the track at Pettengill street, they could not reasonably be expected to show any indication of their purpose until they arrived at a point so near the junction that with the speed at which the car was then running it would not be possible, with any agencies at his command, to stop it in season to prevent a collision if the team in fact attempted to cross.

The law governing the rights and duties of the proprietors of street railways and travelers with ordinary teams in their relations to each other has been so critically examined and fully considered, both upon reason and authority, in the recent decisions of this court, that no extended discussion of the rules applicable to the case at bar is here required. *Flewelling* v. *Railroad*, 89 Maine, 585; *Atwood* v. *Railway Co.*, 91 Maine, 399; *Fairbanks* v. *Railway Co.*, 95 Maine, 78; *Warren* v. *Railway Co.*, 95 Maine, 115; *Robinson* v. *Street Railway*, 99 Maine, 47; *Butler* v. *Street Railway*, 99 Maine, 149; *Marden* v. *Street Railway*, 100 Maine, 41.

According to the well settled law of this State those operating street cars and travelers with teams have equal rights on the highway, and the rights of each class must be exercised with due regard to the rights of the other, proper consideration being given to the difference in motive power and to the fact that the cars must run on a fixed track and rapidly acquire a greater momentum. All who have occasion to use the highways, whether by the old or new modes of travel, are governed by the same rule of reasonable use and reasonable care. But a distinction is recognized, both by reason and authority between the degree of caution and vigilance to be exercised by street cars while running along the street between

the crossings, and that required when approaching such crossings. It is now held with a substantial unanimity of judicial opinion that in view of the frequency with which teams in the ordinary course of travel and traffic must pass across the railway at public street junctions, the motorman of a car when approaching these junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at the junction in season to prevent a collision with teams that may suddenly turn to drive over the track. *Marden* v. *Street Railway*, 100 Maine, 41, and cases cited.

In the case at bar the jury must have reached the conclusion that the defendant's servants in charge of the car at the time in question, failed to exercise that degree of vigilance and precaution in slackening the speed of the car and keeping it under control, that the plain exigencies of the situation required; and after a patient study of the physical situation and the conduct of the parties, this court does not feel warranted in saying that the finding of the jury was so manifestly wrong that it must be set aside.

2. But the plaintiffs were not entitled to recover simply upon proof of defendant's negligence. It was incumbent upon them to go further and show that there was no want of ordinary care on their own part which contributed as a proximate cause of the injury.

The jury must have found that the plaintiffs were not guilty of any negligence in the management of the team, but in the opinion of the court this finding of the jury was unmistakably wrong as to the plaintiff Joseph Denis.

It is true that the established rule respecting steam railroads that it is negligence per se for a person to cross the track without first looking and listening for a coming train, has been repeatedly held by this court to be inapplicable to the crossing of the tracks of a street railway in a public street where the cars do not enjoy the exclusive right of way. It cannot be declared as a matter of law that it is negligence per se for a traveler to cross the tracks of a street railway without first looking and listening for an approaching

car. But before crossing a street railway the traveler is required to exercise all reasonable and ordinary care, prudence and vigilance to avoid a collision with a street car, and in exercising this degree of care he may be required as a matter of fact in many situations, to look and listen for an approaching car before attempting to cross the track. He must do for his own safety and for the safety of the passengers in the car, what ordinarily, careful, thoughtful and prudent persons are accustomed to do under like circumstances. Whether his failure to look and listen before crossing is to be deemed negligence must be determined upon all the facts and circumstances disclosed by the evidence. *Fairbanks* v. *Railway Co.*, 95 Maine, 78; *Warren* v. *Railway Co.*, 95 Maine, 115; *Butler* v. *Street Railway*, 99 Maine, 149; *Marden* v. *Street Railway*, 100 Maine, 41.

The plaintiff Joseph Denis had previously lived on Pettengill street and for years had been familiar with the running of the cars on Main street and, as he admits in his testimony, "knew they were liable to go back and forth at any time." He appears to have apprehended that a car might be approaching at the time he came out of the driveway of Henry Brooks, for he states that before crossing the track there, he looked up the street to see if a car was coming and discovered none. But he must have known that the speed of a car between the street crossings on such descending grade, would probably be more than twice that of his team, and that he was liable to be overtaken by it before reaching Pettengill street. He should have considered that the jingling of his sleigh bells was liable to prevent him from hearing the sound of the gong and other noises of an approaching car. But the car must have come around the curve 40 rods above the Brooks house within a few seconds after the plaintiff started down the street. If he had stopped his team and listened, the sound of the approaching car must have been heard by him. If he had turned his head and glanced up the track the head light of the rapidly approaching car would have appeared to his unobstructed vision. He did neither of these things, but with an absence of caution and freedom from anxiety difficult to explain or comprehend, he drove down to Pettengill street and without stop-

ping to listen or turning to look, he deliberately attempted to cross the track. True, he says he was looking ahead thinking it more probable that a car might be coming up the track, but seeing none ahead of him, he might reasonably have apprehended the approach of one behind him. Did he do for his own safety, the safety of his wife and child and the passengers on the car, all that ordinarily prudent travelers usually do under like circumstances? It is the opinion of the court that in this respect there was a failure of duty on his part and that he must be deemed guilty of contributory negligence.

3. But the contributory negligence of the injured party that will prevent a recovery must have contributed as a proximate cause of the injury. *Atwood* v. *Railway Co.*, 91 Maine, 405. The plaintiff may have been negligent and his negligence may have afforded an occasion or opportunity for an injury which is caused by a defendant's subsequent and independent negligence, but such negligence on the part of a plaintiff will not prevent a recovery. *Ward* v. *Railroad Co.*, 96 Maine, 145.

But the facts in this case are materially different from those in the last named cases, and the rule there applied is not applicable here. In each of those cases, the plaintiff as the result of his own prior negligence, was in a passive condition of peril as obvious to the defendant's servants as that of a person lying on the track unconscious from intoxication or sleep. By the exercise of ordinary vigilance and precaution, the defendant in those cases might have avoided the collision, and its failure to exercise such precaution was deemed the proximate cause of the injury, for the reason that it was negligence subsequent to that of the plaintiff, and independent of it.

In the case at bar the defendant's negligence cannot be deemed subsequent to and independent of the plaintiff's contributory negligence, and the doctrine of prior and subsequent negligences does not apply. The defendant's negligence was contemporaneous and concurrent with the plaintiffs and not subsequent to it. The plaintiff's negligence actively continued from its commencement to the moment of the collision. The situation was analogous to that in

Butler v. *Street Railway*, 99 Maine, 160. As stated by the court in that case, the defendant's negligence "operated to produce the result in connection with the plaintiff's negligence and not independently of it; the plaintiff's negligence was operative to the last moment and contributed to the injury as a proximate cause."

The verdict in favor of Joseph Denis was not authorized by the evidence and must therefore be set aside.

4. It is contended in behalf of the defendant that the verdict in favor of the wife Josephine Denis, should also be set aside, not because the negligence of her husband was legally imputable to her, for the doctrine of imputable negligence was expressly rejected by this court in *State* v. *B. & M. Railroad*, 80 Maine, 430; but for the alleged reason that she herself was guilty of negligence which contributed as a proximate cause of the injury. But as observed by this court in *Whitman* v. *Fisher*, 98 Maine, 577, "it does not by any means necessarily follow that a wife who is riding with her husband, and who is herself in the exercise of reasonable care, is legally responsible for the negligence of her husband as to acts over which she has no control." *Shultz* v. *Old Colony Street Railway Co.*, 193 Mass. 309. Joseph Denis, the driver of the team, was a man 37 years old, who was familiar with the running of the cars over this route. He owned the team which he was driving, and it is not questioned that he was an experienced and competent driver. The wife testifies that she had nothing to do about driving the horse, she was "afraid"; and that she didn't tell her husband anything about driving the horse, or make any suggestions about the railroad track or the cars. It is true that she looked up the track when they started from the Brooks house, presumably on account of some remark of her husband, but it satisfactorily appears from all of the evidence that she neither assumed nor felt any responsibility for the management and control of the team, but deferred entirely to the judgment and experience of her husband. She appears to have been a woman in feeble condition, this being the first time she had been out of doors since the birth of her last child a month before. She and her husband occupied the whole of the seat in the sleigh and the little girl six years old sat on her parents' knees, her mother holding her cape over her to protect her from the cold.

Upon consideration, therefore, of all the facts and circumstances, it is the opinion of the court that the jury did not commit a manifest error in finding that the plaintiff, Josephine Denis, was not justly chargeable with culpable negligence for failing to look or listen for an approaching car or for any other acts of omission or commisson on her part connected with the drive that evening.

The entries must accordingly be as follows:

In the case of Joseph Denis,

Motion for new trial sustained.

In the case of Josephine Denis,

Motion for a new trial overruled.

WASHINGTON HASLAM *vs.* W. B. JORDAN, Administrator.

SAME *vs.* CLARINDA M. JORDAN et als.

Hancock. Opinion March 2, 1908.

Deeds. Consideration. Seizin. Evidence. Reference.

As between the parties to a deed no consideration is necessary, and the only effect of the consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose the consideration may be varied or explained by parol proof.

While parol evidence is not admissible to alter, control or contradict a deed. yet for the purpose of showing the character of the grantee's seizin such evidence is admissible to show the external circumstances and the relation of the parties to each other and to the transaction, from which may be inferred the effect of the deed. Such evidence does not in any way tend to control or alter the deed.

When a grantor conveys land to a grantee, without consideration, and the grantee at the same time, without consideration, and as a part of the same transaction whereby the grantor conveyed the land to him, reconveys the land to the grantor, a momentary seizin only vests in the first grantee and he does not become invested with any title which enures to the benefit of one to whom he has made a prior conveyance of the same land by mortgage deed of warranty.

Although a referee in his report has expressly stated that in awarding judgment he exercised the powers of an equity court, yet the Law Court cannot be bound to adopt and enforce the statement that he exercised equity powers in arriving at a result, when it appears from the evidence and rescript filed by him that his powers as referee authorized him to declare precisely the same result, and therefore the assertion that he acted in equity must be treated as surplusage.

On exceptions by defendants. Overruled.

Two real actions, one against the administrator of the estate of Gilman Jordan and the other against the heirs of the said Gilman Jordan, brought for the recovery of certain land. Both actions were referred with the right to except regarding matters of law.

The referee found for the plaintiff in each action and with his report filed a rescript presenting the questions of law reserved by the defendants. The material parts of the rescript appear in the opinion.

When the report of the referee was offered, the same against the objections of the defendants was accepted. The defendants then took exceptions to the order accepting the report.

So much of the rescript filed by the referee as does not appear in the opinion is as follows:

"Both parties derive title from Albion S. Jellison. The record title of plaintiffs is as follows:—

"1. Albion S. Jellison to A. F. Burnham by deed of mortgage dated Oct. 21, 1876, recorded Oct. 23, 1876.

"2. Albion S. Jellison to A. F. Burnham by deed of quitclaim dated Dec. 20, 1876, recorded Dec. 23, 1876.

"3. A. F. Burnham to Eliza I. Jordan by deed of quitclaim dated Aug. 9, 1879, recorded Aug. 11, 1879.

"4. Eliza I. Jordan to Albion S. Jellison by deed of quitclaim dated Aug. 9, 1879, recorded Aug. 11, 1879.

"5. Albion S. Jellison back to Eliza I. Jordan by deed of warranty dated Aug. 9, 1879, recorded Aug. 11, 1879.

"6. Eliza I. Jordan to Charles E. Dunham by deed of mortgage dated Aug. 9, 1879, recorded Aug. 11, 1879. This mortgage was later discharged,

"7. Eliza I. Jordan to S. B. Giles by warranty deed dated June 27, 1885, recorded Aug. 7, 1885.

"8. S. B. Giles to Wellington Haslam, plaintiff, by deed dated July 17, 1891, recorded Sept. 14, 1891.

"The defendants' record title is as follows:—

"1. Albion S. Jellison to Gilman Jordan by mortgage deed of warranty dated Aug. 1, 1877, recorded Aug. 2, 1877.

"2. Gilman Jordan to defendants, heirs and Admx. by descent."

John A. Peters, for plaintiff.

Oscar F. Fellows, for defendants.

Memorandum. The Justice ruling in these cases at nisi prius, did not sit during the argument thereof at the Law Court, being disqualified under the provisions of Revised Statutes, chapter 79, section 42.

SITTING: WHITEHOUSE, STROUT, SPEAR, CORNISH, JJ.

SPEAR, J. These cases are both real actions which were referred "with leave to except regarding matters of law." The report of the referee, presenting the exceptions taken at the trial, was offered against objection and ordered to be accepted. To this order the defendant excepted. Both actions are for the recovery of the same parcel of land, both parties deriving their title from the same grantor. The record title of the plaintiff is in a direct line, through mesne conveyances from Albion S. Jellison. The defendants record title is from Albion S. Jellison to Gilman Jordan by mortgage deed of warranty dated August 1st, 1877, recorded August 2, 1877; and from Gilman Jordan to defendants' heirs and administratrix, by descent. It appears that Albion S. Jellison on August 1st, 1877, had no title in the premises conveyed to Gilman Jordan. The referee rendered judgment for the plaintiff in each case, and with his report filed the following rescript presenting the questions of law reserved by the defendants: "It is to be noted that at the date of the deed Albion S. Jellison to Gilman Jordan (the ancestor of the defendants) on August 1, 1877, the grantor, Albion S. Jellison,

had no title, he having previously conveyed the land to A. F. Burnham by deed dated December 26, 1876. It follows that at the time no title passed by this deed to the defendant's ancestor, Gilman Jordan.

"It is to be further noted, however, that subsequent to his conveyance to Gilman Jordan by warranty deed of mortgage dated August 1, 1877, Albion S. Jellison, the grantor in that deed, received from Eliza I. Jordan, the then owner, a deed of quitclaim dated August 9, 1879. No. 4 in plaintiff's chain of title.

"The defendants claim that this after acquired title in Albion S. Jellison at once passed to their ancestor, Gilman Jordan, under the familiar rule that an after acquired title by a grantor in a warranty enures to his grantee by way of estoppel, and to save circuity of action.

"The plaintiff claims that the rule does not apply under the facts of this case.

"Against the objection of the defendants, I received the oral testimony of Albion S. Jellison (under whom defendants claim) to the following effect: The deed to him from Eliza I. Jordan dated Aug. 9, 1879, was prepared and executed in the office of A. F. Burnham an attorney. At the same time, the deed back from him to Eliza I. Jordan (deed No. 5 in plaintiff's chain of title) was also prepared and executed by him. Also at the same time, the mortgage deed from Eliza I. Jordan to Chas. E. Dunham was prepared and executed. He, Albion S. Jellison, paid nothing for the conveyance to him from Eliza I. Jordan and he received nothing for his conveyance back to her.

"Apart from the testimony of Albion S. Jellison I find the three deeds bear the same date, were recorded the same day and were filed for record at the same hour and minute, viz: Aug. 11, 1879 at 5.15 P. M.

"I am satisfied that the conveyance Eliza I. Jordan to Albion S. Jellison, which the defendants claim operated to vest the title in Jellison's prior grantee Gilman Jordan, was made to him merely in trust to reconvey to Eliza I. Jordan, which trust he immediately executed. He did not take any beneficial interest under the con-

veyance to him and none passed to his prior grantee Gilman Jordan. I do not think the rule relied upon by the defendants governs this case. If any title passed to Albion S. Jellison, it was a naked legal title only, which he could have been compelled in equity to release to Eliza I. Jordan, the beneficiary, or to her grantees.

"As referee, and under R. S., Ch. 84, Sec. 21, I exercise the power of an equity court, and award judgment in both cases for the plaintiff. Since, however, in my opinion the question of title could have been fully determined in one suit I award costs in one suit only."

There is no controversy, nor could there be any, with respect to the facts found by the referee, but the defendants contend that, in the state of the pleadings governing the trial of the case before the referee, the oral testimony of Albion S. Jellison was inadmissible and that for this reason the report should not have been accepted. If admissible under the rules of law, there can be no question that the ruling accepting the report of the referee should be sustained. *Gammon* v. *Freeman*, 31 Maine, 243; *Kelley, Admx., in equity* v. *Jenness, et al*, 50 Maine, 455; *Wark* v. *Willard*, 13 N. H. 389; *Runlet* v. *Otis*, 2 N. H. 167; *Marsh* v. *Rice*, 1 N. H. 167.

We think the evidence was admissible. Nothing is better established than the defendants' contention that written contracts cannot be altered or controlled by parol evidence, but such is not the effect of the testimony admitted. It does not alter, control or contradict the deed from Eliza I. Jordan to Albion S. Jellison whose seizin the defendant claims enured to his benefit. It rather tends to show the external circumstances and the relation of the parties to each other and to the transaction, from which may be inferred the effect of the deed. The evidence that the three deeds spoken of in the referee's report were prepared and executed at the same time in the office of a certain attorney, does not in any way tend to control or alter the deeds, nor does the evidence that no consideration was paid. As between the parties to a deed no consideration is necessary. *Laberee* v. *Carleton*, 53 Maine, 211. The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration. For every other purpose the

consideration may be varied or explained by parol proof. *Tolman* v. *Ward*, 86 Maine, 303. Under these rules of law it is apparent that the evidence admitted does not have the effect of denying that Jellison was seized, but was competent for the purpose of showing the character of his seizin.

Upon this point, *Hadlock* v. *Bulfinch*, 31 Maine, 246, a case involving an action of dower, is apposite. The court say: "It is insisted that the defendant is estopped to deny the seizin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny that the husband was seized, he may be permitted to show the character of that seizin, and if it was not such, that his widow would be entitled to dower."

There is a striking analogy, in all its phases, between the case at bar and *Pomeroy* v. *Latting*, 15 Gray, 435. This was a writ of entry for the foreclosure of a mortgage, the same form of action as in the cases before us, involving the question, whether two or more deeds made simultaneously could be regarded as one transaction, in order to carry out the intention and secure all the rights of the parties concerned. Chief Justice Shaw in the opinion said: "In regard to the evidence offered and rejected, we are not prepared to say that some of it might not be objectionable, and contrary to the rule of law, as admitting parol evidence to alter or control written agreements and contracts. But we think that the internal evidence from the deeds themselves, together with evidence of external circumstances, showing the relations of the parties to each other, to explain and give effect to their language, which is admissible, are sufficient in the present case to establish all the facts on which our conclusion in matters of law are placed."

If we apply this rule to the case at bar, it will then appear that we have admitted only the internal evidence from the deeds themselves, all bearing the same date and being recorded at the same instant, and the evidence of the external circumstances showing the relation of the parties to the transaction and to each other.

From this evidence it is a legitimate inference, that the transfer and the re-transfer between Jordan and Jellison were but a single transaction, vesting in Jellison only a momentary seizin,—what

Chancellor Kent has termed "a transitory seizin for an instant;" that, no consideration having been paid, it was the intention to vest such seizin in Jellison for the purpose of accomplishing a re-transfer, and that he took no beneficial interest under the conveyance.

The questions which have arisen under claims for dower afford good illustration of this doctrine. In all such instances it has been held that a seizin in transitu to serve a particular purpose will not entitle the widow to dower, in contravention of such purpose. *Gammon* v. *Freeman*, 31 Maine, 243; *Wallace* v. *Silsby, et al.* 42 N. J. L. 1.

Jellison, therefore, while seized under the deeds for the purpose of re-transfer was not beneficially seized, even for a moment, and did not as prior grantor become invested with any title that enured to the benefit of the defendant.

We are of opinion that the evidence admitted was competent under the pleadings and that it was not necessary to change the form of action from law to equity, in order to enable the referee to proceed with the determination of the case.

In his report, however, he expressly stated in awarding judgment that he exercised the powers of an equity court. But this court, in the discharge of the grave duty of determining the rights of parties, cannot be bound to adopt and enforce the statement in the report of a referee, that he exercised equity powers in arriving at a result, when it appears from the evidence and the rescript filed by him, that his powers as referee authorized him to declare precisely the same result. The assertion in the report that he acted in equity must be treated as surplusage, as it was competent for him to do all that he did, acting in his capacity as referee regardless of any proceedings in equity.

Exceptions overruled.

E. W. BUCKLEY *vs.* MAXIME BEAULIEU et al.

Androscoggin. Opinion March 3, 1908.

Search and Seizure Warrants. Constitutional Guaranty. Unreasonable Searches. Unnecessary Damage. Liability of Officers. Constitution of Maine, Article 1, section 5.

1. The constitutional guaranty that "the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures," is a restraint upon officers executing a search warrant as well as upon magistrates issuing it.
2. While officers in executing a warrant to search a dwelling house occupied by a family, may, and should, search thoroughly in every part of the house where there is reason to believe the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants and be careful to injure the house or furniture no more than reasonably necessary.
3. Where officers searching a dwelling house for intoxicating liquors have no reason to believe that such liquors are concealed within the walls or partitions of the house, but desire to ascertain whether any pipes leading to some receptacle for liquors, are concealed there, their sounding and even probing of the walls and partitions for that purpose should be done with as little damage as possible.
4. Where officers for the purpose only of ascertaining whether such pipes are concealed within the walls and partitions of a dwelling, make use of a dwelling, make use of an axe, a pickaxe and crowbar, and tear out the paper, plaster and laths entirely around the walls of every room on the first floor of a dwelling house for a width generally of from two to four feet, leaving the debris on the floors and carpets of the rooms, they act unreasonably, do unnecessary damage, and thereby exceed their authority and become liable to the owner therefor.

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

Action of trespass quare clausum for an alleged breaking and entering of the plaintiff's dwelling house in Lewiston. The defendants were deputy enforcement commissioners duly appointed under the provisions of chapter 92, Public Laws, 1905, known as the

"Sturgis Law," and at the time of alleged trespass, by virtue of a warrant therefor duly issued by the Municipal Court of Lewiston, were engaged in searching the plaintiff's dwelling house for intoxicating liquors alleged to be concealed therein. The plaintiff is a resident of New York City and the dwelling house, at the time of the alleged trespass, was occupied by his brother Timothy F. Buckley as a tenant at will.

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

"In a plea of trespass for that the said defendants at Lewiston, on the fifth day of August, 1906, with force and arms broke and entered the plaintiff's close in said Lewiston and then and there with pick-axe, bars, and other instruments ruined and destroyed to a large extent the plaintiff's building, tore down the walls of the house, cut, destroyed and defaced the walls, floors and other portions of the plaintiff's house against the law of the land and against the will of the plaintiff and the plaintiff further alleges that these acts were done by the defendants willfully, and wantonly, to the damage of the said plaintiff, (as he says) the sum of one thousand dollars."

Plea, the general issue, with a brief statement as follows:

"That at the time of doing the acts complained of in plaintiff's writ, to wit, on August 5th, A. D. 1906, the defendants and one A. B. Howard of Auburn in this County, were duly and legally appointed and qualified deputy enforcement commissioners of the State of Maine, and were acting as such; that the said A. B. Howard was then armed with a warrant legally issued from the Municipal Court of the City of Lewiston, in said County of Androscoggin, a court having general jurisdiction over the subject matter, directed to the Sheriff of our said County of Androscoggin, his Deputies, the Constables of the City of Lewiston, and of the several towns in said County, and the enforcement commissioners and deputy enforcement commissioners of the State of Maine, commanding them, or either of them, to enter the dwelling house and its appurtenances occupied by Timothy Buckley, and situated on the west side of Grove street in said Lewiston, being the same premises

described in plaintiff's writ and declaration and therein to search for intoxicating liquors alleged in said warrant to be then on the said fifth day of August aforesaid, there unlawfully kept and deposited by said Buckley for illegal sale in the State of Maine; that said warrant was duly issued from said court on and bearing the date of said fifth day of August, aforesaid, bearing its seal and the teste of the judge thereof, and over the signature of A. K. P. Knowlton, its then duly appointed and qualified acting clerk; that said Howard was present and armed with and acting under said warrant, and directing said search in said capacity as deputy enforcement commissioner, during all of the acts complained of in plaintiff's writ and declaration; that said Beaulieu and said Stevens, in their said capacity as deputy enforcement commissioners, assisted in said search as aids of said Howard, and under the directions contained in said warrant; that all of the acts complained of in plaintiff's said writ and declaration, which these defendants did at all were done in the execution of said warrant, in the presence and under the direction of the person, to wit, of said Howard, who was then and all of the time there personally present and armed with the same, and that neither of said defendants did any act which was not reasonable and necessary in the execution of said warrant; and that the said Howard and the said Beaulieu and Stevens, acting in their said several capacities did all things required of them by said warrant according to the tenor thereof.

Tried at the January term, 1907, Supreme Judicial Court, Androscoggin County. Verdicts for defendants. The plaintiff then filed a general motion for a new trial, and also during the trial excepted to certain rulings made by the presiding Justice. The exceptions were not considered by the Law Court.

The material facts are stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton and J. G. Chabot, for defendants.

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

EMERY, C. J. The decisive question in this case is whether the defendants in their execution of a warrant to search the plaintiff's dwelling house for intoxicating liquors went so far as to violate the constitutional guaranty that "the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures." This court in *State* v. *Guthrie*, 90 Maine, 448, in considering the duty of an officer entrusted with a search warrant used the following language, viz: "It is a sharp and heavy police weapon to be used most carefully lest it wound the security or liberty of the citizen. It was unknown to the early common law and came into use almost unnoticed in the troublous times of English history. Lord Coke denied its legality, but finally the courts and parliament, recognizing its great efficiency, contented themselves with carefully restricting and controlling its use. *Entick* v. *Carrington*, 19 Howell's State Trials, 1030. The danger of its abuse has been so clearly apprehended in this country that constitutional barriers have been erected against it." This constitutional limitation upon its use is to be observed by the officer executing the warrant, as well as by the magistrate issuing it.

Whether the conduct of the officer in a given case was reasonable or unreasonable must be determined by all the circumstances of that case. No definite line can be drawn. The division is rather by a zone within which reasoning men might reasonably differ, but outside of which there would be a general concurrence of reasoning, thinking men. The general principle, however, is that while the officers should search thoroughly in every part of the described premises where there is any likelihood that the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, should mar the premises themselves as little as possible, and should carefully replace so far as practicable anything they find it necessary to remove. As said in Tiedman on The Police Power, vol. 2, page 787: "Under a constitutional government, of which the liberty of the citizen is the cornerstone, the privacy of one's dwelling is rarely ever invaded, and then only in

extreme cases of public necessity and under such limitations as will serve to protect the citizen from any unusual disturbance of his home life."

In the case at bar the following facts appear from the testimony of the defendant officers themselves: They had a warrant to search the plaintiff's dwelling house for intoxicating liquors alleged to be unlawfully kept therein by the tenant. From the prior and contemporaneous conduct of the tenant and his wife the officers believed, and had reason to believe, that intoxicating liquors were somewhere in the house. They searched the house "thoroughly," and without hindrance, from attic to cellar inclusive, and even dug into the floor of the cellar. They examined the walls and floor of the cellar and the walls and floors of each room, including the attic, but found no liquors, nor any indications of any receptacles, secret panels or openings, or communications with receptacles, nor any other indications as to where liquors might be hid. They sounded the walls "pretty thoroughly" with hammers, but no such indications were thereby discovered. The officers, nevertheless, insisted to the tenant and his wife that intoxicating liquors were somewhere in the house, and that unless the location was revealed they should break into the walls of the various rooms. The tenant and his wife declared there were no liquors then in the house, the officers having already by a prior search of the stable taken all they had. The officers thereupon, using an axe, pickaxe and crowbar, broke into and tore out a strip from the interior walls of all the rooms below stairs from kitchen to front hall inclusive, entirely round each room, tearing off the paper, plastering and lathing, and dropping the debris upon the floors and carpets. This strip was of varying width, mainly from two to four feet, and was so wide as to require an entire re-papering of the rooms besides the repairs of lathing and plastering. They did all this in the hope of finding, not the liquors, but some pipe or other clue leading to the liquors. The officers then departed, leaving the occupants to remove the torn paper, plaster and broken laths and dust from the carpets and floors of their dwelling, and leaving the plaintiff, the owner, to restore his house and make it again habitable.

Upon these facts we think it clear that the manner and extent of the search in this case were unreasonable and in excess of the officers' authority. Even if under all the circumstances, not believing any liquors to be concealed there, they could lawfully have probed the walls in the hope of finding a pipe or other clue of the existence of which they had found no indications, such probing could have been sufficiently made with some slender probe with comparatively little injury. The destructive use of axe, pickaxe and crowbar for that purpose was unnecessary and unreasonable, and hence unlawful.

It may be conceded that the defendants acted in good faith in the full belief and with reason to believe that the occupant was keeping liquors in the house in violation of law, but that is not a defense. In this civil action against them they are to be judged by their conduct, not by their motives except as to the assessment of damages. Officers must not allow their zeal and beliefs to blind them to the rights of the owners and occupants of the dwelling house they search. Those rights, as well as the interests of the prosecutors, are to be regarded and protected by officers. In this case the tenant was not convict but only accused, and only of a misdemeanor. The owner was not even accused.

However confident the officers were of the guilt of the occupant, the house and its owner were not thereby outlawed.

Motion sustained.
Verdict set aside.

NATHAN BERLAIWSKY *vs.* HYMAN ROSENTHAL.

Kennebec. Opinion March 4, 1908.

Sales. Terms of Payment. Presumptions. Vendor may Repossess Himself of Goods Sold, When. Subsequent Purchaser.

In the absence of agreement or understanding between the parties, as to terms of payment, the law presumes a sale to be a cash sale, that is, a sale conditioned on payment concurrent with delivery, and not a sale on credit, and a delivery in such case, f. o. b. car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and if payment, is not made, the vendor may repossess himself of the goods sold, and sell them to another.

On exceptions by defendant. Sustained.

Replevin for three tons of old iron junk, brought in the Superior Court, Kennebec County. Plea, the general issue with brief statement alleging "that the title to the property at the time of the alleged taking and at the time of replevying the same was in the defendant and not in the plaintiff."

Tried at the June term, 1907, of said Superior Court. Verdict for plaintiff. The defendant excepted to certain instructions given by the presiding Justice in his charge to the jury.

The case appears in the opinion.

Fred W. Clair, for plaintiff.

Brown & Brown, for defendant.

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

SAVAGE, J. Action of replevin for three tons of iron. The plaintiff bought the iron of one Weiner on a certain Wednesday at an agreed price to be delivered f. o. b. car at Anson to be shipped to Waterville. Weiner loaded the iron on the car, and on the Monday following, while the car was still at Anson, he sold and delivered the iron to the defendant, who then shipped it to Water-

ville, where it was replevied by the plaintiff. The question tried was, which party had title.

At the trial, there was evidence from which the jury might have found properly, if they believed it, that the sale by Weiner to the plaintiff was understood as a cash sale, that the plaintiff was to send a check for it, and that Weiner held the iron at Anson until the check should be received. If so, the sale was conditional on payment, and if no payment, unless payment was waived for the time being, the title to the iron did not pass to the plaintiff. *Stone* v. *Perry*, 60 Maine, 48; *Seed* v. *Lord*, 66 Maine, 580. And in such case, the vendor after a reasonable time, if payment was not made, might lawfully sell to another. But the verdict of the jury for the plaintiff negatived necessarily this proposition.

There was also evidence coming from the plaintiff himself tending to show that nothing whatever was said between the plaintiff and Weiner as to when the iron was to be paid for, and that there was no understanding as to the terms of payment. Upon this phase of the case, the presiding Judge instructed the jury in substance that, if the iron was sold by Weiner to the plaintiff without any understanding as to the terms of the payment, and if it was delivered on the car directed to the plaintiff in pursuance of their agreement, then the iron belonged to the plaintiff, that the contract between them was completed, and that if nothing more was said as to the terms of payment the plaintiff had the right to the possession of the iron under the agreement, whether he sent his check for it or not. To these instructions the defendant has excepted.

The exceptions must be sustained. The court below seems to have proceeded upon the theory that when a sale is made without any agreement or understanding as to terms of payment, it is to be deemed a sale on credit, in which case a delivery f. o. b. on car, as agreed, would completely vest the title in the purchaser. But this is directly opposed to the doctrine declared in *Furniture Co.* v. *Hill*, 87 Maine, 17, where it was said that under such circumstances, "the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The plaintiff's," (who were the vendors in that case), "would have

had the right to retain possession until the purchaser had been ready to perform his part of the contract. Or, if the goods had been delivered with expectation of immediate payment, and this had not been done, the plaintiffs had the right to retake possession of the goods."

In the absence then of agreement or understanding, as to terms of payment, the law presumes a sale to be a cash sale, that is, a sale conditioned on payment concurrent with delivery, and not a sale on credit, and a delivery in such case, f. o. b. on car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and if payment is not made, the vendor may repossess himself of the goods sold.

By this rule, under the evidence in this case, which is made a part of the bill of exceptions, if the jury had found, as they well might have found from the testimony of the plaintiff himself, that nothing whatever was said or understood between him and Weiner in regard to terms of payment, the jury would have been warranted in finding that the title to the iron was in the defendant, and not necessarily in the plaintiff as they were in effect instructed. The instructions were therefore erroneous and prejudicial.

Exceptions sustained.

E. A. STROUT *vs.* MARGARET M. LEWIS, Admx.

Sagadahoc. Opinion March 4, 1908.

Fraud. Burden of Proof. Class of Proof Required to Establish Fraud.

When in an action on a written contract the defendant alleges fraud in the inception and execution of the contract, the burden is on the defendant to establish the allegation of fraud by clear and convincing proof.

When in an action on a written contract the defendant alleges fraud in the inception and execution of the contract and the proceeding in effect involves the reforming of the contract on the ground of fraud, then to enable a court in equity to exercise this power, proof of the fraud must be full, clear and decisive, especially where the oral evidence comes mainly from the parties to the suit, and relief will not be granted where the evidence is loose, equivocal or contradictory or in its texture is open to doubt or opposing presumptions.

In the case at bar, *Held:* (1) That the proof fell far short of substantiating the fraud alleged by the defendant. (2) That the evidence showed good faith rather than fraud on the part of the plaintiff. (3) That the verdict was so glaringly wrong that it must be set aside.

On motion by plaintiff. Sustained.

Assumpsit to recover a broker's commission on the sale of real estate, based upon a written contract. Plea, the general issue with brief statement as follows:

"And for a brief statement of equitable matter of defense to be used under the general issue pleaded, the said defendant says that on the 27th day of June, 1904, the date of the alleged written agreement, and prior thereto, the plaintiff, by one Hutchins his agent, and the defendant, agreed between themselves that if the defendant should place the real estate in question in the plaintiff's hands for sale by him, the said defendant would pay to the said plaintiff the sum of twenty dollars, which was the sum agreed upon to cover the plaintiff's expense in cataloguing and advertising said estate, that said sum of twenty dollars should be payable to the said plaintiff in any event, whether a sale was effected by him, and that there should be no other or further expense or charge to her, the

said defendant, on any account or for any reason or purpose whatsoever; that upon these propositions the minds of the parties met and mutually agreed; that on said 27th day of June, 1904, the aforesaid agreement was intended to be reduced to writing, and that the said plaintiff's agent volunteered to so reduce it, and in pursuance thereof wrote in upon a printed form the written agreement which is herein declared on, and handed the same to the said defendant to be signed by her. That she then asked him what said paper was, and that he then and there represented to her that the same was merely a writing to show that the said real estate had actually been placed in the plaintiff's hands for sale and also to provide for the payment of said twenty dollars in accordance with their agreement, and that relying upon said representations the defendant then and there signed the same.

"And the defendant further says that in truth and fact the statement and representations of the plaintiff's agent as to the nature and contents of said paper were false and fraudulent, that the said instrument did not embody the terms of the actual agreement between the parties; that the misrepresentations of the plaintiff's agent were affirmative statements of fact, made with the purpose of inducing the defendant to sign said instrument, and that in reliance thereon she was in fact induced to and did sign the same, that said affirmative statements were false in fact and known to be so by said plaintiff's agent, that they were material representations and that the defendant ever has been and now is ready and willing, and now offers, to pay to the plaintiff the twenty dollars due to him upon the original and only mutual agreement and contract between them."

Tried at the August term, 1907, of the Supreme Judicial Court, Sagadahoc County. Verdict for plaintiff for $20.00 with interest from May 22, 1906. The plaintiff then filed a motion to have the verdict set aside for the following reasons: 1. "Because it is against law and the charge of the Justice." 2. "Because it is against evidence." 3. "Because it is manifestly against the weight of evidence in the case." 4. "Because the damages assessed are insufficient."

The case is stated in the opinion.

Note. Although the title of this case would indicate that the action was against the defendant in a representative capacity, yet the writ, declaration and proceedings show that the suit was against her individually and not as administratrix.

Williamson & Burleigh, for plaintiff.

Staples & Glidden, for defendant.

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

CORNISH, J. This was an action of assumpsit to recover a broker's commission on the sale of real estate, based upon a written agreement dated June 27, 1904.

The defendant pleaded the general issue together with an equitable brief statement, alleging fraud in the inception and execution of the written contract and claiming that under the actual oral agreement, made between the parties, she was to pay the plaintiff twenty dollars when the farm was sold, to cover the expense of cataloguing and advertising, whether the sale was made through the plaintiff's efforts or her own and that there was to be no further charge against her of any kind.

By agreement of counsel the case was submitted to the jury upon these pleadings, they to pass upon the question of fraud and if the defendant's contentions were sustained, the jury were authorized to give the plaintiff a verdict of twenty dollars as if the contract itself had been reformed. This the jury did, their verdict being for twenty dollars with interest from the date of sale. The plaintiff on motion seeks to have this verdict set aside as against the evidence.

The vital question is the proof of deliberately planned and carefully executed fraud on the part of the plaintiff's agent, Hutchins, for on no other hypothesis can the verdict be sustained. The charge is a serious one and the law imposes upon the defendant the burden of substantiating it by clear and convincing proof. "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." Wigmore Ev., sec. 2498. It must be "clear, convincing and satisfactory." *Liberty* v. *Haines, Admr.*, 103 Maine, 182.

In effect the proceeding here, involved the reforming of a written contract on the ground of fraud, and the law is well settled that to enable a court in equity to exercise this power, proof of the fraud must be full, clear and decisive, and relief will not be granted where the evidence is loose, equivocal or contradictory or in its texture is open to doubt or opposing presumptions. *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290; *Fessenden* v. *Ockington*, 74 Maine, 123. This rule is especially enforced where the oral evidence comes mainly from the parties to the suit. *Parlin* v. *Small*, 68 Maine, 289.

The proof in this case falls far short of this standard. The only evidence of fraud comes from the defendant herself who, in mechanical and oft-repeated phrase, says that the agent told her "his terms were $20 for advertising and so forth," that "it would cost her $20 whether he sold the place or she did," that he gave her this contract to sign saying that "it was a document to show that she would pay him the $20" and that she did not read it or hear it read but relied upon his statement as to its contents. This testimony is without corroboration. Against it was the clear and positive statement of Mr. Hutchins that the terms of the contract as written were precisely as agreed upon orally, that he read the agreement to the defendant and explained it fully, that she looked on while he was reading, and that she then signed it, after having ample opportunity to examine it further if she had desired. The inherent improbability of the defendant's version strikes one forcibly. She was a woman of mature years and of intelligence and it is highly improbable that she would have signed a contract with a comparative stranger without first learning its contents either by reading it herself or having it read to her. It is equally inconceivable that Mr. Hutchins would have agreed to take property into his hands valued by her at $1200, and negotiate a sale for the paltry sum of $20, a commission of 1 4-5% on the asking price, including expenses which might naturally consume a large portion if not the whole of that amount, when his usual rates were the same as expressed in the contract. He would be giving his services for nothing.

Nor is it easy to believe such deliberate fraud on the part of Mr. Hutchins, when we consider that he had no personal interest in the matter but was acting for the plaintiff, and that this agency had sold more than one hundred farms in this single county during the past few years. Such conduct would be more easily attributable to a transient promoter than to the proprietor of an established business where experience teaches that honesty is the best policy.

It further appears that the property was finally sold through the efforts of the plaintiff's agent Mr. Morrill, who succeeded Mr. Hutchins in that locality. As the result of previous correspondence, a sister of the purchaser, with two others went to Brunswick and met Mr. Morrill by appointment. He procured a team with driver, and sent them to the defendant's farm with a note to Mr. Jaques, a relative and confidential adviser of the defendant. He quoted $1100 as the selling price, a reduction having been authorized from the original figure. The trade was closed that day between the parties themselves on the premises for $1050, although great care was taken to conceal the fact from Mr. Morrill by both the defendant and the purchaser who during the negotiations asked the defendant the significant and yet not unusual question whether she could sell the place herself.

It was not until some weeks later, when the parties met in Brunswick to make the transfer, that Mr. Morrill accidentally learned of the sale and he then asked for his commission in accordance with the contract. Under the established rule in this State, the plaintiff had fulfilled his part of the agreement and was entitled to his compensation, but this seems to have been one of a class of cases, not too uncommon, where avarice weakens principle, and after a purchaser has been found through the efforts of a broker, the owner, in closing the deal, is willing to make a reduction from the purchase price and stand his chances of avoiding the payment of commissions.

The evidence in this case shows good faith rather than fraud on the part of the plaintiff and his representatives, and the verdict of the jury is so glaringly wrong that it cannot be allowed to stand.

Verdict set aside.

In Equity.

FIRST NATIONAL BANK OF AUBURN

vs.

HARRY MANSER, Trustee, et als.

Androscoggin. Opinion March 6, 1908.

Contracts. Construction.

It is a well settled and familiar rule of construction that a contract cannot be varied by parol evidence when its terms are clear, unambiguous and complete.

It is also a well settled rule when a contract is ambiguous or incomplete, parol evidence may be admitted for the purpose only of correcting the ambiguity or supplying the deficiency.

In the case at bar, a bill of sale dated November 10, 1899, for $3000 was given by White & Son to one Boothby "as security for his liability upon certain notes" indorsed by said Boothby for said White & Son, but did not state the amount of the notes to secure which it was given. The property included in the bill of sale was described as follows: "All the sawed lumber now in and around our mill in said Leeds and all lumber piled in our yard adjacent thereto together with all sawed or unsawed lumber in and around our said mill or in Dead River or Androscoggin Lake at any and all times until the said sum is paid to the said Boothby." After taking the bill of sale, said Boothby indorsed promissory notes signed and discounted by said White & Son at the plaintiff bank, of the face value of $4330.05, and also notes similarly signed and indorsed were discounted at the Livermore Falls Trust & Banking Company, of the face value of $1190. On the 18th day of December, 1902, said Boothby with the consent of said White & Son took possession under his bill of sale of a certain quantity of lumber in and about the mill of said White & Son, and also with their consent appointed one Lothrop as agent to sell said lumber for the benefit of the holders of the notes indorsed by him. Said Lothrop, it was alleged, thereupon proceeded to convert the lumber into money and held the proceeds thereof. April 18, 1903, said White & Son were adjudicated bankrupts, and the defendant Manser was duly appointed and qualified as trustee, and thereafter as trustee aforesaid began an action against the plaintiff bank to recover for the value of certain lumber alleged to have been taken possession of by said Boothby under the bill of sale, and also began an action against said Lothrop to recover the proceeds from the sale of lumber made by him. It was admitted that the amount of promissory

notes of said White & Son indorsed by said Boothby and outstanding at the date of the bill of sale, was $1100, and that all these notes had been fully paid, and all the property described in the bill of sale disposed of before Dec. 18, 1902. The plaintiff bank prayed, among other things, that the bill of sale be adjudged and decreed to be a valid mortgage upon the lumber taken possession of by said Boothby on December 18, 1902, and also that the plaintiff and the Livermore Falls Trust & Banking Company be subrogated to the rights of said Boothby in the security understood to be effected by the bill of sale.

Held: (1) That it was unnecessary to decide whether the terms of the bill of sale were sufficient to cover future acquired property. (2) That the bill of sale did not cover future liability for indorsements by Boothby. (3) That the bill of sale must be adjudged and decreed to be invalid and of no force and effect and did not create any lien upon the lumber of White & Son taken possession of by Boothby on the 18th day of December, 1902. (4) That on the date of the plaintiff's bill Boothby had no rights under the bill of sale to which the plaintiff and the Livermore Falls Trust & Banking Co. could be subrogated. (5) That Lothrop had no right or authority to take possession of and convert into money the lumber belonging to White & Son.

In equity. On report. Bill dismissed.

Bill in equity brought by the plaintiff bank against Harry Manser, trustee in bankruptcy of the partnership estate of Charles D. White and Howard C. White, late copartners in business as C. D. White & Son, Thomas H. Boothby, Ralph K. Lothrop and the Livermore Falls Trust & Banking Company. The bill was taken pro confesso as to Thomas H. Boothby, and the Livermore Falls Trust & Banking Company. The other defendants answered. The Livermore Falls Trust & Banking Company was requested to join in the bill as a party plaintiff but not consenting was joined as a party defendant. The gist of so much of the bill as is material to the issues raised, is stated in the opinion.

Heard on bill, answers and proof before a Justice of the Supreme Judicial Court sitting as a court in equity. At the conclusion of the hearing, and by agreement of the parties, the case was reported to the Law Court for decision upon so much of the evidence as was legally admissible.

The case sufficiently appears in the opinion.

John A. Morrill, for plaintiff.

Harry Manser and F. A. Morey, for defendant Manser.

Newell & Skelton, for defendant Lothrop.

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

SPEAR, J. This is a bill in equity involving the construction of the following written instrument.

"Know all men by these presents.

"That we, Charles D. White and Howard C. White of Leeds, County of Androscoggin and State of Maine copartners under the firm name of C. D. White and Son in consideration of three Thousand (3000) Dollars paid by Thomas H. Boothby of said Leeds the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver, unto the said Thomas H. Boothby the following goods and chattels, namely: All the sawed lumber now in and around our mill in said Leeds and all lumber piled in our yard adjacent thereto together with all sawed or unsawed lumber in and around our said mill or in Dead River or Androscoggin Lake at any and all times until the said sum is paid to the said Boothby.

"Provided nevertheless that this lumber as above specified is sold and held by the said Boothby as security for his liability upon certain notes and that said lumber may be sold to pay said notes and in event of the payment of same and a release from said Boothby that all or any part of said lumber shall revert to and become the property of the said Charles D. White & Son.

"To have and to hold all and singular the said goods and chattels to the said Thomas H. Boothby, and his executors, administrators and assigns, to their own use and behoof forever.

"And we hereby covenant with the said Thomas H. Boothby that we are the lawful owner of the said goods and chattels; that they are free from all incumbrances that we have good right to sell the same as aforesaid; and that we will warrant and defend the same unto him the said Thomas H. Boothby, his heirs, executors, administrators, or assigns, against the lawful claims and demands of all persons."

The plaintiff bank in its bill in equity alleges that after taking said bill of sale said Boothby endorsed promissory notes signed and discounted by White & Son at the plaintiff bank of the face value

of $4330.05; that notes similarly signed and endorsed were discounted at the Livermore Falls Trust & Banking Company of the face value of $1190; that in 1902 said Boothby with the consent of White & Son took possession under his bill of sale of certain lumber in and about the mill of said White & Son; and with their consent appointed Ralph K. Lothrop as agent to sell said lumber to the best advantage for the benefit of the holders of the notes endorsed by him; that said Lothrop thereupon proceeded to convert said lumber into money and now holds the proceeds thereof; that on the 18th day of April, 1903, the said partnership of C. D. White & Son, and the individual members thereof, were adjudicated bankrupts under the laws of the United States and that Harry Manser of Auburn, one of the defendants, was appointed and qualified as trustee in bankruptcy of said estates; that on the 18th day of August, 1906, said Manser as said trustee began an action against the plaintiff bank to recover the sum of $3312.61 for the value of certain lumber alleged to have been taken possession of by said Boothby under said bill of sale; that on the 29th day of August, 1906, said Manser as trustee also brought an action against said Lothrop to recover the proceeds held by said Lothrop from the sale of said lumber above described.

Under these allegations the plaintiff prays that said bill of sale dated November 10, 1899, may be adjudged and decreed to be a valid mortgage upon the property so taken possession of by said Boothby on the 18th day of December, 1902, and that the plaintiff and said Livermore Falls Trust & Banking Co. may be subrogated to the rights of said Boothby in the security understood to be affected by said mortgage. The other requests are not essential to the decision of the case.

It is admitted that the amount of promissory notes of White & Son endorsed by Boothby, and outstanding at the date of the bill of sale, was $1100, and that all these notes had been fully paid, and all the property described in the bill of sale disposed of, before December 18, 1902.

Under this state of facts the plaintiff contends that the bill of sale should be regarded as a mortgage and construed to extend a

lien to after acquired property, and security to after acquired liability of Boothby by endorsement. The instrument will not bear this construction. Whether its terms are sufficient to cover future acquired property, it is unnecessary to decide, as it is very clear that they do not cover future liability for endorsements. The rule of construction that a contract, when its terms are clear; unambiguous and complete, cannot be varied by parol is too familiar to require citation. Another rule, that when a contract is ambiguous or incomplete, parol evidence may be admitted for the purpose only of correcting the ambiguity or supplying the deficiency, is equally well settled.

The second paragraph in the contract is specific and unambiguous, but incomplete in omitting to state the amount of the notes to secure which the bill of sale of lumber was given. If we supply the words in italics to indicate the amount of the notes, then this paragraph will read as follows: "Provided nevertheless that this lumber as above specified is sold and held by said Boothby as security for his liability upon certain notes, *amounting to $1100*, and that said lumber may be sold to pay said notes and in the event of payment of the same and a release from said Boothby that all or any part of said lumber shall revert to and become the property of said Charles D. White & Son." Reading into the contract the words "amounting to $1100" makes it complete. Now, it is evident, construing the contract in its complete form, that no interpretation can be invoked that makes this paragraph more lucid or specific than the language itself imports. In other words, it must be held to mean just what it says, that the lumber covered by the bill of sale should be held by Boothby as security for endorsement of notes to the amount of $1100 and no more, the amount of the endorsed notes outstanding at the date thereof.

It further provides for what, in the absence of any provision, the law would imply "that in the event of payment the same (notes) and a release from said Boothby that all or any part of said lumber shall revert to and become the property of the said Charles D. White & Son." This language needs no interpretation. When the notes amounting to $1100, endorsed by Boothby, were paid, all his

rights under the bill of sale ceased and all the lumber was released, and, by operation of law, independent of any agreement, reverted to the original owners. The latter part of this paragraph was simply confirmatory of the legal rights of the parties.

Our conclusion is that the instrument described and set forth in the plaintiff's bill, dated November 10, 1899, must be adjudged and decreed to be invalid and of no force and effect, and to create no lien upon any of the property of the said C. D. White & Son; that on the 18th day of December, 1902, the date when said Boothby is alleged to have taken possession of certain lumber of C. D. White & Son, with their consent by virtue of the authority conferred upon him by said bill of sale, said Boothby had no lien upon any of the lumber so alleged to have been taken, or right to possession thereof; that at the date of the plaintiff's bill he had no rights under the alleged bill of sale to which the plaintiff and the Livermore Falls Trust & Banking Company could be subrogated; and that said Ralph K. Lothrop had no lawful right or authority to take possession of, and convert into money, lumber and other property of said C. D. White & Son, as he is alleged to have done in the plaintiff's bill.

Bill dismissed with costs to the defendant Manser only.

WILLIAM A. MITCHELL *vs.* JOHN COLLINS EMMONS.

York. Opinion March 7, 1908.

New Trials. Motions Therefor. Practice. Newly Discovered Evidence. Supreme Judicial Court Rule XVII. "Court." Statute 1875, chapter 32; 1907, chapter 62, section 1. Revised Statutes, 1841, chapter 115, section 101; 1903, chapter 79, section 46; chapter 84, sections 1, 22, 53; chapter 91, sections 2, 5; chapter 101, sections 4, 6; chapter 104, section 17; chapter 106, section 47.

A motion under Revised Statutes, chapter 84, section 53, to set aside a verdict on the ground of newly discovered evidence, in order to be properly before the Law Court, must be made in court and the term "court" as applied to actions at law means court in session. A Justice in vacation is not the court.

When a motion is made under Revised Statutes, chapter 84, section 53, to set aside a verdict on the ground of newly discovered evidence, the statute requires that the testimony respecting the allegations of the motion "shall be heard and reported by the Justice," meaning the Justice presiding at the term when the motion is filed.

Rule XVII of the Supreme Judicial Court provides, among other things, that "when a motion for a new trial is made for any other cause" than that the verdict is against law or evidence, "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." No power is conferred upon a Justice in vacation to make such order.

The rule governing a motion to have a verdict set aside on the ground of newly discovered evidence is that before the court will grant a new trial upon this ground, the newly discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial.

In the case at bar, which was an action to recover the purchase price of a pair of horses sold by the defendant to the plaintiff, the trade having been rescinded by the plaintiff because of breach of warranty by the

defendant, the verdict was for the plaintiff, and the defendant filed a motion for a new trial. *Held:* That while the evidence at the trial was contradictory, yet the jury were justified in finding a warranty on the part of the defendant and a breach of the same.

Also in the case at bar, the defendant filed a motion for a new trial on the ground of newly discovered evidence. This motion was not properly before the Law Court but for reasons stated in the opinion the Law Court concluded to consider the newly discovered evidence. *Held*: That the newly discovered evidence was merely cumulative on the question of breach of warranty and had the same or its equivalent been offered at the trial it is not probable that a different verdict would have been rendered.

On motions by defendant. Overruled.

Assumpsit to recover $300, the purchase price paid by the plaintiff to the defendant for a pair of horses, the trade having been rescinded by the plaintiff because of a breach of warranty by the defendant.

The first and principal count in the plaintiff's declaration was as follows:

"In a plea of the case, for that, the plaintiff, at said Kennebunk, heretofore, to wit, upon the tenth day of May, A. D. 1906, paid to the defendant a certain sum of money, to wit, three hundred dollars, and received into his possession a certain pair of horses. That previous to the payment of the said money and the receipt of said horses, said defendant claimed to be the owner of said horses to have worked them upon his farm doing all sorts of work, such as hauling and backing loads, plowing, and other farm work; and previous to said sale of said horses to the plaintiff the defendant represented and warranted to the plaintiff that said horses were sound and all right in every respect, that they would work in any spot or place, that they had done all kinds of ordinary work for the defendant, and that they were indeed and truly worth a much larger sum, to wit, four hundred dollars, than defendant required plaintiff to pay therefor. That the plaintiff, expressly relying upon the aforesaid statements and warranties concerning said horses made by the defendant, took said horses into his possession and paid the defendant therefor said sum of three hundred dollars, and then and there believed, on account of the said statements and warranties of the defendant that said horses were well worth three hundred dollars, that they were

sound in every respect, would ordinarily work in any spot or place and do and perform the ordinary labor and services that work horses usually perform. The plaintiff says that the statements and warranties of the defendant were false and fraudulent and false misstatements, inasmuch as one of said horses was balky and would not pull, would not work at all, although the plaintiff many times and in every way possible tried to cause said horse to work and perform ordinary services such as a work horse usually performs. And the plaintiff alleges that thereafterward, to wit, upon the twenty-ninth day of May, A. D. 1906, after negotiations and conversations with the defendant, he, said plaintiff, rescinded said sale and offered to return and deliver to the defendant at his barn in Kennebunk said horses, and at the same time demanded the return of said three hundred dollars, but that said defendant refused to accept said horses or to return to the plaintiff said sum of three hundred dollars. And the plaintiff alleges that by reason of all of the foregoing an action has accrued to him to have and recover of said defendant said sum of three hundred dollars and interest thereof from the said twenty-ninth day of May, A. D. 1906."

The declaration also contained an omnibus count of the common form together with a statement of what the plaintiff would offer to prove thereunder which in substance was the facts alleged in the first count.

Plea the general issue with brief statement as follows:

"That he the defendant never represented and warranted to the plaintiff that said horses were sound and all right in every respect or that they would work in any spot or place.

"And the defendant further says that when said plaintiff received said horses at the home of the defendant in Kennebunk, said horses would work in any spot or place, were in good working condition, except being tired from a hard day's work, and had done all kinds of ordinary work for the defendant; and if said horses will not work now it is the result of the plaintiff's treatment of said horses or from some other cause for which the defendant is in no way to blame or responsible."

Tried at the January term, 1907, Supreme Judicial Court, York County. Verdict for plaintiff. The defendant then filed a general motion to have the verdict set aside. Afterwards, to wit, October 16, 1907, the defendant also filed a motion for a new trial on the ground of newly discovered evidence, and October 19, 1907, a Justice of the Supreme Judicial Court, in vacation, issued the following order thereon:

"It is ordered that the above motion be allowed and filed and that testimony be taken not later than November 9th, A. D., 1907, before Bessie M. Harmon at the office of Judge Cleaves, Biddeford, Maine."

The case appears in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

John G. Smith, for defendant.

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

CORNISH, J. Action to recover three hundred dollars, the purchase price of a pair of horses, the trade having been rescinded by the plaintiff because of breach of warranty by defendant. The verdict was for the plaintiff. The defendant filed two motions for a new trial; one on the ground that the verdict was against the evidence and the other based on newly discovered evidence.

The alleged warranty, which was oral, did not relate to the soundness of the horses, but to their willingness to work, the representation being that "they were good horses, all right, and would work anywhere." The defendant denied both the warranty and the breach. Was there a warranty? The testimony on this point is necessarily meagre. The plaintiff affirmed it. The defendant denied it. The only testimony outside their respective statements is that of one Head who corroborates the plaintiff to some extent. The jury believed the plaintiff and we think they were justified. The plaintiff bought the horses for working purposes solely, and as there was no representation as to their soundness it is hardly probable that he would have paid the liberal sum of three hundred dollars without some satisfying representation and assurance as to their ability and

willingness to work, and without even making inquiry as to the fact as the defendant claims. The jury did not err in accepting the plaintiff's version.

As to the breach of the warranty, the evidence was more voluminous. Three witnesses besides the plaintiff testified to the balkiness of one horse immediately after the plaintiff brought the team home. The defendant met this with seven witnesses besides himself who testified to the work the horses had done while owned by the defendant and the absence of balkiness, and with a veterinary surgeon and three other semi-experts who testified to the cause and effects of laminitis, to which they attributed the horse's unwillingness to pull, after having had a hard day's work, an all night drive and one day's absolute rest.

This was a question peculiarly within the experience and judgment of the jury and we see nothing in the evidence to cause us to disturb their finding. The plaintiff apparently acted in good faith. He wrote the defendant immediately after he had worked the horses and discovered the difficulty and offered to return them, but the defendant's reply while denying all charges, was of that evasive and unsatisfactory nature that fails to inspire confidence in the author. The first motion cannot be sustained.

The second motion is not properly before us. The statutory provision in relation to motions for new trial is as follows:

"When a motion is made in the supreme judicial court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding Justice; when the motion is founded on any alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion, shall be heard and reported by the justice, and the case shall then be marked law." Rev. St., ch. 84, sec. 53.

The motion based on newly discovered evidence falls within the latter part of this section but like that governed by the first part, it must be made in court, and the term "court" as applied to actions at law means a court in session. A Justice in vacation is not the court.

The distinction is carefully observed throughout the statutes and any powers to be exercised by a Justice in vacation are granted in express terms. The following are illustrations. Application for a writ of habeas corpus may be made "to the supreme judicial or superior court in the county where the restraint exists, if in session; if not, to a justice thereof; and when issued by the court it shall be returnable thereto; but if the court is adjourned without day, or for more than seven days, it may be returned before a Justice thereof and be heard and determined by him." Rev. Stat. ch. 101, sec. 6. The writ itself may be issued by the Supreme Judicial Court, or either of the Superior Courts, or any of the Justices thereof. Rev. Stat., chap. 101, section 4. "A petition for a writ of mandamus may be presented to a justice of the supreme judicial court in any county in term time or vacation." Rev. Stat., chap. 104, sec. 17. Notice on a petition for review "may be ordered by any justice of the supreme judicial court in term time or vacation." Rev. Stat., ch. 91, sec. 2, and "on presentation of a petition for review, any justice of said court may in term time, or in vacation, stay execution on the judgment complained of, or grant a supersedeas." Rev. Stat., chap. 91, sec. 5.

The same distinction is recognized with reference to filing in the clerk's office, documents material in a pending suit. Rev. Stat., ch. 84, sec. 22; the ordering of notice upon proceedings to quiet the title to real estate; Rev. Stat., ch. 106, sect. 47, and Laws of 1907, chap. 62, sec. 1.

The general power of ordering notices is conferred by chap. 84, sec. 1, in these words: "When it appears that the defendant has not had sufficient notice, the court may order such further notice as it deems proper. Any justice of the supreme judicial or of either superior court may order notice concerning any civil proceeding in or out of term time, directing how it shall be given, and such order, when made in vacation, shall be indorsed on the process." This power of ordering notices in vacation was conferred by chapter 32 of Pub. Laws of 1875, prior to which time it vested in the court alone.

The term civil proceeding or process as here employed is "a generic term for writs of the class called judicial." It does not embrace mere

motions in a pending cause. Rule XVII of this court also provides that "when a motion for a new trial is made for any other cause (than that the verdict is against law or evidence) the evidence in support thereof, shall be taken within such time as the court shall order, or the motion will be regarded as withdrawn." No power is conferred upon a Justice in vacation to make such order. All of these requirements, both of statute and of rule, were ignored in the present case. The motion was not filed in court but presented to a Justice in vacation, after two terms had intervened since the trial, and the order of the Justice that the motion be allowed and filed, and the evidence taken before a designated stenographer prior to a given date, was made in vacation.

Moreover the statute requires that the testimony respecting the allegations "shall be heard and reported by the justice," meaning the Justice presiding at the term when the motion is filed. Rev. St., ch. 84, sec. 53; or as the earlier statute had it, "shall be heard, examined and reported by the judge." Rev. St., 1841, ch. 115, sec. 101. In harmony with this is sec. 46 of chap. 79 which specifies among the only cases that can come before the Law Court "cases in which there are motions for new trials upon evidence reported by the justice." No certificate of the Justice accompanies the report of the evidence in this case and no order sending it forward to the Law Court. It is signed simply by the stenographer and no testimony appears to have been heard or reported by the Justice as the law requires. *Bartlett* v. *Lewis*, 58 Maine, 350.

For these reasons this court might with propriety decline to entertain the motion as not properly before it. Inasmuch, however, as this point was not raised by the opposing counsel and as evidence under the motion was introduced by both parties, it may be more satisfactory to consider this evidence on its merits.

By agreement of parties, immediately after the trial held at the January term, 1907, the horses were sent to Boston to be sold at public auction. Without the knowledge of the plaintiff, they were bid in by the defendant on February 6, 1907, for $100, and were at once shipped to the defendant's farm in West Kennebunk where they have since been kept.

The newly discovered evidence seeks to attack the verdict along two lines, first, by showing the pitiable physical condition of the horses at the time they were bought at auction by the defendant, as tending to explain the reason why they did not pull on January 13, 1907, at a test made by the plaintiff during the trial in the presence of witnesses who testified to the fact, and second, by showing that since the repurchase, they had never balked but had been faithful workers. The new evidence is bulky, covering one hundred and fifty pages while the testimony taken at the trial covers only sixty two, and it comes from nine witnesses produced by the defendant and from six produced by the plaintiff. It all relates to conditions existing and facts occurring subsequent to the trial, including a test made in the presence of both parties on November 6, 1907, one and a half years after the original sale on May 10, 1906.

While such evidence may in certain cases be regarded as newly discovered, as in *State* v. *Terrio*, 98 Maine, 17, where the evidence of certain mechanical experiments with rifle and shells was introduced by the State at the trial, without sufficient opportunity for the defense to meet it, and after conviction, upon a motion for new trial, another expert was authorized to make an exhaustive study of the question in order to test the accuracy of the conclusions reached by the expert for the State; yet the force of such evidence, which might be termed newly-occurring instead of newly-discovered, depends upon the circumstances of each particular case, the nature of the inquiry, and the kind of evidence submitted. Facts of a scientific nature might stand upon a different footing from ordinary testimony.

The new testimony here is merely cumulative on the question of breach of warranty. We fail to see why the most of it, or evidence equally forceful, could not have been produced at the trial. The test made by the defendant in November, 1907, the result of which is left in doubt, could probably have been arranged while the horses were in the plaintiff's possession at sometime between the sale in May, 1906, and the trial in January, 1907.

Nor are we greatly impressed with the weight of the new evidence. Had it or its equivalent been offered at the trial, we do not think it probable that a different verdict would have been rendered.

The rule governing such motions has been laid down in a recent case in these words: "The true doctrine is, that before the court will grant a new trial upon this ground, the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial." *Parsons* v. *Railway*, 96 Maine, 503.

Applying this rule to this particular case, with that discretion which is actuated "by a desire upon the one hand to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done," it is the opinion of the court that the entry should be,

Motions overruled.
Judgment on the verdict.

CYRUS THOMPSON et al. *vs.* FRANK L. SHAW.

Washington. Opinion March 12, 1908.

Common Law Assignment. Power, Authority and Duty of Assignee. Assenting and Non-Assenting Creditors. Trustee Process. Liability of Assignee in Trustee Process. Fraud. Exceptions in Scire Facias. Authority of Law Court. Revised Statutes, chapter 88, sections 63, 79.

When an assignor makes a common law assignment of all his property, not exempt from attachment and execution, for the benefit of such of his creditors as may, after notice of the assignment, assent thereto, and a reasonable time is provided in the assignment for such assent, and the assignee accepts the trust, then such assignment, if bona fide, is lawful, and until assailed by some one claiming rights against it under the provisions of the United States Bankruptcy Law it stands as a valid transfer of the property described as conveyed therein.

When a common law assignment for the benefit of creditors assenting thereto has been lawfully made and creditors have been notified of such assignment, any creditor may assent to the assignment and secure a pro rata part of the property with the other assenting creditors, or may attack the assignment through bankruptcy proceedings against the assignor, or may attach by trustee process the property in the hands of the assignee and thereby secure so much thereof as would not be needed to satisfy the debts of previously assenting creditors.

When an assignee accepts an assignment lawfully made to him by an assignor for the benefit of such of the assignor's creditors as may assent thereto, he thereby assumes the duty towards assenting creditors to administer the trust according to its provisions. But as to non-assenting creditors he owes no such duty, and they cannot legally complain if he gives up the trust and returns the property to the assignor, unless he does it with the intent and purpose thereby to defraud such non-assenting creditors.

When a common law assignment has been lawfully made and creditors have been seasonably notified of the assignment and have an opportunity to assent thereto, then no special duty rests on either the assignor or the assignee to secure such assent.

When a common law assignment has been lawfully made, the assignee has a right to employ counsel and when the assignment so provides, he may lawfully pay out of the trust funds in his hands all reasonable and necessary counsel fees.

When a common law assignment has been lawfully made and a non-assenting creditor by trustee process attaches the property in the assignee's hands, such assignee will not be held chargeable for sums paid by him, prior to the service of the writ, to the bona fide creditors of the assignor in settlement of their just demands.

When a common law assignment has been lawfully made and a non-assenting creditor by trustee process attaches the property in the assignee's hands, such assignee will not be held chargeable for property returned by him to the assignor prior to the service of the writ, unless he returned it with the intent and purpose to defraud non-assenting creditors.

An intent to defraud creditors, especially such creditors as have not assented to the provisions of a common law assignment for their benefit, is not to be inferred from successful efforts to compromise the claims of creditors after such assignment has been made.

When the bill of exceptions in an action of scire facias founded upon an original trustee process, indicates that the whole case is to be considered by the Law Court, the exceptions need not specify the extent to which the Law Court may examine the case.

Revised Statutes, chapter 88, section 79, providing that "whenever exceptions are taken to the ruling and decision of a single justice as to the liability of a trustee, the whole case may be re-examined and determined by the Law Court, and remanded for further disclosure or other proceedings, as justice requires," applies alike to scire facias and original proceedings in trustee process, and when exceptions are taken in an action of scire facias founded upon an original trustee process and the exceptions indicate that the whole case is to be considered, the Law Court has authority to correct any error in the judgment rendered by the court below whether of law or of fact.

In the case at bar, *Held:* That the common law assignment to the defendant was not fraudulent and that prior to the service of the original trustee writ upon him, he had lawfully discharged himself of all the property received by him from the assignor except $182.66 and for that sum only the plaintiffs should have judgment.

On exceptions by defendant. Sustained.

Scire facias founded upon an original trustee process brought by the plaintiffs against one Minnie A. Dyer as principal defendant and Frank L. Shaw, trustee. The question of the trustee's liability upon his attempted disclosures in the original suit was before the Law Court in *Thompson et al.* v. *Dyer*, 100 Maine, 421, in which he was charged generally as trustee. In the scire facias proceedings the defendant was allowed to disclose anew. See Revised Statutes, chapter 88, section 72.

The common law assignment referred to in the opinion, is as follows:

"Know all men by these presents, that I, Minnie A. Dyer of Millbridge, in the County of Washington and State of Maine, doing business under the firm name of Dyer's Grocery, as party of the first part, in consideration of one dollar paid by Frank L. Shaw of Machias in said county, party of the second part, and of the trust herein expressed, do grant and assign to the said party of the second part all my property, estate, rights and credits of every description, both individual property and property of said firm of Dyer's Grocery, except such as is by law exempt from attachment and execution, to have and to hold the same to the said Frank L. Shaw in trust to sell and dispose of the said property to the best advantage, and collect and convert into money said debts and demands, and to proceed with said property according to law, and make a proportional distribution of the net proceeds thereof among such creditors of said party of the first part as shall become parties to this assignment, as parties of the third part, within sixty days of the date hereof, and after the payments above mentioned, and hereinafter stated and made to pay the surplus to the party of the first part.

"And it is further agreed that the said trustee shall, out of the trust estate, pay all the costs and expenses of carrying out the trust herein declared, including a reasonable compensation for the trustee herein named, and for the services of an attorney when such services become necessary, and to pay all claims entitled to priority under the insolvent laws of Maine, in so far as such laws are not repugnant to or have not been superseded by, the bankrupt laws of the United States.

"And said Frank L. Shaw agrees to accept said trust and execute the same according to the provisions of this instrument and agreeably to law. And the creditors, whose names are hereunto subscribed, agree to said assignment, and to receive their proportional part of said property in full of all their claims against said party of the first part, and upon payment thereof to relieve and forever discharge said party of the first part from their respective claims. To

the covenants and agreements hereof the respective parties bind themselves and their legal representatives.

"In testimony whereof, we the said parties of the first, second and third parts, hereunto set our hands and seals on the sixth day of October, A. D. 1899, the said parties of the third part adopting and using one common seal. The signature of any duplicate copy hereof of the same tenor to be of like effect as if signed hereto.

"Minnie A. Dyer, (seal)
"Frank L. Shaw, (seal)"

This assignment was duly acknowledged by Minnie A. Dyer before Joseph W. Leathers, a justice of the peace.

Heard at the April term, 1907, Supreme Judicial Court, Washington County. After hearing, the presiding Justice rendered judgment against the defendant trustee for the amount of the plaintiff's judgment against Minnie A. Dyer, the principal defendant in the original suit, to wit, $404.57 and costs, and thereupon the defendant trustee excepted.

The case appears in the opinion.

Howard R. Ives, for plaintiffs.

William R. Pattangall, for defendant.

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

KING, J. This is an action of scire facias founded upon an original trustee process brought by the plaintiffs against Minnie A. Dyer as principal defendant and Frank L. Shaw, trustee.

The facts and circumstances leading up to these proceedings in scire facias, as shown by the record, briefly stated, are as follows:

Prior to Oct. 6, 1899, Minnie A. Dyer, of Milbridge, Maine, owning a store and stock of merchandise, was carrying on business under the immediate management of her husband. Domestic difficulties resulted in a separation. Investigation revealed to her that her liabilities exceeded her assets.

An attachment against her property was made, and other suits and attachments were threatened.

In this situation, after conference with her attorneys, Messrs. Pattangall & Leathers, she made, on the sixth day of October, 1899, a written assignment of all her attachable property to the defendant for the benefit of such of her creditors as should assent thereto within sixty days. This assignment Mr. Shaw accepted and signed. The defendant left the detailed management and disposition of the property so assigned to him, and the settlement with Mrs. Dyer's creditors, to Messrs. Pattangall & Leathers, with whom however, he frequently consulted and fully approved and adopted what his attorneys did in the premises. The plaintiffs were seasonably notified of the assignment but did not assent thereto.

None of the creditors appear to have formally assented to the assignment. The property was converted into money amounting to $3780. An effort was made to effect a settlement with the creditors on a percentage basis, and all claims, except that of the plaintiffs, appear to have been settled either by compromise or as the result of prior suits.

On Feb. 9, 1900, the plaintiffs served their original trustee process upon the defendant as trustee of Minnie A. Dyer. The principal defendant was duly defaulted. The question of the trustee's liability upon his attempted disclosures in that original suit was before this court in *Thompson* v. *Dyer*, 100 Maine, 421, in which he was charged generally as trustee.

It was there held that a statement of information received from his attorneys as to their doings in connection with the property assigned could not properly be considered as facts disclosed by him, because he had not adopted such statement as his own on oath in his disclosure and that the deposition of his attorney was not admissible because the facts sought to be proved by the deposition had not been alleged as required by statute. The court said: "The result is that upon the disclosure to which we are confined Mr. Shaw must be charged generally as trustee. If in fact he had no goods, effects or credits of Mrs. Dyer in his hands either actually or constructively at the date of the service of the writ upon him, he has not yet shown it by legal evidence adduced in the manner provided by law. He has not yet stated discharging facts in his

disclosure, nor has he yet opened any door for the statements of other persons.

"Upon scire facias he will undoubtedly have the opportunity to make as full and clear and detailed a disclosure as may be required, or as he may desire, and to make the statements of Mr. Pattangall a part of that disclosure, or to open a door for their admission otherwise."

In answer to these scire facias proceedings the defendant has made a full disclosure under oath in which he states the amount of money received from the property assigned to him and specifies in detail to whom and in what amounts it has been disbursed. Although his disclosure reveals that he relied upon information furnished him by his attorneys as to many of the details and facts disclosed by him, yet he states on oath his belief in the truth of that information, adopts it as his own, and declares those details and facts to be true.

He has now, we think, properly disclosed those facts as to the disbursement of the funds received by him as assignee which the court could not consider in his former disclosure.

At the April term, 1907, after hearing upon this disclosure, the presiding Justice rendered judgment against the trustee for the amount of the plaintiffs' judgment against the principal defendant, $404.57, and costs. The case is before this court on exceptions to that judgment.

The plaintiffs in support of the judgment below, claim that the assignment was fraudulent and void as to the assignor's creditors, and that under the provisions of R. S., chap. 88, sec. 63, the trustee is chargeable with the full amount of their judgment against the principal defendant.

Nothing appears in the assignment to indicate fraud. It is in the usual form of a common law assignment for the benefit of creditors. By it all the assignor's property not exempt from attachment and execution, was conveyed to be divided pro rata among all of her creditors who should assent thereto, and reasonable time for such assent was provided for. Such an assignment, if bona fide, is lawful. It is not contra bonos mores. Until assailed by some

one claiming rights against it under the provisions of the bankruptcy law it stands as a valid transfer of the property described as conveyed therein. *Pleasant Hill Cemetery* v. *Davis*, 76 Maine, 289.

But the plaintiffs contend that this assignment was not made bona fide, that the assignor intended thereby to place her property beyond the reach of her creditors for her advantage; and that such fraudulent intent is discovered from the circumstances out of which the assignment proceeded and the subsequent conduct of the assignor and assignee in relation to the property assigned.

They urge, in argument, as acts showing a want of good faith in the assignment, that the assignee did not devote his personal attention to the performance of all the duties imposed upon him by the assignment, but permitted his attorneys, who were acting also for the assignor, to attend chiefly to the details of the business; that no effort was made to secure the assent of the creditors to the assignment, but instead a compromise settlement was solicited; that some of the money received from the property was turned back to Mrs. Dyer; and that the attorneys were allowed by the assignee too liberal compensation for their services.

This position of the plaintiffs that the record here shows that the assignment was made with a fraudulent intent is untenable, we think. The situation and conduct of the assignor at the time it was made, and the provisions of the assignment itself, refute and disprove it. Mrs. Dyer was insolvent, creditors were attaching, she could not pay them, and in this extremity she placed all of her property in the hands of a trustee for the benefit of all of her creditors without favor or preference, reserving nothing for herself even for her immediate necessities. Her act did not put the property beyond the reach of her creditors. It was still subject to attachment by trustee process in the hands of the assignee by any non-assenting creditor, who would by such attachment reach all of such property then held by the trustee, and not needed to satisfy the debts of any previously assenting creditors.

Neither do we perceive in the subsequent conduct of the parties, as suggested by the plaintiffs, any substantial proof of an original fraudulent intent, or actuating motive, to hinder, delay or defraud

creditors. The assignee had a right to employ others to assist him in the execution of the trust, for whose acts, however, he became in law fully responsible. If the creditors were seasonably notified of the assignment and had an opportunity to assent thereto, and it appears that the plaintiffs were so notified, then no special duty rested on either the assignor or assignee to secure such assent.

An intent to defraud creditors, especially such creditors as have not assented to the provisions of a common law assignment for their benefit, is not to be inferred, we think, from successful efforts to compromise the creditors' claims after such assignment is made.

We find, therefore, nothing in the assignment itself or in the situation or conduct of the parties thereto, to justify the plaintiffs' claim that the assignment was fraudulent and void as to the assignor's creditors.

When notified of the assignment the plaintiffs might have assented thereto and secured a pro rata part of the property with other assenting creditors; or, they might have attacked the assignment through bankruptcy proceedings against the assignor; or, lastly, they might have attached by trustee process the property in the hands of the assignee and thereby secured so much thereof as would not be needed to satisfy the debts of previously assenting creditors, if any. They did nothing, however, for four months, and then summoned the assignee as trustee of the assignor. The rights of the parties in this trustee process must be determined by the conditions as they existed at the time of the service of the writ, Feb. 9th, 1900. *Pleasant Hill Cemetery* v. *Davis*, supra.

The plaintiffs did not assent to the assignment, and, therefore, the defendant owed no contractual duty to them as such assignee.

If, prior to the service of their writ upon him, he had discharged himself of the trust by delivering back to the debtor in good faith the property received, or by paying the proceeds thereof to her bona fide creditors in settlement of their just demands, then the plaintiffs would have no legal cause to complain of his acts. *Thomas* v. *Goodwin & Trustees*, 12 Mass. 140.

An examination of the disclosure and other evidence in the record shows that prior to Feb. 9, 1900, the date of plaintiffs'

attachment, the defendant had paid, from the $3780, received from the property that Minnie A. Dyer assigned to him, by her orders, to her bona fide creditors and to herself $3381.51 leaving an actual cash balance in his hands of $398.48. But there had been a prior trustee process served upon him in favor of Swift et als., creditors of the assignor, in which prior proceedings he was finally adjudged trustee for $215.83, and which judgment was afterwards paid by him from the $398.49, leaving but $182.66 attachable in his hands Feb. 9, 1900.

It is unnecessary to consider here the fact that after the service of the plaintiffs' attachment the defendant also paid $420 to S. W. Thaxter & Co., previous attaching creditors, because the defendant now admits that he must personally lose the benefit of that payment, the same having been made without the statutory demand upon execution necessary to fix his liability therefor as against a subsequent attaching creditor.

The plaintiffs suggest that it does not sufficiently appear that the defendant's liability, as trustee in the suit of Swift et als., was legally fixed so as to afford him the benefit of that payment.

From the whole disclosure, and all the evidence in the record, we think it does appear that the payment to Swift et als. was made because the defendant was legally required so to do. The plaintiffs do not deny this in their allegations.

It appears that he paid it after a contest and hearing in court.

In answer to a question whether that payment was made "to protect you from liability" he answered "yes."

Again, the plaintiffs contend that the defendant is chargeable for the amounts paid back to Mrs. Dyer. This contention would prevail if the plaintiffs had become parties to the assignment.

An assignee, accepting such an assignment, assumes the duty towards assenting creditors to administer the trust according to its provisions. But as to non-assenting creditors he owes no such duty. They can not legally complain if he gives up the trust and returns the property to the assignor, unless he does it with the intent and purpose thereby to defraud such non-assenting creditors. The plaintiffs here did not become parties to this assignment. They are not

in a position to complain because the assignee, prior to their attachment, permitted Mrs. Dyer to use some of the property assigned to him, unless that was done by him to defraud them. The record does not disclose any such intent to defraud. Mrs. Dyer turned over to the assignee all of her property not attachable. She was without any means of support. Domestic difficulties resulted in divorce proceedings by her against her husband. The assignee permitted her to have from time to time for her support and expenses money from the property she had turned over to him, amounting in all to $550. We do not think he is chargeable for that sum in this subsequent trustee process by non-assenting creditors.

Still again the plaintiffs contend that the counsel fees paid by the assignee should not be considered a proper disbursement. This contention is not maintainable. The assignee had a right to employ the services of counsel. The property was attached before it was assigned. Other suits were brought in which the assignee was summoned as trustee. The husband's rights in the property were an incumbrance upon it to be removed in some way.

It, therefore, does not appear unreasonable that defendant did employ counsel. The assignment provided for the payment of necessary counsel fees. It appears that the counsel employed performed substantially all the detailed business connected with the settlement of the affairs, looked after all the litigation which has followed, and that the assignee charged nothing for his services. In view of all this it can not be said that the amount paid for these services is excessive, or that its payment by the assignee indicates an intent to defraud the plaintiffs.

Lastly, the plaintiffs question the authority of this court, under the exceptions, to pass upon the correctness of the judgment below because the bill of exceptions does not indicate whether the decision was erroneous in fact or in law.

The exceptions in the case at bar provide that the "writ, evidence including admissions made at said hearing, and decree of the presiding Justice, are to be annexed hereto and made a part of the bill of exceptions," thus indicating that the whole case was to be considered by the Law Court. But the exceptions need not specify the

extent to which the Law Court may examine the case. Chapter 88, sect. 79, R. S., provides: "Whenever exceptions are taken to the ruling and decision of a single justice as to the liability of a trustee, the whole case may be re-examined and determined by the law court, and remanded for further disclosure or other proceedings, as justice requires." This statute applies alike to scire facias and original proceedings in trustee process. *Brainard* v. *Shannon*, 60 Maine, 342, was an action of scire facias. Under the exceptions this court has authority, we think, to correct any error in the judgment below whether of law or of fact.

Our conclusion is that the defendant has shown by his disclosure that, prior to Feb. 9, 1900, the date of the service upon him of the plaintiffs' orignal trustee writ, he had lawfully discharged himself of all the property received by him from Minnie A. Dyer except the sum of $182.66, and for that sum only the plaintiffs should have judgment.

Accordingly the entry should be,

Exceptions sustained. Judgment for plaintiffs for $182.66.

HERBERT W. CUTTING et al. *vs.* JAMES H. HARRINGTON.

Sagadahoc. Opinion March 17, 1908.

Execution Sale. Recitals in Officer's Deed. Same are Evidence. Notice Sent by Mail. Prepayment of Postage Presumed. Revised Statutes, chapter 78, section 33.

1. When a levy of execution upon land is made by sale instead of by extent, a return of such upon the execution itself is not required by the statute and is not essential to the purchaser's title.
2. The recitals by the officer in his official deed to the purchaser of land at execution sale are evidence of his doings in advertising and making the sale.
3. A recital by an officer in such deed that he "sent a notice (to the judgment debtor) by mail," fairly and sufficiently imports that he prepaid the postage as required by the statute, R. S., chapter 78, section 33.

On report. Judgment for plaintiff for one undivided third only of the demanded land.

Real action to recover a certain lot or parcel of land at "Rising Sun or Log Landing" in the town of Phippsburg. Plea, the general issue with brief statement that the defendant "claims title to two undivided third parts of said demanded premises and no more."

This action came on for trial at the December term, 1906, Supreme Judicial Court, Sagadahoc County, at which time the facts were agreed upon and then by agreement of the parties the case was reported to the Law Court for that court to render such judgment as the law and the evidence required.

In 1874, one Thomas M. Reed was seized of the demanded premises and remained seized of the same until his death and then under his will, admitted to probate in 1882, the title to the same passed to his three nephews, Franklin Reed, Edwin Reed and Andrew F. Reed, in equal shares.

On September 2, 1897, the Bath National Bank recovered a judgment against said Franklin Reed, then and thereafterwards a

resident of Boston, Massachusetts, in the Supreme Judicial Court, Sagadahoc County, for the sum of $2366.97, debt and costs, and on September 27, 1897, it seized upon the execution issued thereon all the right, title and interest which the said Franklin Reed had on November 24, 1894, the date when the same was attached on the original writ, in and to certain parcels of real estate in Sagadahoc County, among them being the demanded premises, and on October 30, 1897, the right, title and interest of the said Franklin Reed in and to the demanded premises was sold at sheriff's sale upon said execution and bid in by the said Bath National Bank, a deed thereof being executed and delivered by the sheriff to said Bath National Bank, October 30, 1897.

On August 25th, 1898, the said Bath National Bank recovered a judgment in the said Supreme Judicial Court against said Andrew F. Reed, then and thereafterwards a resident of Boston, Massachusetts, for the sum of $2529.53, debt and costs, and on September 22, 1898, it seized upon the execution issued thereon, all the right, title and interest which the said Andrew F. Reed had on September 13, 1895, the date when the same was attached on the original writ, in and to certain parcels of real estate in Sagadahoc County, among them being the said demanded premises, and on October 31, 1898, the right, title and interest of the said Andrew F. Reed in and to the demanded premises was sold at sheriff's sale upon said execution and bid in by the said Bath National Bank, a deed thereof being executed and delivered by the sheriff to said Bath National Bank, October 31, 1898.

The defendant's title to the two undivided thirds of the demanded premises depended upon the validity of the two aforesaid execution sales, the plaintiff contending that there was not sufficient legal evidence that the sheriff gave to the judgment debtors the personal notices of the sales provided by statute.

The sheriff's return of sale on the execution against said Franklin Reed, so far as the same relates to the personal notice given to said Franklin Reed is as follows: "And on the same 27th day of September A. D. 1897, being more than thirty days before the time appointed for the sale hereafter mentioned, I sent to the said

Franklin Reed a notice in writing that said right, title and interest would be sold by public auction on the 30th day of October, 1897, at 10 o'clock in the forenoon at the sheriff's office in Bath in said county," etc. The execution against said Andrew F. Reed was not returned to the office of the clerk of courts and the record does not disclose that the sheriff ever made any return of sale thereon.

The sheriff's deed of the demanded premises sold on the execution against the said Franklin Reed, so far as the same relates to the personal notice of sale given to the said Franklin Reed, contains a recital as follows: "And whereas, on the twenty-seventh day of September A. D. 1897, I sent to the said Franklin Reed a written notice by mail that on the thirtieth day of October, A. D., 1897, at ten o'clock in the forenoon at the sheriff's office in the city of Bath in the said county of Sagadahoc, said right, title and interest of the said Franklin in and to the real estate aforesaid, would be sold at public auction, said notice having been given at least thirty days before said time appointed for the sale." The sheriff's deed of the demanded premises sold on the execution against the said Andrew F. Reed, also contains a similar recital differing only in the necessary change in name and dates.

Revised Statutes, chapter 78, section 33, prescribing the notices to be given by the officer when real estate has been seized on execution and is to be sold at public auction, reads as follows: "The officer in such case shall give written notice of the time and place of sale, to the debtor in person, or by leaving the same at his last and usual place of abode, if known to be an inhabitant of the state, and cause it to be posted in a public place in the town where the land lies, and in two adjoining towns, if so many adjoin; and if the land is situated in two or more towns, then in each of those towns, and in two towns adjoining each of them; and if the land is in two or more counties, an officer in either county may sell the whole right. When the land is not within any town, the notice shall be posted in two public places of the shire town of the county in which the land lies, instead of the posting aforesaid. When the debtor is not a resident of such county, the personal notice may be forwarded to him by mail, postage paid; all to be done thirty days before

the day of sale. The notice shall also be published for three weeks successively before the day of sale, in a newspaper printed in whole or in part in such county, if any, otherwise in the state paper."

The case is stated in the opinion.

Staples & Glidden, for plaintiffs.

George E. Hughes, for defendant.

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

EMERY, C. J. Real action on report. The controversy is over two undivided thirds of the demanded land which the defendant claims under levy of execution. The judgment and the execution are admitted to be valid. The levy was by sale of the land under what is now R. S., ch. 78, sec. 32 et seq. The only objection urged against the validity of the sale and its efficacy to pass the title to the purchaser is that there is not sufficient legal evidence that the officer gave to the judgment debtor the notice of sale provided by the statute.

The plaintiffs claim that the only competent evidence of such notice is the return of the officer upon the execution, which return in this case may be conceded, arguendo at least, not to show sufficient notice. But as was said by this court in *Caldwell* v. *Blake*, 69 Maine, 458, at page 470: "Where an extent is made upon lands, the return of the officer must be seasonably made and recorded. Not so where property is sold upon execution. The statute does not require it, and the decisions are that 'the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever.'" The giving the notice of sale, and how given, may be proved, prima facie at least, by the officer's recitals in his official deed to the purchaser. Wigmore on Evidence, sec. 1664.

In his official deed in this case the officer recited that he "sent to the (judgment debtor, naming him) a written notice by mail" of

the time and place of sale, the debtor not being a resident of the county in which the land lay. The statute (sec. 33) provided that in such case the notice might be "forwarded to him (the debtor) by mail, postage paid." The plaintiffs contend that, even if the recitals are evidence, the omission of the words "postage paid" from the recital is fatal, and that because of that omission the purchaser acquired no title.

In cases of levy upon land by extent, (where, instead of being sold at public sale after public notice, the land was transferred direct to the judgment creditor, as was formerly the practice in Maine and other New England States), it was generally held that the officer's return of his doings must be drawn with fullness and exactness. Inferences and presumptions were allowed little, if any, force. Such has been the rule of construction in this State in such cases. We do not think, however, that those decisions control the decision of cases like this, where the land is sold at public sale after ample public notice. Indeed, it is very generally held in the other States that when a sale upon execution is actually made and a deed executed and delivered to the purchaser, no evidence of notice of the sale having been given need be adduced by him in support of his title. In Freeman on Executions, 3rd ed. sec. 286, the learned author, with many citations of authorities, says: "A very decided preponderance of the authorities maintains this proposition; that the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault. This rule has been applied in cases where the purchaser was aware of the deficiency of the notice, and seems applicable in all cases in which the absence of the notice was not occasioned by some fraud or collusion of which the purchaser had notice, or in which he participated." The theory seems to be that, while the officer is responsible to any party harmed by the absence of insufficiency of the prescribed notice of sale, the sale itself cannot be collaterally avoided thereby. Sec. 339. The purchaser at an execution public sale, or his grantee, is not in the same relation to the judgment debtor as is the judgment creditor taking the debtor's land direct to himself by extent. Their titles

are different in origin and nature. The purchaser may have the benefit of reasonable inferences and presumptions in reading the officer's recitals of his doings without conflicting with the strict rule in cases of levy by extent. Sec. 339 of Freeman on Executions. Thus in *Wood* v. *Morehouse*, 45 N. Y. 368, where one question was whether the officer had given the proper notice of an execution sale, the court held that, in the absence of evidence to the contrary, it was to be presumed, under the maxim omnia praesumuntur rite esse acta, that the officer gave the proper notice. Other cases to the same effect are cited by Freeman in the sec. 339 above cited.

In this State, also, the strict rule applied to returns of levy by extent has been relaxed in cases of levy by sale. In *Bailey* v. *Myrick*, 50 Maine, 171, the statute required the notice of sale to be published in some "public newspaper." The officer returned that he had published the notice in "a newspaper," omitting the word "public." The court held that it sufficiently appeared that the statute was complied with, that the word "newspaper" imported publicity. In *Millett* v. *Blake*, 81 Maine, 531, the judgment debtor was described in the execution as residing in Lagrange. In his recital of sending a notice by mail, the officer did not state that he directed it to the debtor at Lagrange. The court held that such a direction could be inferred, saying, page 535: "Something may be inferred as to the correctness of the action of a public officer when the law requires him to do a certain act."

In the case at bar, as already stated, the statute provided that the notice to the debtor might be "forwarded to him by mail postage paid." The officer recited he "sent to the said (debtor) a written notice by mail." Taking into account the legal presumption "as to the correctness of the action of a public officer when the law requires him to do a certain act," as was done in *Millett* v. *Blake*, supra, we think it a fair, and even obvious, inference that the officer prepaid the postage. It was at the time (1897 and 1898) well known that under the postal laws and regulations, mail matter would not be forwarded without prepayment of postage. It had then, as now, become a fixed habit especially among business men and officials, to prepay postage by means of affixing a stamp. Any

one then asserting he had "sent by mail" a letter or document, would have been universally understood as asserting that he had done everything required to insure its being forwarded, including prepayment of postage as well as depositing the letter in the proper post office receptacle. If convinced that in fact he had not prepaid the postage, he would have retracted his assertion that he had "sent" the letter. The single word "mailed," as used by a notary in his certificate, is held to imply that the requisite postage was prepaid. *Rolla State Bank* v. *Pezoldt*, 95 Mo. App. 404, 69 S. W. 51. The words "sent by mail" would seem to be of as strong import in any connection.

We find no previous decision of this court in cases of levy by sale compelling us to construe the officer's recitals in this case so strictly and technically as the plaintiffs would have us. In *Pratt* v. *Skolfield*, 45 Maine, 386, where the officer's deed was held defective for want of sufficient recitals, the defects are not stated. Hence that case is no guide. Even in the cases of levy by extent, no return has been adjudged insufficient because of an omission like this. Granting that the court should be critical in constructing official returns to see that all essentials are fully stated, or clearly implied, or presumed by law, yet it would be hypercritical to hold at this day that an official recital by an officer that he had "sent a written notice by mail" does not import that he affixed the usual stamp, thus prepaying the postage, (that being his official duty) as well as that he deposited the document in the proper post office receptacle.

No other objection is made to the deed or recitals in the deed, and none is perceived. It must be held, therefore, that the defendant has the better title to two-thirds, and that the plaintiff can only have judgment for one-third of the land.

Judgment for the plaintiff for one undivided third only of the demanded land.

In Equity.

PHILLIPS VILLAGE CORPORATION *vs.* PHILLIPS WATER COMPANY.

Franklin. Opinion March 17, 1908.

Corporations. Ultra Vires Contracts. Retrospective Operation by Statute. Specific Performance. Private and Special Laws, 1885, chapter 490, section 2; 1887, chapter 141; 1891, chapter 170; 1905, chapter 162.

A village corporation being a creature of the statute, has only such powers as are conferred by statute or by necessary implication.

When a village corporation has made a contract which is ultra vires, a bill in equity brought by itself for the specific performance of the same cannot be maintained.

When a village corporation is only invested with power "to raise such sums of money as may be sufficient for the support of a suitable number of hydrants, in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hooks and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department," and has no power to raise money for any other purpose, such corporation has no authority to enter into a contract with a water company providing that after the expiration of a term of years the corporation should have the right to purchase the water company's entire plant, at an appraised value to be fixed by three appraisers, chosen one by the corporation, one by the water company, the third by these two, and on payment of the price so determined, that the water company should transfer to the corporation its entire plant, and if such corporation does enter into such a contract it is ultra vires.

When a village corporation has made a contract for the purchase of the plant of a water company and which contract was ultra vires at the time it was made and afterwards by a legislative act such corporation has been authorized to "vote to purchase the entire works and rights" of the water company "for such sums of money as may be adjudged payable according to the terms" of the contract, such authority may have a retrospective action and make valid the contract, but when the corporation attempts to avail itself of the granted power, it must proceed according to the terms of the act, and first "vote to purchase," etc. "for such sums of money as may be adjudged payable," etc., before it can maintain a bill in equity for the specific performance of the contract.

In equity. On report. Bill dismissed.

Bill in equity brought by the plaintiff corporation against the defendant water company for specific performance of article 10 of a certain written contract entered into between the plaintiff corporation and the defendant water company September 15, 1896, whereby the plaintiff corporation sought to compel the defendant water company to select an appraiser as provided in said article 10.

The plaintiff corporation was incorporated under the provisions of chapter 490, Private and Special Laws, 1885, and by the provisions of chapter 141, Private and Special Laws, 1887, section 2, of said chapter 490, was amended so as to read as follows:

"Said corporation is hereby invested with power, at any legal meeting called for the purpose, to raise such sums of money as may be sufficient for the support of a suitable number of hydrants, in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hook and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department and no money shall be raised for any other purpose except as above specified."

September 15, 1896, the plaintiff corporation and the defendant water company entered into a written contract as aforesaid in relation to a supply of water for the extinguishment of fires within the limits of the plaintiff corporation, and in addition thereto by article 10 of the contract further agreed as follows:

"Art. 10. It is further agreed that said Corporation shall have the right to purchase the Company's entire works and rights at the expiration of ten years from the date of this contract, for ten per cent additional to their appraised value, to be determined as hereinafter provided. And it is further agreed that, at the expiration of twenty years from the date of this contract, the said Corporation shall have the right to purchase said Company's entire works and rights at their appraised value, to be determined as hereinafter provided.

"In case the Corporation should avail itself of this option and purchase said water works, it is agreed and understood that they shall have appraised, take over and pay for all the property, rights and franchises of said Company, and shall assume, perform and carry out all agreements made by said Company, and the said Company shall, on payment of the price determined, make all deeds, conveyances, assignments and transfers, necessary to carry into effect this article of this agreement.

"For the purpose of ascertaining the value of said water works, for the purposes covered by this article, it is agreed that said Corporation may select one appraiser, said Water Company one appraiser, and those two select a third, and that said committee so formed and created, after due notice and hearing given all parties interested, shall appraise and fix the value of said water works and all the property of said Company, and the sum at which said Corporation shall have the right to purchase and take over said works, rights franchises and other property."

By the provisions of chapter 162, Private and Special Laws, 1905, the aforesaid chapter 490 as amended by the aforesaid chapter 141, was further amended by adding to said chapter 490 sections 12 and 13, and reading as follows:

"Sec. 12. Said Phillips Village Corporation at any legal meeting called for that purpose may vote to purchase the entire works and rights of the Phillips Water Company for such sums of money as may be adjudged payable according to the terms of article ten of the contract entered into between said Phillips Village Corporation and said Phillips Water Company. Or in accordance with the terms of any other contract hereinafter entered into by the same parties. Said Phillips Village Corporation shall, after such vote, and payment of the purchase price to said Phillips Water Company, receive from said Phillips Water Company an assignment and transfer of all the works and rights of said Phillips Water Company. And shall thereafter own and operate said works and exercise and enjoy the rights and franchise of said Water Company as fully as if granted to it direct."

"Sec. 13. The Philips Village Corporation is hereby vested with the authority to raise such sum or sums of money as are necessary for the payment of the purchase price of said works, or in payment of future extensions, additions, or improvements of the same, by assessment upon the polls and property within its territory, or by the issuance of bonds of the corporation and to execute its mortgage of the above works and rights as security for their payment."

The plaintiff corporation had never voted to purchase the plant of the defendant water company, but had twice refused so to do.

The cause came on for hearing before the Justice of the first instance, on bill, demurrer, answer, replication and proof, and at the conclusion of the evidence and by agreement of the parties the case was reported to the Law Court for determination upon so much of the evidence as was "legally admissible and competent."

The case appears in the opinion.

E. E. Richards, F. W. Butler and D. R. Ross, for plaintiff.

Foster & Foster and F. E. Timberlake, for defendant.

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

STROUT, J. Plaintiff was incorporated by the legislature by chapter 490, Special Laws of 1885, amended by chapter 141, Special Laws of 1887. Being a creature of statute, it had only such powers as were conferred by statute expressly or by necessary implication. By section 2 of chapter 490, Special Laws, 1885, as amended by chapter 141, Special Laws, 1887, it was empowered to raise money to provide water for the extinguishment of fires, provide hydrants, etc., and for no other purpose. Under this grant of power, it might contract with a water company to supply water for such purpose. It did this by a contract with defendant company, incorporated by chapter 170, Special Laws of 1891, which authorized defendant to contract with plaintiff for supply of water. By article 10 of that contract, the parties provided that after the expiration of ten years the plaintiff should "have the right to purchase the (defendant) company's entire works," at an appraised value to

be fixed by three appraisers chosen one by plaintiff and one by defendant, and the third by these two, and on payment of the price so determined, the defendant should transfer to plaintiff by proper conveyance its entire plant.

The plaintiffs have selected an appraiser, and asked defendant to select one, which it has failed to do, and this bill is brought for specific performance, to compel the defendant to select one appraiser, as provided for in article 10. To this the defendant says that article 10 was ultra vires, and is not binding. Prior to the act of 1905, Special Laws, c. 162, no authority had been conferred upon plaintiff to purchase defendant's plant, or to raise money to pay for it. The agreement consequently was ultra vires, and without force. The act of 1905 authorized plaintiff "at any legal meeting called for that purpose" to "vote to purchase the entire works and rights of the Phillips Water company for such sum of money as may be adjudged payable according to the terms of article ten of the contract entered into between said Phillips Village Corporation and said Phillips Water Company, or in accordance with the terms of any other contract hereinafter entered into by the same parties," and the plaintiff was authorized by the act to raise money for the payment of the price, and for future extension by assessment or by issuing bonds.

Prior to this act, we find no authority given to plaintiff to purchase the works or to raise money to pay for them.

This authority given by the act of 1905 may have a retrospective operation and make valid article ten of the contract, theretofore invalid. But when the Village Corporation attempts to avail itself of the granted power, it must proceed according to the terms of the act. That contemplated a single vote of the Village Corporation to purchase the water works "for such sum of money as may be adjudged payable," etc. This language clearly implies that the vote shall precede the appraisal. It cannot be construed to authorize an appraisal in the first instance, and leave to the Village Corporation the option then to buy or not. Fair dealing, as well as the reading of the statute, requires that before an appraisal is had, there should be an obligation to purchase on the one hand and to sell on

the other, in which case an appraisal would be useful and binding. There is no reason why the Water Company should be subjected to the expense, trouble and exposure of its business attendant upon an appraisal, when there is no obligation of the Village Corporation to buy, and perhaps no intention to do so. It must be borne in mind that prior to the enabling act, the Village Corporation had no authority to purchase or require an appraisal.

No vote of the Village Corporation to purchase has ever been passed. On the contrary, at two meetings of the corporation in the warrants for which was an article to see if the corporation would vote to purchase the water plant, it was voted to pass over the articles,— thus refusing to commit the corporation to the purchase.

The plaintiffs are not entitled to an appraisal, until it shall vote to purchase, as provided in the act. In *Farmington* v. *Water Co.*, 93 Maine, 192, there was a valid contract between the parties, and the case turned upon the construction of that contract. Here there was no valid contract between the Village Corporation and the Water Company until the Village Corporation voted to purchase, as authorized by the act of 1905. Such vote was necessary to make any contract between the parties. *Kennebec Water District* v. *Waterville*, 96 Maine, 234, cited by plaintiff, has no application to this case, and the same is true of *Mayo* v. *Village Fire Co.*, 96 Maine, 541. In *Kittery Water District* v. *Agamenticus Water Co.*, 103 Maine, 25, the statute authorizing the purchase of the water plant provided that if the parties did not agree upon the price, the Water District might apply to a Justice of this court for the appointment of appraisers. That case does not apply to the question in this.

The entry must be,

Bill dismissed with costs.

FRANK C. PERKINS, Admr., *vs.* OXFORD PAPER COMPANY.

Oxford. Opinion March 17, 1908.

"Immediate Death Statute." Construction of Same. Master and Servant. Contributory Negligence. Public Statutes, Mass., 1887, chapter 24, section 3. Statute 1848, chapter 70; 1855, chapter 161; 1891, chapter 124, section 1. Revised Statutes, chapter 89, sections 8, 9, 10.

Revised Statutes, chapter 89, section 9, provides as follows: "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." *Held:* That this statute was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial.

When there is a comparatively safe and likewise a more dangerous way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method and he thereby assumes the risk of injury which its use entails.

The plaintiff's intestate was employed as an engineer in the defendant's mill and had been so employed for about five years prior to his death. In attempting to pass under a large and rapidly moving belt shackled with "Jackson Hooks," so called, the nuts and bolts of which projected about one inch from the surface of the belt, he was struck on the head by the hooks and knocked to the floor in an unconscious condition and remained unconscious until his death seventy-five hours later. The plaintiff administrator then brought an action against the defendant under the provisions of Revised Statutes, chapter 89, section 9. The defendant contended (1) that this form of action could not be maintained as a matter of law, because the death was not immediate; (2) That the plaintiff's intestate was guilty of contributory negligence.

Held: (1) That the action was properly brought under the statute although the plaintiff's intestate survived the accident seventy-five hours. (2) That the plaintiff's intestate was guilty of contributory negligence as there was no necessity for his passing under the belt at a point where he was liable to be struck by it.

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

Action on the case brought under Revised Statutes, chapter 89, section 9, by the plaintiff as administrator of the estate of Arthur N. Perkins, deceased intestate, for the benefit of the widow of said Arthur N. Perkins, and against the defendant corporation to recover damages for the death of the said Arthur N. Perkins, such death having been caused by the alleged negligence of the defendant corporation. The declaration in the plaintiff's writ is as follows:

"In a plea of the case. For that the defendant, on the 23rd day of November, 1906, was the owner, and operator of a certain mill, with its machinery appurtenances and appliances situated in Rumford, in the County of Oxford, and State of Maine, used for the manufacture of pulp and paper. And the plaintiff avers, that it was then and there the duty of said defendant to provide a safe and suitable place for its employees to perform their labor, and also safe and suitable machinery and appliances. And the plaintiff avers that the said defendant, on said 23rd day of November, was unmindful of its duty in this behalf, in that it then and there unlawfully and negligently failed to provide either a safe and suitable place for his intestate to perform his labors, or safe and suitable machinery or appliances, as required by law. And the plaintiff avers, that as a part of the machinery of said mill, owned and operated by the defendant as aforesaid is an engine numbered four, with all of its appurtenances and appliances about which it was the duty of the plaintiff's intestate, then and there to be employed. And it is averred, that as a part of the appliances of said mill, then and there owned and operated by the said defendant, was a large belt known as the speed or power belt, which was then and there fastened, or connected, with a large wheel or pulley on said engine, and then and there extending to the main shaft in said mill, and which moved with great rapidity. And it is averred, that the defendant then and there unlawfully, carelessly and negligently connected the two ends of said belt, by means of bolts, clasps and nuts, a system of connection known to the mill trade as "Jackson

Hooks;" that the said defendant, then and there unlawfully, carelessly and negligently, allowed said bolts by which the said belt was then and there connected, to project a great distance from the belt. And the plaintiff avers that on the said 23rd day of November, and for a long time prior thereto, his intestate, Arthur N. Perkins, was then and there employed by the said defendant for hire, in its mill, as aforesaid, as engineer, and that it was the duty of the plaintiff's intestate to labor around, and about the said engine, its appurtenances and appliances. And the plaintiff avers, that while his intestate was then and there employed about said engine in the regular performance of his duty, and while in the exercise of due care and caution, and without fault on his part, due wholly to the unlawful carelessness and negligent manner, by which the said belt was then and there connected, by the said defendant, your plaintiff's intestate was then and there suddenly and forcibly struck in the head, by one of the bolts aforesaid, then and there receiving injuries from which he then and there immediately died. Whereby Lula Perkins, wife of the said Arthur N. Perkins, for whose benefit this action is brought, suffered great loss and damage, and whereby and by virtue of the statute, in such case made and provided, an action has accrued to the plaintiff, in his capacity as administrator, as aforesaid, to have and recover of the said defendant said loss and damage, for the benefit of the said Lula Perkins. Yet the said defendant, though often requested, has not paid the same, but neglects and refuses so to do, to the damage of said plaintiff (as he says) the sum of five thousand dollars, which shall be made to appear, with other due damages; and have you there this writ with your doings therein."

Plea, the general issue. Tried at the May term, 1907, Supreme Judicial Court, Oxford County. Verdict for plaintiff for $3,250. The defendant then filed a general motion to have the verdict set aside. Several exceptions were taken by the defendant during the trial but the same were not considered by the Law Court.

The case fully appears in the opinion.

Matthew McCarthy and Wm. H. Newell, for plaintiff.

Bisbee & Parker, for defendant.

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

CORNISH, J. This is an action on the case brought under section 9 of chapter 89 of the Revised Statutes, for the benefit of the widow of Arthur N. Perkins the intestate, for the death of said intestate caused by injuries received by him while in the employment of the defendant corporation. The case is before this court on motion and exceptions by defendant.

There was little conflict of testimony. The undisputed facts are as follows. Arthur N. Perkins at the time of the accident was thirty-two years of age and had been employed by the defendant as an engineer for about five years. He had charge of engines number three and four and their appurtenances situated in machine room number two. These engines and the shafting and pulleys connected therewith were similar in construction. A large belt known as the step speed belt extended from the pulley on the front cone shafting, (said pulley being set between piers on the floor) to the machine shafting at the upper part and rear of the room. The lower side of this belt moved from the machine shafting downward on an incline toward the pulley and its height from the floor varied from a few inches at the pulley to eight or nine feet at the machine shafting. The belt was eighteen inches wide, fastened together with Jackson hooks so called, the nuts and bolts of which projected about one inch from the surface and, when the machinery was in operation, as at the time of the accident, the belt moved at the rate of a mile per minute. The distance on the floor from the center of the front cone shafting to a point beneath the center of the machine shafting was about thirty feet.

Standing by the front cone shafting and looking toward the belt and the rear wall, one would see at the left of the belt and about eight inches from it two upright steel columns, the nearest nine feet distant and the farthest twenty-one. Between the farthest column and the rear wall, a distance of about nine feet, but a little toward the left, was a pump, so placed that there was a clear space of three and one-half feet between it and the column. At the left of these columns was a wide and unobstructed passageway.

On the other side, at the right of the speed belt and about ten feet from it, was a cross belt connecting the front cone shafting with the rear cone shafting. The engineer at times in the course of his duty, had occasion to visit this intervening space and this could not be reached from the broad passageway on the left without going under the speed belt at some point. At no point between the first and second columns could a man cross without stooping, but at any point beyond the second column, stooping was unnecessary as the height of the belt varied from six feet three inches to nine feet. At the time of the accident Mr. Perkins started to go beneath the rapidly moving belt at a point between the two steel columns where the height of the belt above the floor was four feet nine and three-fourths inches. His height was five feet four inches. As he crossed, he stooped, but not enough, his head was struck by the hooks in the belt and he was knocked to the floor in an unconscious condition. The accident occurred at about 10 A. M. November 23, 1906, and he remained unconscious until 1 P. M. on November 26, a period of seventy-five hours, when he died.

1. Form of Action.

The first point raised by the defense is that this action cannot be maintained as a matter of law, because death was not immediate.

It is admitted that the intestate survived seventy-five hours after the injury, taking nourishment that was administered, but was in an unconscious condition during the whole period, so that even an operation upon the skull was performed without the use of anæsthetics. The question is raised sharply whether sections 9 and 10 of chapter 89 of the Revised Statutes should be construed to cover such a case. The history of this legislation and the construction put upon it by the court are interesting and important. At common law no value was put upon human life to be recovered in the way of damages. At common law too, a right of action to recover damages for personal injuries did not survive. But by an early statute, now Revised Statutes, chapter 89, section 8, those actions that could be maintained at common law for personal injuries were made to survive and could be prosecuted by the personal representatives whether an action had been brought in the

lifetime of the injured party or simply the cause of action had accrued and the injured party had died before suit was actually brought.

A remedy by indictment against steamboats and railroads in case the life of a person was lost through the carelessness of the respondent's servants was provided by chapter 70 of the Public Laws of 1848, and the limit of recovery extended to $5000 by chapter 161 of the Public Laws of 1855. This statute was construed to cover cases of immediate death only. *State* v. *Maine Central Railroad Company*, 60 Maine, 491. That case came before the court on a demurrer to the indictment, which alleged that the accident occurred on June 27th, and death ensued on June 29th, but did not state whether the injured party was in a conscious or unconscious condition during that time, and the court did not attempt to define the word immediate as used in that connection.

In *State* v. *Grand Trunk Railway*, 61 Maine, 114, a similar proceeding by indictment, the court in re-affirming the essential element of immediate death also call attention to the conscious condition of the sufferer in these words: "In this case the evidence shows clearly and beyond a reasonable doubt, that Pullen, the person injured did not die immediately. He not only survived several hours, but during most of the time was conscious and able to converse intelligently. A right of action, therefore accrued to him which, upon his subsequent death, descended to his personal representatives."

A similar statute giving remedy by indictment was construed by the Supreme Court of Massachusetts not to be limited to cases where death was instantaneous. *Commonwealth* v. *Metropolitan R. R. Co.*, 107 Mass. 236.

Chapter 124 of the Public Laws of 1891, entitled "an Act to give a right of action for injuries causing death" extended, in section 1, the remedy to a civil action in these words:

"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." Revised Statutes, ch. 89, sec. 9.

It will be noted that in this statute neither the word instantaneous nor immediate is used. The test is not life or death, as was applied by the Supreme Court of Massachusetts in construing the statute relating to the survival of actions in *Kearney* v. *R. R. Co.*, 9 Cush. 108; *Hollenbeck, Admr.*, v. *R. R. Co.*, 9 Cush. 478, and *Bancroft* v. *B. & W. Ry.*, 11 Allen, 34. The statute there under consideration provided that "the action of trespass on the case, for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living." It is similar to section 8 of chapter 89 of the Revised Statutes of Maine. The court there logically held that the only question involved in the construction of that statute was whether the sufferer survived the injury. If he did, a right of action accrued without regard to the consciousness or mental capacity of the sufferer.

A right of action could only survive if it once existed and it could exist if the sufferer survived the injury for any appreciable time. The test was the continuance of life after the accident and not the length of time nor want of consciousness during that time.

Following this construction, the Massachusetts court in a subsequent case, where the injured party survived ten minutes in an unconscious state, logically held that a cause of action accrued to the intestate in his lifetime and survived to his personal representative, but as there was no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, further held that only nominal damages could be recovered. *Mulchahey, Admx.*, v. *Washburn Car Wheel Co.*, 145 Mass. 281.

Counsel for defendant cite these cases as decisive of the one at bar and claim that the Act of 1891 should be construed with equal

strictness, that under the facts here a right of action accrued to the sufferer to be enforced by his personal representative and that this statutory action cannot be maintained.

This brings us to the construction of the statute of 1891, which is quite different from that of the survival statute before considered. What did the legislature mean by granting a right of action although death ensues, where the act, neglect, or default is such as would have "entitled the party injured to maintain an action and recover damages in respect thereof," if death had not ensued. We think the plain intent was to give not an empty right of action but a right that should bring substantial damages, not merely a right to sue but a right to recover.

Prior to its passage if death was instantaneous, there was no remedy whatever and if the injury was immediately followed by a comatose condition for a longer or shorter period and that by death, there was no real remedy, for although the personal representative had a right of action under the survival statute, the damages were nominal as in *Mulchahey, Admx.*, v. *Washburn Car Wheel Co.*, supra. The right was a husk without the kernel. To obviate this injustice and to grant compensation to the family of the injured party the Act of 1891 was passed, and a fair, just and reasonable interpretation of that statute is that it gave relief where no substantial relief existed before, and that includes both injuries producing immediate death where no action could before be brought, and those producing at once a condition of insensibility, continuing without cessation until death, where an action could be brought but only nominal damages could be recovered.

Whether the unconscious condition continues for minutes or hours or days, the reason of the rule still prevails and the statute applies.

The decisions in this State are in harmony with this view. The court held in *State* v. *Maine Central R. R. Co.*, 60 Maine, 490, and *State* v. *Grand Trunk Railway*, 61 Maine, 114, under the indictment statute that death must be immediate, without attempting to define the precise meaning of the term. In *Sawyer* v. *Perry*, 88 Maine, 42, which came to this court on a demurrer to the declaration and was the first case under the civil act of 1891, the court

for the first time defined the meaning of "immediate," in these words, the same Justice drawing the opinion as in both the indictment cases above referred to.

"We do not say that the death must be instantaneous, we have never so held. Very few injuries cause instantaneous death. Instantaneous means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be instantaneous. . . . And when we say that the death must be immediate, we do not mean to say that it must follow the injury within a time too brief to be perceptible. If an injury severs some of the principal blood-vessels and causes the person injured to bleed to death, we think his death may be regarded as immediate though not instantaneous. If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes and then dies, we think his death may very properly be considered as immediate though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But, in stating legal propositions it is impossible to be too exact; and while other courts, and some writers of text books, have used indiscriminately the words instantaneous and immediate, and the adverbs instantaneously and immediately, we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words immediate and immediately, as being more comprehensive and elastic in their meaning, than the words instantaneous and instantaneously, and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death; but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death."

The word immediate is, as the court say, an "elastic term," depending upon the facts of each case. This construction recognizes a statutory right of action in case of an injury producing unconsciousness that continues until death. The doctrine admitted, it matters not how long a period of unconsciousness may intervene.

In *Conley* v. *Portland Gaslight Co.*, 96 Maine, 281, which also came to this court on demurrer to the declaration, the court emphasizes the same view in the following language:

"As construed by our court in *Sawyer* v. *Perry*, supra, it is obvious that the statute of 1891 in question, affords a right of action for "injuries causing death" substantially like that given to employees by the Employers' Liability Act in Massachusetts. The third section of that Act (c. 24, P. S. of 1887) gives a right of action "where an employee is instantly killed, or dies without conscious suffering;" and it was held in *Martin* v. *Boston and Maine Railroad*, 175 Mass. 502, that an action could not be maintained under this statute in a case where the injured person survived and endured conscious suffering less than one minute after the injury. See also *Hodnett* v. *Boston & Albany Railroad*, 156 Mass. 86; *Green* v. *Smith*, 169 Mass. 485, 61 Am. St. Rep. 296; *Wiley* v. *Boston Electric Light Co.*, 168 Mass. 40.

"Whether, in the case at bar, it might not reasonably be considered an immediate death within the meaning and purpose of our statute, if the decedent immediately became unconscious after his injury and remained in a comatose state for twenty minutes or even for several hours or days, until life became extinct, it is unnecessary here to determine."

In the case under consideration this question is squarely raised and it is the opinion of the court that the suggestion in *Conley* v. *Portland Gaslight Co.*, is sound and that the statute of 1891 was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial. The defendant's contention upon this point fails.

2. CONTRIBUTORY NEGLIGENCE.

The cause of the accident was the intestate's act in attempting to pass beneath the swiftly moving belt at such a point that he was hit by the Jackson hooks. The danger was an obvious one, at least the belt itself was obvious, and the danger of contact with it, what-

ever the fastening, was apparent to any man using his senses. It was not necessary that he should appreciate the danger in all its details. *Connelly* v. *Woolen Co.*, 163 Mass. 156. But the evidence is convincing that the intestate did know and appreciate the particular danger of which complaint is now made. These hooks had been placed upon the belt about six months before the accident, and had been in continuous use since. Admitting that they could not be seen when the belt was in motion, yet the engine was shut down every Sunday morning for the day in order that the engine, shafting and belting might be inspected and the plaintiff as engineer was present during that time. He had full opportunity to know and must have known what these fastenings were. This is confirmed by the testimony of two witnesses, one of whom testified that Mr. Perkins helped him mend the belt on engine No. 3, which was similar to No. 4 and under Perkins' charge, and the other testified that Perkins once told him he "would hate to get hit by them." The conclusion that Perkins knew the exact condition is irresistible. Assuming that duty called the intestate to the open space beyond the belt, he had two routes open before him by which to reach it, one admittedly safe, the other attended with danger; one enabling him to pass beneath the belt between the second pillar and the rear wall, where there was a passageway of three and a half feet between the second pillar and the pump, and a clear space between the top of his head and the belt of from one to three feet, and the other between the two pillars where the belt was about six inches below the top of his head and he must stoop low if he could pass beneath it at all.

He chose the latter, the obviously unsafe route and he alone must bear the consequences. In *American Linseed Co.* v. *Heins*, 141 Fed. Rep. 49, the employee made a similar choice and on this point the court say: "There was no necessity justifying his conduct in passing over the revolving drum. He could have reached the place to which he desired to go by means of a platform which at least in comparison with the way he did adopt was entirely safe. His failure to choose the safe way was under the decisions of this court negligence."

In *Morris* v. *Railway Co.*, 108 Fed. Rep. 747, the court declare the rule as follows: "When there is a comparatively safe and a more dangerous way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method and he thereby assumes the risk of injury which its use entails." To the same effect are *Russell* v. *Tillotson*, 140 Mass. 201; *Galvin* v. *R. R. Co.*, 162 Mass. 533; *Leard* v. *Paper Co.*, 100 Maine, 59. This was not the case of an emergency call and a quick hurrying order from a foreman which the servant instinctively obeyed, as in *Millard* v. *Railway Co.*, 173 Mass. 512, and *Jensen* v. *Kyer*, 101 Maine, 106. Here the servant acted voluntarily and deliberately and made the short cut which he must have known was dangerous had he stopped to think, or else he attempted it thoughtlessly. Either view would prevent recovery.

It is fair to assume that he did think of the danger and relied upon his own judgment to avoid it because the only witness who saw the accident states that he saw him stooping as he approached the belt. But to attempt to pass voluntarily and unnecessarily beneath a rapidly moving belt at such a point that he was liable to be struck by it and owing to his own error in judgment was in fact struck by it, was clearly negligence on his part.

Analogous cases of a set screw upon a revolving shaft emphasize this accepted doctrine. *Rooney* v. *Cordage Co.*, 161 Mass. 153; *Ford* v. *Mount Tom Sulphite Co.*, 172 Mass. 544; *Demers* v. *Marshall*, 172 Mass. 548; *Same* v. *Same*, 178 Mass. 9. In *Kennedy* v. *Merrimack Paving Co.*, 185 Mass. 442, where an experienced machinist attempted to step over a revolving shaft, the plaintiff's right of recovery was denied in these words: "The plaintiff was a man of experience; and, while he testified that he did not know of the existence of the old collar on the shaft, he had ample opportunity to ascertain its existence. The defendant was not bound to change his machinery or to point out to the plaintiff the fact of the existence of the set screw or the collar. The danger from the revolving shaft was apparent, and as such shafts have collars fastened to them by set screws, a fact well known to the

plaintiff, his getting so near the shaft as to be caught was an act of negligence. Moreover he could have gone by a safer way, and, unless he chose to take the risk of stepping over a revolving shaft, he could have stopped the engine, over the running of which he had full control."

The fact that others took the same route in doing the same work is immaterial. *Gillette* v. *Electric Co.*, 187 Mass. 1. That fact rendered the way no less dangerous nor their conduct less negligent. It is common knowledge that experience sometimes renders men careless in the performance of duties and leads them to take chances that the ordinarily prudent man under the same circumstances would not take. It is needless to multiply authorities. After a careful consideration of the whole evidence, we feel satisfied that the unfortunate accident to the plaintiff's intestate is attributable to the want of due care on his own part.

This view of the case renders it unnecessary to consider the question of negligence on the part of the defendant or the exceptions.

Motion sustained.
Verdict set aside.

BESSIE A. HEALEY *vs.* DEXTER H. SPAULDING.

Kennebec. Opinion March 24, 1908.

Private Nuisance. High Fence Maliciously Maintained. Retaliatory Acts Unlawful. Statute 1905, chapter 167. Revised Statutes, chapter 22, section 6.

1. Though injurious acts done in self-defense may be justifiable, such acts done for retaliation are not justifiable by the law.
2. If acts begun in self-defense are extended to retaliate for injuries received, they become unlawful.
3. One may erect upon his own land a fence as much higher than six feet as may be necessary to protect himself, his family and his property from annoyances inflicted or threatened by his neighbor. But if he build the fence still higher for the malicious purpose of annoying his neighbor in turn, such extra height is unlawful and a private nuisance under the statute R. S., chapter 22, section 6.
4. In determining whether such fence is a private nuisance under the statute it is not necessary to show that the purpose of annoyance was the sole purpose. It is enough to show that it was the dominant one.

On motion by plaintiff. Sustained.

Action on the case brought by the plaintiff in the Superior Court, Kennebec County, to recover damages for an alleged private nuisance maintained by the defendant, consisting of a tight board fence, twelve feet in height, erected on land of the defendant and near the dividing line between the plaintiff's lot and the defendant's lot. The declaration in the plaintiff's writ is as follows:

"In a plea of the case, for that the plaintiff says that she is the owner and occupant of a lot of land situate on the westerly side of Burleigh Street in the city of Waterville in said county of Kennebec, upon which stands her residence numbered twenty-eight in the numbering of the buildings on said Burleigh Street, and bounded northerly by a lot of land on said Burleigh Street occupied by the defendant, and upon which the house occupied by the defendant as a dwelling now stands.

"And the plaintiff says that on the thirtieth day of July, A. D. 1906, the defendant maliciously erected, and since that date has

maliciously kept and maintained upon said lot occupied by him, for the purpose of annoying the plaintiff, a tightly built fence or structure in the nature of a fence, unnecessarily exceeding six feet in height, to wit of the height of twelve feet from near the front of said lot on Burleigh Street along the line or near the line that divides the lot of land of the plaintiff from that occupied by the defendant, for the distance of thirty-five feet.

"That said fence or structure in the nature of a fence interfered with the passage of light and air to the windows on the northerly side of the plaintiff's said residence, and the view in a northerly direction from the windows in plaintiff's said residence is obstructed by said fence or structure in the nature of a fence, whereby the rooms in the northerly part of plaintiff's said residence are darkened, made less pleasant and fit for occupancy. And the plaintiff alleges that said fence or structure in the nature of a fence, injures her in the comfort and enjoyment of her said estate and her said property. Wherefore by virtue of the statute in such case made and provided an action hath accrued to the plaintiff to recover of the defendant the damages sustained thereby."

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 defendant further says that plaintiff was at the time of erection of the fence complained of and for many years prior thereto had been and still is a common scold and public nuisance, causing constant and extreme annoyance and injury to all persons in her vicinity, and that she caused great and continuous annoyance to defendant and his family, and abused, insulted and slandered himself, his wife and his little child.

"And defendant further says that plaintiff with her two minor daughters who lived with her in the house mentioned at the time of and before the erection of the fence complained of were in the habit of constantly mocking, reviling and ridiculing defendant, his wife and little child.

"And defendant further says that plaintiff at and before the erection of the fence complained of was in the habit of throwing, putting and placing upon his lot and upon his property thereon,

dust, dirt and refuse to the great damage and injury of his said lot and property.

"And defendant says that the annoying, injurious and insulting practices above alluded to were practiced and carried on by plaintiff and her said minor daughters living with her in the house mentioned from the piazzas and windows on the side of her house next to his house and lot, wherefore he erected the fence complained of to protect his property and to secure peace and quiet for his family and himself."

Tried at the June term, 1907, Superior Court, Kennebec County. Verdict for defendant. The plaintiff then filed a general motion for a new trial.

The case appears in the opinion.

Revised Statutes, chapter 22, section 6, relating to a fence as a private nuisance, provides as follows: "Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

Charles F. Johnson, for plaintiff.

Harvey D. Eaton and Warren C. Philbrook, for defendant.

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

EMERY, C. J. The plaintiff and defendant owned and occupied dwellings on small adjoining lots in a city. The defendant built on his lot, but close to the plaintiff's lot and within a foot of her house, a tight board fence extending from the street some thirty-five feet back. For a few feet next the street the fence was about six feet high, but for the rest of the distance it was some twelve feet high and up nearly even with the tops of the plaintiff's lower story windows. It practically shuts in her back porch, materially darkens her lower story rooms on that side, and shuts off her view along the street in that direction. She claims that the fence was unnecessary and was built maliciously for the purpose of annoying her, against the provisions of the statute, R. S., ch. 22, sec. 6.

The defendant denies that the fence was built maliciously for the purpose of annoying the plaintiff, and claims it was built to protect himself and family from persistent insulting and annoying language and conduct on the part of the plaintiff and her family. Whether that was the real dominant motive for building the fence was the question, as the defendant admits such a fence was not necessary for any other purpose.

The jury found for the defendant, but we think enough appears from the defendant's own testimony to make it clear that the jury erred, either in their understanding of the law or of the force of the testimony. It was not necessary for the plaintiff to prove that malice, the purpose to annoy, was the sole motive for building the fence. It was only necessary to prove that such was the dominant motive. Granting, as claimed, that the plaintiff and her daughters annoyed the defendant and his family by using opprobrious epithets, by mocking pantomime, and by shaking dirty rugs so that the dust would blow over on the defendant's line of washed clothes, (and the annoyance does not appear to have been anything more) the tenor of the defendant's testimony shows that he was not a patient sufferer acting only on the defensive. He was in his turn an aggressor and an exasperating aggressor. His aggressions appear to have been the beginning of the troubles. His testimony showed much animosity against the plaintiff and a disposition to ignore her rights. All this, and the extraordinary and unnecessary height of the fence (twelve feet) causing such serious injury to the plaintiff and her property, satisfy us, notwithstanding the verdict of the jury, that the fence was built to that extreme height more for retaliation, for punishment, than for defense. We fear the jury did not have in mind the distinction between retaliation and defense. The lay mind is too apt to regard retaliation as justifiable, but the law never does. In a well ordered state, no one is allowed to retaliate for any injury. He must resort to legal remedies which are ample. The defendant had complete protection from the plaintiff's annoying conduct in the statute, Public Laws 1905, ch. 167, or by a much lower fence.

Motion sustained.
Verdict set aside.

A. S. LITTLEFIELD, S. T. KIMBALL AND J. E. MOORE

vs.

MAINE CENTRAL RAILROAD COMPANY.

Knox. Opinion April 1, 1908.

Motion to Dismiss. Demurrer. Replevin. Writ. Demand. Receivers. Statute 1821, chapter 63, section 9. Revised Statutes, chapter 49, section 119.

At common law a motion to dismiss and a demurrer are not interchangeable.

At common law a motion to dismiss can be used to abate the action only when it is apparent from the record that the court has no jurisdiction; and when an order of dismissal is made the action ends.

At common law a demurrer admits the jurisdiction but attacks the pleadings and if the demurrer be sustained, the action is not thereby dismissed but there may still be opportunity for amendment and until further steps are taken, the action remains on the docket.

An action at common law is not to be dismissed for mere defects in pleading that are amendable or which may be cured by verdict, if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action. The defendant should demur if he wishes to raise objections to such defects.

In statutory proceedings, where the jurisdiction of the court rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears, assuming the allegations to be true, that the court has no jurisdiction.

A motion to dismiss does not lie when to support it or resist it, proof is necessary dehors the writ.

In a common law action of replevin a motion to dismiss does not lie when the alleged reasons for dismissal are (1) insufficient description of the property taken, (2) want of allegation of ownership or right of possession in the plaintiff, (3) want of allegation of demand before suit, (4) want of allegation of value, but such objections should be raised by demurrer, if raised at all, as they are mere defects in pleading which can be cured by amendment or verdict and do not go to the jurisdiction of the court.

In a common law action of replevin, a motion to dismiss the action for the alleged reason that the bond is not signed by sufficient sureties will not be sustained, although the objection comes within the scope of the motion, when it appears that on its face the bond is in due form and sufficient.

In an action of replevin, an allegation that the goods "belonged to the plaintiff" is a sufficient averment of ownership.

In an action of replevin, demand is a matter of proof and not of pleading.

In an action of replevin, the allegation of value is unnecessary, and even if required an averment in the proviso that the plaintiff gave bond in a sum certain "being twice the value of said goods and chattels" is sufficient.

In the case at bar, *Held:* That the declaration follows exactly the form of replevin writ established by the Statute of 1821, chapter 63, section 9, and in general use in this State for more than eighty years.

When a replevin writ is made provisionally to be used only in case of the refusal of the defendant to surrender the property after demand and is not served until after demand and refusal, the action is not prematurely brought.

When receivers of a street railway company have been duly appointed with express authority "to prosecute and maintain any suits at law or in equity for the recovery, preservation or protection" of the property of the railway company, no special decree is needed in order to authorize such receivers to prosecute and maintain an action of replevin for the recovery of personal property of the railway company alleged to be unlawfully taken and detained by a defendant.

On exceptions by defendant and also on report. Exceptions overruled. Judgment for plaintiffs.

Action of replevin brought by the plaintiffs as receivers of the Rockland, South Thomaston and Owls Head Street Railway, for one reel of copper trolley wire alleged to have been taken and detained by the defendant. The plaintiffs' writ and declaration were as follows:

"State of Maine.

"KNOX, ss. To the Sheriff of our County of Knox or his Deputy, Greeting:

"We command you that you replevy the goods and chattels following, viz: One reel 4-0 grooved copper trolley wire belonging to A. S. Littlefield, S. T. Kimball, both of Rockland, and J. E. Moore of Thomaston, Knox County, Maine, as Receivers of the Rockland, South Thomaston and Owls Head Railway, now taken and detained by Maine Central Railroad Company in Rockland aforesaid, and them deliver unto the said Littlefield, Kimball and Moore, Receivers, Provided, the same are not taken and detained upon mesne process, warrant of distress, or upon execution as the property of said Littlefield, Kimball and Moore, Receivers, and summon the said Maine Central Railroad Company that it may appear before our Justices of our Supreme Judicial Court, next to be

holden at Rockland, within and for the County of Knox, on the first Tuesday of April next, to answer unto the said Littlefield, Kimball and Moore, Receivers, in a plea of replevin for that the said Maine Central Railroad Company on the first day of March at said Rockland unlawfully, and without any justifiable cause, took the goods and chattels of the said Littlefield, Kimball and Moore, Receivers, as aforesaid, and them unlawfully detained to this day, to the damage of the said Littlefield, Kimball and Moore, Receivers, as they say, the sum of five hundred dollars; Provided, they the said Littlefield, Kimball and Moore as Receivers shall give bond to the said Maine Central Railroad Company with sufficient surety, or sureties in the sum of one thousand dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said Maine Central Railroad Company shall recover against them; and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment; and have you there this writ with your doings therein, together with the bond you shall take.

"Witness, Lucilius A. Emery, Chief Justice of our Supreme Judicial Court at Rockland, the first day of March, A. D., 1907.

"GUILFORD B. BUTLER, CLERK."

A bond to the defendant, as required by the writ, for the sum of one thousand dollars, "being twice the value of said goods and chattels," was duly executed by the plaintiffs as principals and by the National Surety Company, "a corporation duly organized by law and having an office at said Rockland," as surety. See Revised Statutes, chapter 49, section 119.

The writ was duly entered at the April term, 1907, Supreme Judicial Court, Knox County, at which time the defendant filed a motion to dismiss the action for the following reasons:

"1st. Because the goods and chattels mentioned, and which the officer was commanded to take, are not definitely or sufficiently described.

"2nd. Because the plaintiffs are not named as owners, or that they have or had a right of posssesion to the articles named.

"3rd. Because there is no averment in the writ of a demand having been make upon the defendant before this action was commenced, or that said article was tortuously or unjustly taken or detained.

"4th. Because there is no averment or statement in the writ of the value of the article alleged to have been taken and detained.

"5th. Because the bond is not signed with sufficient sureties.

"Wherefore the defendant prays judgment of said writ, and for a return of the goods and chattels therein named."

This motion was overruled and the defendant excepted. The action was then continued to the September term, 1907, of said court at which time it came on for trial. The defendant pleaded the general issue with brief statement as follows:

"And said defendant, by brief statement of its further defense says that the goods and chattels, viz., the coil of wire mentioned in plaintiffs' writ, was not, at the time of the issuing of said writ, owned or possessed by the plaintiffs, nor were said goods and chattels ever owned or possessed by the plaintiffs, and neither were they then or now entitled to the possession thereof as receivers or otherwise.

"And the defendant further says that at the time of the issuing and service of said writ, C. Gardner Chalmers of Bangor was the owner thereof, but before that time said Chalmers had deposited with and entrusted to the defendant said coil of wire for shipment, whereby and by reason whereof, the defendant became the owner thereof pro hac vice, and the same was then and there rightfully in its possession, and was then and there wrongfully and illegally taken therefrom, and are in law entitled to a judgment for a return thereof to it."

At the conclusion of the evidence, it was agreed that the case should be reported to the Law Court for decision "upon so much of the evidence as is legally admissible, the Law Court to render such judgment as the law and the legal evidence require." It was also agreed that the defendant's exceptions to the overruling of the motion to dismiss should be carried to the Law Court as a part of the case.

It was admitted that the Rockland, South Thomaston and Owls Head Railway was duly organized as a railroad company.

Clause three of the original decree appointing receivers of the aforesaid Owls Head Railway reads as follows:

"Said receivers are hereby authorized and directed to take possession of all the real and personal property of said Rockland, South Thomaston & Owls Head Railway, including its line of railway, its equipment, franchise rights, and including all deeds, books, vouchers, accounts, contracts, papers and documents. Said receivers shall preserve, manage and care for said property, may employ all necessary servants, agents and employees, shall collect and receive all money due or that may hereafter become due to said company from whatever source and shall pay all wages and caring for said property. Said receivers are authorized to prosecute and maintain any suits at law or in equity for the recovery, preservation or protection of said property."

All the material facts appear in the opinion and in *Chalmers* v. *Littlefield et als.*, 103 Maine, 271.

J. E. Moore, *A. S. Littlefield and S. T. Kimball*, for plaintiffs.

D. N. Mortland, for defendant.

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

CORNISH, J. This is an action of replevin for one reel of copper trolley wire, a part of a quantity purchased by the Rockland, South Thomaston and Owls Head Railway, for use in the construction of a street railway from the Rockland line to Crescent Beach and Owls Head.

The plaintiffs claim title as receivers of said railway; the defendant denies the title of the plaintiffs and sets up right of possession in itself as bailee of C. Gordon Chalmers who claims ownership by virtue of an attachment in an action of assumpsit brought by him against the corporation July 12, 1904, and an execution sale thereon made June 14, 1906. The case is before this court on defendant's exceptions to the overruling of its motion to dismiss, and also on a report of the evidence.

1. MOTION TO DISMISS.

The defendant alleges five grounds for dismissal, four of which should have been raised, if at all, by demurrer to the declaration and not by a motion to dismiss. These are: insufficient description of property taken; want of allegation of ownership or right of possession in the plaintiffs; want of allegation of demand before suit and want of allegation of value. It is familiar law that a motion to dismiss will lie only when it is apparent on the record that the court has no jurisdiction, as in case of want of indorser to an original writ, *Clapp* v. *Balch*, 3 Maine, 216; *Pressey* v. *Snow*, 81 Maine, 288, or of writ running without warrant against the body of the defendant, *Cook* v. *Lothrop*, 18 Maine, 260, or of want of service, *Searles* v. *Hardy*, 75 Maine, 461, and analogous cases. But an action at law is not to be dismissed for mere defects in pleading that are amendable or may be cured by verdict if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action. The defendant should demur if he wishes to raise objections to such defects. A motion to dismiss and a demurrer are not interchangeable. The former can be used to abate an action only when it is apparent from the record that the court has no jurisdiction; the latter admits the jurisdiction but attacks the pleadings. An order of dismissal is a finality. The action ends. Not so with the sustaining of a demurrer. There may still be opportunity for amendment and until further steps are taken, the action remains on the docket.

In statutory proceedings, where the jurisdiction of the court rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears, that, assuming the allegations to be true, the court has no jurisdiction, as in *Rines* v. *Portland*, 93 Maine, 227; *Hayford, Aplt.*, v. *Bangor*, 103 Maine, 434. But the case at bar is the common law action of replevin and not one of the four reasons for dismissal under discussion goes to the jurisdiction of the court.

"A defendant cannot move for a dismissal or nonsuit for the mere insufficiency or uncertainty of the declaration or complaint, where

the defects may be obviated by amendment or by giving leave to plead over, or by allowing a continuance or where the defect may be cured by verdict" (as in *Stimpson* v. *Gilchrist*, 1 Maine, 202; *Hutchins, Admr.*, v. *Adams*, 3 Maine, 174; *Elliott* v. *Stuart*, 15 Maine, 160). "The underlying principle, as shown by the cases is: That if trial may be had on the merits of the case, and the defects in the pleading may be amended or cured by subsequent pleas or proceedings, the action should not be dismissed." Cyc. Vol. 14, page 440-1.

In *Barlow* v. *Leavitt*, 12 Cush. 483, the defendant attempted to take advantage of a misjoinder of different causes of action by a motion to dismiss, and the court in overruling the motion said: "There is no ground for the motion to dismiss this action. The court below had jurisdiction both of the subject matter and of the parties. The defect, if any existed, was in the misjoinder of two separate and distinct causes of action, for each of which the law prescribes different remedies. At common law, the only proper mode of taking advantage of such a defect was by a demurrer or motion in arrest of judgment. 1 Chit. Plead. 236. Under the practice act, it can be done only by demurrer." The Supreme Court of Vermont in *Alexander* v. *School District*, 62 Vt. 273, noted the distinction in these words: "The motion to dismiss is sought to be maintained on the ground that the plaintiff cannot recover as bearer on the order set out in the specifications, or bill of particulars, because it is not negotiable. This ground is entirely untenable, and wholly misconceives the nature and scope of a motion to dismiss. Such a motion is in the nature of a plea in abatement, and is not used for testing the right of recovery on the merits, but only for impeaching the correctness of the proceedings for the purpose of abating the action. Defects apparent on the face of the declaration, independent of any reference to the writ or its service, are not pleadable in abatement nor the subject of a motion to dismiss. The proper way of taking advantage of such defects is by demurrer or motion in arrest of judgment." Therefore, as to the first four objections to the declaration the remedy by a motion to dismiss was clearly inappropriate, and exceptions to the overruling of the motion in those particulars cannot be sustained.

We might add, however, that the objections would not be tenable even if raised on demurrer. The description is ample within the rule laid down in *Musgrave* v. *Farren*, 92 Maine, 198; the allegation that the goods "belonged to" the plaintiffs is sufficient averment of ownership; demand is a matter of proof and not of pleading, *Seaver* v. *Dingley*, 4 Maine, 306; *Lewis* v. *Smart*, 67 Maine, 206; the allegation of value is unnecessary, *Blake* v. *Darling*, 116 Mass. 300; *Litchman* v. *Potter*, 116 Mass. 371, and, if required, there is a sufficient averment in the proviso that the plaintiffs gave bond "in the sum of one thousand dollars being twice the value of said goods and chattels." In fact the declaration follows with exactness the form of replevin writ established by sec. 9 of chap. 63 of the Laws of 1821, and in general use in this State for more than eighty years.

The fifth cause of dismissal is that the bond is not signed with sufficient sureties. This objection comes within the scope of a motion to dismiss. *Wilson* v. *Nichols*, 29 Maine, 566. But the bond is signed by the National Surety Company as surety, as authorized by Rev. Stat., chap. 49, sec. 119, and the company is described as being duly organized by law and having an office at said Rockland. On its face the bond is in due form and sufficient and a motion to dismiss does not lie when to support it or resist it, proof is necessary dehors the writ. *Chamberlain* v. *Lake*, 36 Maine, 388; *Badger* v. *Towle*, 48 Maine, 20; *Hunter* v. *Heath*, 76 Maine, 219.

This ground therefore fails.

2. The Case on its Merits.

The rights of the parties in this action have been substantially established in the case of *Chalmers* v. *Littlefield, et als.*, 103 Maine, 271, where the material facts connected with this litigation are set forth with such fullness that it is unnecessary to repeat them here. The parties in the two suits are reversed but the issues are practically the same. In that case Mr. Chalmers attempted to hold the defendants liable in trover for the conversion of certain steel rails which had come into their possession as receivers of the Railway Company, and which he claimed to own by virtue of an execution sale made after the receivers were appointed. The wire in the case at bar was

sold under the same execution and at the same time as the rails, so that Mr. Chalmers' source of title is the same in both cases, as is also that of the receivers.

In the former case this court held that the title to this personal property passed into the custody of the receivers, who had been appointed by the court to take possession of all the property of the corporation and to manage it for the interest of the bondholders and creditors as their rights might be made to appear, that the entire property was in custodia legis, when Mr. Chalmers, without leave of court, presumed to seize and sell a part of it on the execution issued on a judgment which was also taken after the receivers were appointed, and this the law did not permit them to do. The title of the receivers was therefore held valid and that of Mr. Chalmers invalid, and that decision as to title is conclusive in the case at bar.

It is further contended by the defendant that the plaintiffs have not been authorized by any special decree of court to bring this suit. The answer is that no special decree was needed. The original decree of appointment was comprehensive in its terms and among other powers conferred on the receivers was the express authority "to prosecute and maintain any suits at law or in equity for the recovery, preservation or protection of said property." This action is in conformity with that authority. Finally the counsel claims that the defendant came lawfully into possession of this property as a common carrier, and that the action could not be maintained until there had been a proper demand and refusal, which demand should have been made at least the day previous to the service of the writ. The evidence shows that one of the plaintiffs made the writ on the morning of March 2, 1907, and, accompanied by the sheriff, went at once to the station agent and demanded the wire, that his request was refused, and he then directed the sheriff to serve the writ and take the property which was done. The refusal gave the plaintiffs the right to proceed forthwith. To require a longer time to intervene might wholly defeat the plaintiffs' rights as it would permit the property to be put beyond their reach. Where a replevin writ is made provisionally to be used only in case of the refusal of the

defendant to surrender the property, the action is not prematurely brought. *O'Neil* v. *Bailey*, 68 Maine, 429; *Grimes* v. *Briggs*, 110 Mass. 446.

"A writ may be considered as purchased at any moment of the day of its date which will most accord with the truth and justice of the case." *Bank* v. *Mosher*, 79 Maine, 242.

Exceptions overruled. Judgment for plaintiffs for $1 damages and costs. Plaintiffs to keep property replevined.

FRANK O. YOUNG *vs.* IRA H. RANDALL.

Kennebec. Opinion April 21, 1908.

Master and Servant. Negligence. Assumption of Risk.

When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care and experience ought to know and appreciate. He also assumes the risks of all dangers, of which he knows and which he should appreciate whether obvious and visibly apparent or not.

The plaintiff while operating a swinging circular saw in the defendant's employ sustained personal injuries resulting in the loss of the second and third fingers of the left hand and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant. The plaintiff thereupon brought an action against the defendant and recovered a verdict for $1000. Assuming all the facts to be as claimed by the plaintiff, *Held:* That the action cannot be maintained and the verdict is so clearly wrong that the same must be set aside.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff while operating a swinging circular saw in the defendant's employ, resulting in the loss of the second and third

fingers of the left hand and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant in that the saw table "was not provided with any standards or upright pieces sufficiently near the path of the saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in and upon said saw, and thereby said plaintiff's employment was made unnecessarily dangerous."

Plea, the general issue. Verdict for plaintiff for $1000. The defendant then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

A. M. Goddard, for defendant.

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

CORNISH, J. Tort for personal injuries while operating a swinging circular saw in defendant's employ. The defendant is a manufacturer of lumber and manager of the Augusta Lumber Company, which operates a large mill at Augusta. In the spring of 1905, he purchased a lot of standing timber in the neighboring town of Belgrade and sent a crew there to cut and manufacture the same. Among them was the plaintiff who was the owner of a team of four horses and of a portable sawing machine driven by a gasoline engine. After working with his team five or six weeks yarding logs, the plaintiff started his sawing machine and with the assistance of Mr. Weston, the foreman, attempted to saw a small lot of ash logs into shovel handle bolts about forty-four inches long. This proved impracticable as the logs, varying in length from twenty-five to thirty feet, were too heavy to be handled and sawn easily with his machine which was constructed in the ordinary way for sawing cord wood, with a stationary circular saw and a push or sliding table.

The foreman then suggested the necessity of a swinging saw with a stationary table, and informed Mr. Randall through the plaintiff where a second hand machine of that sort could be obtained. Mr. Randall thereupon procured the saw and sent it, with necessary

shafting and pulleys purchased elsewhere, to Belgrade, and with it went Mr. Dixon his millwright, who was to have charge of setting it up.

The temporary machine was then hastily constructed. A table or platform about eighteen inches wide and two feet high was built of planks resting on blocking. The left end of this table, viewed from the operator who stood in front of it, was connected with a run provided with rolls over which the logs were pushed by hand lengthwise from the ground upon and along the table. Against the side of the table opposite the operator stood three heavy logs or posts set firmly in the ground and extending above the table six or eight feet, carrying on their tops the bearings or boxes which held the main shaft. One of these posts stood within a few inches of the right end of the table, another toward the left end and eight feet from the first, and between the two was a third, the exact location of which is in controversy. At the right of this middle post and one foot from it, according to the plaintiff, or two and one-half inches from it according to the defendant, the saw frame or ladder was suspended from the main shaft in such a manner that the circular saw attached to the lower end could be swung forward and backward in the slot, extending part way across the table, by means of an oxbow bolted to the ladder and extending forward toward the operator. The distance from the saw to the right end of the table was the exact length of a bolt, forty-four inches. Four men were employed in working the machine, two at the left with cant dogs to push the logs upon the table and hold them in place, one to operate the saw, and one at the right to keep the end of the log flush with the end of the table, and to remove the bolts. In operation the logs were pushed upon the table, the larger end ahead, the scarf was first sawn off, then the various bolts and if the smaller end was less than six inches in diameter, that portion was used for cord wood.

As the saw was hung somewhat higher than the table, it had a natural tendency in cutting, to draw the logs toward and under it, a tendency which was stronger in the smaller logs, and which could be

resisted only by having proper guards and supports on the back of the table. The failure of duty alleged by the plaintiff in his writ is that the saw table "was not provided with any standards or upright pieces sufficiently near the path of said saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in upon said saw." The plaintiff admits the existence of the three posts before described, but says they were insufficient for the purpose, as there was a space of forty-four inches at the right of the saw, and of one foot at the left without any support or guard whatever, so that in sawing a stick of such a length that it reached from the right end of the table to a point between the saw and the post on the left, it had no support whatever, except at the extreme right end, and the action of the saw tended to pull it in toward itself taking with it the hand of the operator resting upon the stick. The defendant met this issue by offering evidence tending to show that the distance from the saw to the post on the left was only two or three inches, that four or five inches at the right of the saw was an additional post firmly set in the ground and extending above the table, placed there to serve this very purpose, and also that guides or guards were attached to the back of the table, the one at the left of the saw extending from post to post, being a timber four inches square, and the one at the right, from post to post, a plank two by six set on edge.

Here was a sharp issue of fact, the plaintiff admitting that if the fourth post and the guards were there at the time of the accident, the table was reasonably safe, and the defendant admitting that if they were not there it was negligently constructed.

The jury found for the plaintiff upon this as upon all other issues and their verdict the defendant asks to be set aside. It is unnecessary to consider the question of the defendant's care or want of care in the construction of the machine. The plaintiff is in this dilemma. If the defendant was not guilty of negligence in this respect the plaintiff admittedly cannot recover. If the defendant was guilty of negligence the plaintiff is precluded from recovering because of his own knowledge of the careless construction and his assumption of the attendant risks. This is a fatal point in the plaintiff's case.

The particular danger on which he bases his right to recover was the lack of protection against the tendency of the saw to draw the logs to itself. But this was no concealed or hidden danger. It was obvious as soon as he began to operate. He felt the tendency to draw. He admits it. He saw the lack of protection, and with his experience he must or at least should have known the risk attendant upon the sawing of a stick resting against only one support. The plaintiff was not an inexperienced boy, but a man thirty years of age, of intelligence and of some experience with circular saws. He was the owner of a portable saw mill and had himself operated it six weeks or more during the previous winter, and in that time must have learned its traits. While that worked on a somewhat different plan from this, yet the difference and its effects must have been obvious to him. He had asked for no instructions before beginning work nor during its progress though Mr. Weston, the foreman, stood near by. He apparently needed none. The foreman could have told him nothing that he himself could not see and appreciate. In his writ he does not complain because no instructions were given him. He began and continued the work without protest or objection, confident of his own knowledge and experience. There is evidence that he even showed impatience when cautioned more than once by the foreman not to jump the saw and not to keep his left hand upon the log. His method of operation was to pull the swinging saw by the oxbow with his right hand, while he steadied himself by placing his left hand upon the log at the right and within five or six inches of the saw itself. He worked but little the Wednesday afternoon that the machine was completed, as the saw needed setting and filing, but began on Thursday morning and worked during the forenoon. He says that he noticed the tendency of the saw to pull the logs toward it as it cut, especially the smaller and more crooked ones, and during the forenoon "there was one log that the cant of it was kind of up and kind of crooked and it turned down as a stick naturally would, the saw pinched in the wood a mite and the log rolled toward the saw and went out through." The accident of the afternoon was practically a repetition of this. In the afternoon the plaintiff had worked but half an hour before he was injured. His

own description of the accident is clear. "Well, we had a log come up and I sawed off this scarf, and it came on and I sawed it again, I should say three or four cuts into three or four of these sticks that we used for bolts, and then there came a piece here that was just a little longer than it ought to be, about six inches longer, and I thought it was smaller than six inches, so I threw it off, but Weston wanted it sawed, — so I took it up and held it on the saw like that (illustrating) and the saw bit on to it and took my hand in." "I took hold of this saw and brought it to me and as I did, it kind of rolled this way a little and when I put the saw on she bit here and then caught and went right over like that (illustrating). I think both pieces went out under the saw that way. I know they got out of my way." On the plaintiff's own statement nothing unusual happened, nothing that the plaintiff might not himself have anticipated if the conditions were favorable. He nowhere stated that he did not see and appreciate the precise risk in question. He simply denies having worked on this particular kind of a machine prior to the day of the accident. The doctrine of assumption of risk has been so often and so fully expounded that its mere statement is sufficient.

"When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care and experience ought to know and appreciate. He also assumes the risks of all dangers, of which he knows and which he should appreciate whether obvious and visibly apparent or not." *Babb* v. *Paper Co.*, 99 Maine, 298. See also *Mundle* v. *Mfg. Co.*, 86 Maine, 400. The application of this firmly established principle to the case at bar precludes recovery. The accident arouses our sympathy but assuming all the facts to be as the plaintiff claims, this action cannot be maintained. *Demers* v. *Deering*, 93 Maine, 272; *Wilson* v. *Steel Edge Stamping Co.*, 163 Mass. 315; *Tenanty* v. *Boston Mfg. Co.*, 170 Mass. 323; *St. Jean* v. *Tolles*, 72 N. H. 587.

The jury did not give proper consideration to the plaintiff's assumption of the risk. Whether they were unduly affected by

sympathy or by the unmaintainable position so persistently contended for by the defendant's counsel as to the ownership of the machine or by both, it is impossible to determine. But whatever the cause, the verdict is so clearly wrong that the entry must be,

Motion sustained.
Verdict set aside.

In Equity.

MARTIN FLYNN

vs.

THE AMERICAN BANKING AND TRUST COMPANY et als.

Androscoggin. Opinion April 21, 1908.

Banks and Banking. Stockholders. Liability. Persons Entitled to Enforce. Time to Sue. Liability for Interest. Insolvency and Receivers. Guaranty of Payment. Demand. Acceptance of Dividends. Pledges of Stock. Private & Special Laws, 1887, chapter 281; 1889, chapter 349, section 6. Statute 1871, chapter 86, section 3. R. S., 1871, chapter 47, section 71; 1883, chapter 47, section 84; 1903, chapter 47, section 84.

By the charter of a Maine corporation the shareholders were made "individually liable equally and ratably, and not one for another, for all contracts, debts and engagements of the corporation to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares." *Held:*

1. The liability imposed by the statute upon the shareholders was not an asset of the corporation and could not be enforced by the corporation nor by its receiver but only by the creditors of the corporation in their own behalf.
2. The shareholders were not subject to suit by the creditors of the corporation to enforce such statutory liability until in proceedings against the corporation its assets were fully administered and the fact and amount of deficiency of assets judicially ascertained. Such suit begun within six years after such judicial ascertainment is not barred by the six years statute of limitations.

3. When in proceedings against the corporation the final account of the receiver, showing a full administration of the assets and no balance in his hands, is by decree approved and allowed and the report of the commissioners on claims against the corporation previously accepted and allowed shows the amount of the liabilities of the corporation, the fact and amount of the deficiency of assets, if any, have been judicially ascertained. A suit to enforce the statutory liability of the shareholders begun immediately thereafter is not begun prematurely. There is no need of a further decree to declare an obvious mathematical truth.

4. If the assets of the corporation when fully administered only suffice for the payment of the principal of the debts of the corporation, the statutory liability of the shareholders may be resorted to for the recovery of such interest as would have been recoverable from the corporation had it continued solvent, without receivership.

5. When in proceedings against a defaulting corporation for the sequestration and administration of its assets, a loss of assets results from the misconduct of the receiver, the loss must be borne by the shareholders and the amount of their liability is thereby increased pro tanto.

6. If the corporation has guaranteed the payment of the notes of others "when due and payable without notice of any neglect on the part of the payors thereof," the corporation becomes liable and interest begins to run upon such notes against the corporation from the default of the payors, without demand upon, or notice to, the corporation.

7. When the directors of the corporation vote to stop payment of its liabilities, or its assets are sequestered by a decree of the court, no demand upon the corporation is necessary to entitle a creditor to interest for delay in payment.

8. A suit by creditors against shareholders to recover out of their statutory liability the interest due from the corporation is not a separate suit for interest, nor does the acceptance of dividends from the assets of a defaulting corporation to the amount of the principal of their claims, bar the creditors from recovering the interest on them from the shareholders.

9. Where the holders of guaranteed notes reassign them to the corporation or its receiver and prove their claims therefor against the corporation, and the receiver collects the notes, but instead of paying the proceeds to the former holders turns them into the general fund for creditors with the approval of the court, such holders are entitled to be regarded as general creditors with the same right to resort to the statutory liability of shareholders, though had such proceeds been paid to them they would have been paid in full.

10. Persons appearing by the stock books and stock certificates to be the absolute owner of their shares in such a corporation are subject to the statutory liability of shareholders, though they only hold them as security for debts due to them from the real owners.

11. The mere fact that upon the stock books and the stock certificates the word "trustee" appears after the name of the holder does not exempt him from the statutory liability of a shareholder.

12. Purchasers of shares in such a corporation take the risk of the financial condition of the corporation at the time of their purchase whether good or bad. They take over the liabilities as well as the rights attaching to the shares purchased. The shareholders at the time of the default of the corporation have cast upon them the entire liability imposed by the statute in question.

In equity. On exceptions by certain defendants. Overruled.

Bill in equity brought by the plaintiff, a creditor of the defendant corporation, The American Banking and Trust Company, in behalf of all the creditors of the defendant corporation and against sundry of the shareholders of the defendant corporation to enforce the liability of its shareholders imposed by the provisions of chapter 349, Special Laws, 1889, amendatory of its original charter, whereby its shareholders were made "individually liable, equally and ratably, and not one for another, for all contracts, debts and engagements of said corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The bill was taken pro confesso against certain of the defendants including The American Banking and Trust Company. Other defendants answered and one defendant both demurred and answered. Certain amendments to the bill were allowed during the various proceedings. Also eventually the bill was dismissed as to certain of the defendants named therein.

The cause was first heard on bill, answers, demurrer and evidence by the Justice of the first instance who overruled the demurrer, sustained the bill and referred the cause to a special master in chancery "to hear, determine and report upon all claims of creditors which are claimed to be secured by the statutory liability of the shareholders of the American Banking & Trust Company, giving the grounds of all claims owned respectively Dec. 29, 1896, and the equal and ratable amounts for which each shareholder is liable." Several defendants then excepted to certain rulings made by the aforesaid Justice.

Upon the coming in of the report of the master several defendants filed various exceptions thereto. A hearing was then had on the acceptance of the report by the aforesaid Justice, who, after the hearing, overruled all the exceptions, ordered that the report be accepted and confirmed and made and entered final decree.

Several defendants then took exceptions to the ruling overruling their exceptions "to the report of the special master filed in said cause, confirming said report and entering final decree in accordance therewith."

The case appears in the opinion.

Harry R. Coolidge, and Newall & Skelton, for plaintiff.

W. W. Bolster, and Oakes, Pulsifer & Ludden, for W. W. Bolster et als., defendants.

Reuel W. Smith, for Benj. R. Redman, defendant.

John A. Morrill, for Auburn Savings Bank, defendant.

C. Vey Holman, for C. Vey Holman, Trustee, defendant.

W. H. Judkins, for Monmouth Academy, defendant.

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

EMERY, C. J. The American Banking and Trust Company, a Maine banking corporation, stopped payment by vote of its directors Dec. 22, 1896. Seven days afterward the Bank Examiner filed a bill in equity against the corporation for the sequestration of its assets and the appointment of a receiver to administer them. Two days later, Dec. 31, 1896, the decree of sequestration was signed and a receiver appointed, who took possession of all the assets of the corporation. These assets were in time fully administered and distributed to the creditors of the corporation. There was no surplus.

The corporation was chartered and began business in 1887 as the Maine Mortgage Loan and Investment Company, but in 1889 it changed its name to American Banking and Trust Company. By an amendatory Act (Special Laws of 1889, ch. 349) additional powers as a banking company were granted the corporation and by section 6 of the Act its shareholders were made "individually

liable, equally and ratably, and not one for another, for all contracts, debts and engagements of said corporation, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." The present bill in equity is brought by a creditor of the corporation in behalf of all the creditors against sundry of its shareholders to enforce that liability. The case was heard upon bill, answers, demurrer and evidence, by a single Justice who made findings and rulings, and made a decree sustaining the bill and referring the case to a master. No appeal was claimed from his findings of fact but several exceptions were taken by different defendants to his rulings of law and the case is before the Law Court upon those exceptions only. The various exceptions have been exhaustively argued with numerous citations of cases by the several counsel for the defendants and by the counsel for the plaintiff. Of course all the briefs and the cases cited, numerous as they are, have been studied, but to answer every argument and comment on every case cited would consume so much space and make this opinion so very long, the parties and counsel must be content with our conclusions and briefly stated reasons therefor.

THE EXCEPTIONS TO THE RULINGS OF THE SINGLE JUSTICE.

1. Some of the defendants contend that there is not sufficient evidence that the amendment creating that liability of the shareholders was ever accepted by them. The fact that after the enactment of the amendment the shareholders allowed their corporation to continue in business and exercise the new powers provided in the amendment, and to make contracts, debts and engagements therein authorized, is sufficient evidence of their acceptance of the liability imposed upon them. No shareholder appears to have objected at the time. It is too late to object now after the contracts, etc., have been made. *Stanley* v. *Stanley*, 26 Maine, 191.

2. The corporation stopped payment Dec. 22, 1896. Its assets were sequestered by decree of the court Dec. 31, 1896. This bill was not filed until Sept. 17, 1904. The defendants contend that this suit is therefore barred by the general six year statute of limitations.

Upon the question when the statute of limitations begins to run against a creditor seeking to enforce the statutory liability of shareholders for his debt against the corporation, there have been numerous, various and even conflicting decisions in other jurisdictions, but our duty is to construe our own statute in harmony with our own decisions and with what we think the better reason, even though we come to conclusions different from those of other courts.

Of course the statute of limitations does not begin to run against the creditor and in favor of the shareholder when the debt or other obligation is incurred by the corporation, but only when the shareholder becomes subject to a suit to enforce his liability. When does the shareholder become subject to such suit is, therefore, the determining question. One view is that it is when the corporation fails to pay, or, at least, when its assets are sequestered so it cannot pay. The other view is that it is when the creditor's remedies against the corporation and the assets of the corporation have been exhausted. Under the former view the creditor immediately upon default of the corporation can ignore the corporation and its assets, can pursue the shareholders alone, collect of them his debt against the corporation, and leave them to bring their own suits against the corporation for recoupment, though it might in the end appear that the corporate assets were ample to pay all the corporate debts and hence that the suits against the shareholders were unnecessary and vexatious. Individuals and corporations often default for want of ready cash to meet obligations when due, though they have ample assets eventually to pay all their obligations in full. Under the latter view the creditor cannot ignore the corporation, his direct and principal debtor, upon its default, and cannot burden the shareholders with suits until the necessity therefor is shown by an exhaustion of the corporate assets. Evidently the liability of the shareholder is heavier and more severe under the former than under the latter view.

We think the latter view is the correct one to take of the statute imposing the liability in this case. The statute imposes a new liability before non-existent, and hence if susceptible of more than one construction it should receive that imposing the lightest burden.

The shareholder is not made liable "on" the contracts, debts and engagements of the corporation, but only "for" them. He cannot be joined in any suit against the corporation on such contracts, etc., because he is not a party to them, nor can the corporation or its receivers sue him, since his liability is not to them or for them, but only "for" the creditors. It is no part of the corporate assets. It is a liability apart and distinct, in origin and character, from that of the corporation. The creditor's claim is primarily against the corporation and only secondarily against the shareholder. The creditor's remedy against him, to use a military metaphor, is a reserve force to be brought into action only when necessary, only when it becomes apparent that the remedy against the corporation has failed.

We hold, therefore, that under the statute in this case the shareholder is not to be vexed with suits, and hence the statute of limitations does not begin to run until the assets of the debtor corporation are fully exhausted, nor until it has been judicially ascertained in proceedings against the corporation that a resort to the statutory liability of the shareholders is necessary.

In so holding we hold nothing new, but are following the reasoning in the cases in this State. *Longley* v. *Little*, 26 Maine, 162; *Hewett* v. *Adams*, 50 Maine, 271; *Morris* v. *Porter*, 87 Maine, 510; *Gillin* v. *Sawyer*, 93 Maine, 151; *Childs* v. *Cleaves*, 95 Maine, 498; *Pulsifer* v. *Greene*, 96 Maine, 438; *Hale* v. *Cushman*, 96 Maine, 148; *Abbott* v. *Goodall*, 100 Maine, 231. The same view was incidentally expressed by the court in *Maine Trust Company* v. *Southern Loan Company*, 92 Maine, 444, where the court said on page 452. "So must the assets of the corporation be exhausted before this liability be incurred."

It is urged in argument that by such a holding the burdens of the shareholders are increased; that they are disabled from discharging themselves from liability; that the creditors can delay almost indefinitely their proceedings against the corporation and thus prolong the liability of the shareholders against their will. The shareholders, however, are not helpless. They can so conduct the affairs of their corporation that there shall be no default in its

obligations. They can themselves apply the corporate assets to the payment of the corporate debts. That their assets are sequestered and receivers appointed is rather the fault of the shareholders than of the creditors, but even then the shareholders can compel the receivers to proceed with reasonable vigor and speed to a full administration.

In the proceedings against the corporation in this case it was not judicially ascertained until May, 1904, at least, that the corporate assets were exhausted and that a resort to the shareholders was necessary. This bill was filed Sept. 17, 1904 and hence is not barred by the six year statute of limitations.

3. But some of the defendants contend that if the right of action against them did not accrue until it was judicially ascertained that the corporate assets were exhausted, then this bill was prematurely filed. The final account of the receiver was filed May 7, 1904 and showed a full disbursement of all his receipts. On Sept. 13, 1904, this final account was settled and the court entered a decree that the account, being final and "showing a complete disposition of the assets of the corporation and no balance remaining in his hands, is hereby accepted, approved and allowed." The report of the commissioners on claims had previously been filed and accepted, showing the amount of the debts of the corporation. The receiver's accounts allowed showed how much of the indebtedness had been paid and when. These two amounts had thus been judicially ascertained and declared. It had also been adjudicated that the assets had been fully administered and exhausted. The deficiency of assets, if any, and the amount of the deficiency then appeared of record. There was no need of a further decree of the court to establish a mere mathematical truth. We agree with the single Justice that to acquire such a decree would be finical in the extreme. This bill not having been filed until after the decree of Sept. 13, 1904 was not prematurely filed.

4. Upon the appointment of a receiver for the corporation, commissioners were also appointed by the court to determine the claims against the corporation and were instructed to allow such

interest as would accrue up to the date of the receivership Jany. 1, 1897. They executed their commission according to those instructions and made their report showing the amounts due at that date. Upon these claims thus allowed, payments were made from time to time by the receiver as he realized from the assets, the last payment being made Nov. 12, 1903. The sum of these various payments only equals the amounts of the debts allowed to be due Jany. 1, 1897. The interest accrued since that date remains unpaid.

The defendants now contend that the shareholder's liability does not extend to such interest. As supporting this contention many cases are cited, but nearly all of them are cases of proceedings against the corporation and can be eliminated by conceding, arguendo, that, as between the creditor and the corporation and its sequestered assets in the hands of its receivers, interest beyond the date of the receivership cannot be recovered unless there are surplus assets after paying the indebtedness of that date; that when the corporate assets are exhausted the remedy against the corporation is exhausted. Moreover in all these cases it is held that where there is a surplus of assets, it shall be applied to the payment of such interest before any distribution is made among shareholders. When, however, the corporate assets are exhausted and the corporation by a court decree, in pursuance of the statute, is enjoined from transacting any further business, the corporation has become civiliter mortuus. It has then no legal rights nor liabilities except to formal dissolution. The liabilities of its receivers or other representatives are fully discharged when they have administered its assets. If nothing remains for the payment of subsequent accrued interest, creditors have no remedy against the corporation, its assets or receivers for such interest.

But though the corporation and its receivers may thus be freed from actions by creditors to recover claims for interest or other claims, it does not follow that the contracts, debts and engagements of the corporation have been fulfilled. If the contract, debt or engagement is such that interest accrues for delay in fulfillment, it is not fulfilled until that interest also is paid. Whoever is made

liable by contract or by statute for those contracts, debts and engagements is made liable for the interest accrued and accruing on them. The liability of the shareholders for them and for the interest on them is not discharged when the corporation is dissolved. It continues until they are fulfilled, interest as well as principal. It was imposed to ensure that fulfillment in case the corporation should become defunct before itself fulfilled them. The creditor then acquired the same right against the shareholders to recover principal and interest (of course not in excess of their maximum liability fixed by the statute) that he would have had against the corporation had it continued solvent and possessed of its assets. *Richmond* v. *Irons*, 121 U. S. 27. The cases *Crease* v. *Babcock*, 10 Met. 525, and *Grew* v. *Breed*, 10 Met. 569, were suits by bill holders against shareholders in banks of issue and were decided upon the ground that the then Massachusetts statute did not provide for interest on bank bills.

The defendants cite from the Maine statute relative to claims against insolvent banks, the last clause of sec. 66 of ch. 47 of R. S. of 1883 (in force when the proceedings against the bank in this case were begun) as follows: "All claims allowed shall bear interest from the time they are filed, *provided* that the assets in the hands of the receivers are more than sufficient to pay the principal of all the claims allowed and outstanding when the final dividend is declared." The original of this clause is found in Laws of 1872, ch. 86, sec. 3, which enacts that sec. 71 of ch. 47 of the R. S. of 1871 "shall not be construed to require the payment of interest on claims against the bank unless the assets, etc." The argument is that that statutory limitation upon the payment of interest is to be read into every contract and obligation of the bank and hence that its shareholders are entitled to the benefit of that limitation. That statute, however, was designed for banks of issue, where the liability of the shareholders was different in many respects from that imposed by the statute in this case, and was enforceable only by the receivers. But even that statute does not declare the bank's contracts and obligations to be fulfilled by the failure of the bank and the appoint-

ment of the receivers. It simply limited the powers of the receivers of such banks and thereby limited the liability of those shareholders. In this case the creditors, and they only, have the right to enforce the liability imposed by its charter upon the shareholders of this corporation. That liabilty is for *all* the contracts, etc., of the corporation. There is no exception nor condition, except that it shall not exceed the par value of their shares.

5. The defendants claim, however, that an action cannot be maintained for interest alone and hence this proceeding cannot be maintained for interest. It is true that one action cannot be maintained for the principal of a debt and a separate action for the interest. It is also true that when a creditor has accepted payment of the principal in full for his claim or debt, he cannot afterward maintain an action for the interest. The interest is incident to the principal debt and not a separate debt unless so stipulated in the contract. In this case, however, there has been no action to recover the principal, and there has been no acceptance, nor even offer of payment, of the principal in full for the debt. The proceedings against the corporation were for the sequestration and division of its assets. The sums received by the creditors from those assets were received as dividends, not as payments. They were, of course, applicable to the debts as they were received but their reception and application entailed upon the creditors no forfeiture of the accruing and accumulating interest.

It is urged that to hold the shareholders responsible for interest accruing during the delays of administration is a hardship upon them. It would be an equal hardship upon the creditors to hold that they must lose the interest, through no fault of theirs. The responsibility for the failure of the corporation, for the necessity, for the sequestration and administration of its assets, and for the delay and expense entailed, is more upon the shareholders than upon the creditors. It is not, however, a question of hardship but of legal right. The enforcement of even unquestioned legal rights sometimes inflicts great hardship, but the court cannot for that reason stay its hand.

6. Through the misconduct of the first receiver appointed, some $6500 of the assets of the corporation were irretrievably lost. Who must bear the loss, the creditors or the shareholders? We think the loss fell upon the shareholders and that there it must remain. Though the assets were in the custody of the court through a receiver by it appointed and controlled, they were still the property of the corporation and its shareholders, until administered. The loss was their loss even if from causes beyond their control. The risk of that loss they assumed when they so managed the affairs of the corporation that a receivership became necessary.

7. A demurrer to the bill was filed but the bill with the amendments allowed by the single Justice, read in the light of the foregoing, will show sufficient grounds for its maintenance. The objections to the bill are practically disposed of by the propositions above laid down.

EXCEPTIONS TO THE REPORT OF THE MASTER.

The bill having been sustained, the case was referred to a master to ascertain the amount and nature of the claims of the creditors within the statutory liability of the shareholders, also the names of the shareholders, the number of shares owned by each, and the ratable amount of the liability of each share. Upon the coming in of the report of the master, various exceptions to it were filed, which were all overruled by the single Justice and the report accepted. Exception was taken from that ruling.

Some of the exceptions to the master's report are disposed of by propositions already laid down upon the questions above considered. We have therefore, only to consider the other exceptions not thus disposed of.

1. Some of the claims were against the corporation as guarantor of certain notes and mortages sold and assigned by it to purchasers. The guaranty was as follows: "For value received, the within named American Banking and Trust Company hereby guarantees the payment of the within note and interest coupons thereto attached, when due and payable, without notice of any neglect on the part of the payors thereof. The mortgage securing their payment to be

reassigned in due form." The promisors having failed to pay at maturity, the holders of these guaranteed notes and mortages presented their claims therefor to the commissioners which claims were allowed. It is contended by the defendants that for want of a demand made upon the bank for payment of these notes and mortgages no interest runs against it. We think the vote of the directors to stop payment and the immediately following sequestration of its assets, deprived the bank of all right to insist upon a demand. The evident inability and the declared resolution not to pay, if demanded, made a demand useless and therefore unnecessary. All claims due upon demand, including those under the guaranty in question, then became due and payable, and, unless otherwise stipulated in the contract of guaranty, interest began to accrue against the guarantor.

2. It is also contended by some of the defendants that the holders of these guaranteed notes and morgtages should first have proceeded against the promisors. But there was no such stipulation. The guaranty was unconditional, dispensing even with notice of the default of the promisor. The holder could proceed at once against either. *Cooper* v. *Page*, 24 Maine, 73.

3. After the appointment of the receiver, the holders of these guaranteed notes and mortgages proved against the corporation their claims under its guaranties, and assigned the notes and mortgages to the receiver as they had stipulated to do to the corporation. The receiver collected more or less of them from the makers. Had he paid the proceeds over to the respective holders, they would have been paid in full and thus eliminated from the case. Instead of doing this, the receiver turned all the proceeds into the general fund, all of which was administered and distributed pro rata among all the creditors. The result was that the holders of the guaranteed notes and mortgages only received a partial payment pro rata with the general creditors. Can they be reckoned in this proceeding as creditors for the balance remaining unpaid? This question, so far as appears, is academic rather than practical. If the proceeds had all been paid to the holders, the dividends to the other creditors would have been so much less, and the balance of indebtedness to

them to be paid by the shareholders so much more. The burden upon the shareholders would have been nearly the same in either event. We do not think, however, the holders of the guaranteed notes and mortgages are to be excluded from consideration because of the action of the receiver. He was the bank's representative, performing its duties so far as its assets would permit. The money or other property received upon these notes and mortgages were passed to the general fund as the bank would have done. The court ordered them paid out in dividends to all the creditors. The shareholders made no objection at the time, and it is too late now, the decree having been made, the money paid out, and those proceedings closed.

4. When the bank or corporation voted to stop payment and its assets were sequestered all its deposits became immediately due and payable without formal demand, except such as were on some specified time which had not then elapsed. Whatever interest the bank had agreed to pay upon these deposits, it became liable for the legal rate of six per cent from and after its default, unless otherwise stipulated, which does not appear to have been done as to any deposit in this case. *Eaton* v. *Boissonnault*, 67 Maine, 540. It has been held in some cases that a demand for payment of bank currency bills is necessary even after failure of the bank if the bill holder wishes to recover interest. We do not think those cases applicable to deposits under our statute.

5. In some cases the persons appearing on the stock ledger as owners of shares, really only hold them as security for loans, made to the real owners. This fact, however, did not appear upon the books of the bank nor upon the share certificates. So far as there appeared, the persons named as owners were the actual owners. As to the corporation and its creditors, they were the owners and as such were within the statutory liability of shareholders. *Crease* v. *Babcock*, 10 Met. 525.

6. Upon the stock ledger of the corporation the word "trustee" appeared after the name of one shareholder. That shareholder contends in his answer and argument that he invested the entire trust fund in those shares and that as there is nothing left of that

fund he should not be held personally liable. Even if such facts would exempt him from the liability, no evidence of them was reported to the Law Court. So far as appeared, he purchased the shares, became the legal owner, and entitled himself to the dividends on them as well as to represent them in corporation meetings. He thereby assumed the statutory liability attached to them. The addition of the word "trustee" was only descriptio personae. Even if the statute R. S., ch. 47, sec. 84, applies to a case like this, it was not enacted till 1897 after the liability in this case had become fixed.

7. The shareholders purchased their shares at different times, some before and some after particular contracts, debts and engagements upon which the corporation defaulted, were entered into. This fact does not make any difference in their liability under the statute in question, whatever might be the effect under other statutes. No distinction is made by the statute and none can be made by the court. Those who were shareholders at the time of the default have the entire liability cast upon them, those who purchased at the eleventh hour as well as earlier purchasers. The purchaser of shares took the risk of the financial condition of the corporation, good or bad, as it was at the time of his purchase, as well as the future risks. He took over the liabilities as well as the advantages attaching to the shares. *Curtis* v. *Harlow*, 12 Met. 3, *Maine Trust Co.* v. *Southern Loan Co.*, 92 Maine, 444, page 452.

Though numerous exceptions were taken by different defendants it is not expedient to recite and discuss every one seriatim since all the questions of law raised by any of them are decided in the foregoing opinion. The rulings of the master and the single Justice were in accord with what we above hold to be the law, and hence the exceptions must be overruled and the decrees of the single Justice be affirmed, and with costs.

So ordered.

CATHERINE SMITH *vs.* JOHN C. PRESTON.

Cumberland. Opinion April 22, 1908.

Ways. Obstruction. Nuisance. Damages. Water Discharged from Building on Sidewalk. Ice Accumulating Therefrom. Liability of Owner of Building. Landlord and Tenant. Repairs. Instructions. Revised Statutes, chapter 22, sections 5, 13.

One who suffers special injury from a common nuisance may recover damages in an action at law from the person creating it.

An obstruction placed within the limits of a public way is a nuisance at common law as well as by statute.

One cannot use his property adjoining a public way to the injury of his neighbor's person while rightfully travelling upon such way.

One who creates an obstruction in a public way is not relieved from liability for damages resulting therefrom to travellers while lawfully travelling along such way, notwithstanding that some other person has neglected his duty to remove the obstruction.

The proprietor of land may maintain a structure thereon up to the line of a public way but if by that structure he intercepts and artificially collects the snow and rain which would have been harmless if allowed to reach the ground as it fell from the clouds, it is his duty to control the water so collected and not discharge it or allow it to escape upon the public way, thereby obstructing such way.

When a public sidewalk is obstructed by an accummulation of ice resulting from water artifically collected and discharged upon it by a defective gutter on a building and the owner of such building has control over it as to its physical condition and repair, and a person while rightfully using the sidewalk as a traveller, and in the exercise of due care, is injured by that obstruction, such owner is liable in damages to the person so injured.

The right of travellers to use public ways may be temporarily interrupted, and the traveller must submit to some inconveniences occasioned by the use of adjoining property for business purposes. Such necessary interruptions and unavoidable inconveniences are not unlawful obstructions. But when a public sidewalk is unlawfully obstructed as the result of the neglect of the owner of a building, over which he has control, to keep his building in safe condition such owner is liable in damages to any person injured by such obstruction.

Whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising from a neglect to repair. Such liability rests

upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor.

In the case at bar, *Held:* That the defendant's liability arose from the fact that he *caused* the obstruction, and not because an obstruction, which he did not cause, was suffered to exist on the sidewalk adjoining his property.

Also in the case at bar, the defendant landlord requested the presiding Justice to instruct the jury "that if there was any understanding that the landlord should make repairs for the tenant, if there were any defects, he would not be liable until he got notice from the tenant." The presiding Justice declined to give this instruction except as previously explained. *Held:* That the case did not show that there was any understanding that the tenants were to have any care over the exterior of the building, or even to report to the defendant any defects which they might observe therein, and that the requested instruction was properly refused.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff February 1, 1907, and caused by the alleged negligence of the defendant. The defendant was the owner of a certain two-story building on Washington Avenue, Portland, and the plaintiff claimed that a certain gutter on the outside of the defendant's building and over which he had control, was defective and leaky so that the water accumulated by it was wrongfully discharged upon the public sidewalk where it froze and rendered the sidewalk dangerous and that the accumulation of ice caused thereby was an obstruction of the sidewalk and constituted a nuisance both at common law and by statute. The plaintiff, a woman over eighty years of age, while lawfully walking on this part of the sidewalk, slipped and fell on the ice and fractured her left hip and also received other bodily injuries. The plaintiff's writ contained two counts, one at common law and the other under the statute. (See Revised Statutes, chapter 22, sections 5 and 13). Plea, the general issue. Tried at the October term, 1907, Supreme Judicial Court, Cumberland County. Verdict for plaintiff for $507.47. The defendant then filed a general motion for a new trial and also excepted to the refusal of the presiding Justice to give to the jury a certain requested instruction.

The case appears in the opinion,

Connellan & Connellan, and Wm. R. Robinson, for plaintiff.

D. A. Meaher, for defendant.

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

KING, J. On the first day of February, 1907, between nine and twelve o'clock in the forenoon, the plaintiff, a lady past eighty years of age, while walking on the sidewalk on the southerly side of Washington Avenue in Portland, fell and received bodily injuries. She claims that the cause of her fall was a spot of ice which had formed there by the freezing of water wrongfully conducted by the defendant from his building upon the sidewalk, and which rendered the walk dangerous. In this action for damages she has obtained a verdict, and the case is here on defendant's motion to have the verdict set aside as being against the law and evidence, and upon exceptions.

The defendant's building is two stories high, gable roof, standing in the corner formed by Cumberland Avenue on the west and Washington Avenue on the north, with its end facing the latter avenue, and is so located that its northeast corner adjoins the sidewalk, but its northwest corner is back eight or ten feet therefrom. The building has wooden gutters, the one on the easterly side, at its street end, joining the projecting finish of the gable roof, so that this joint of intersection slightly overhangs the sidewalk.

Attached to the east side of this building, on Washington Avenue, is a one story building of the defendant, adjoining the line of the sidewalk, with its roof sloping back from the street. Both buildings were occupied by tenants, and all repairs were to be made by the defendant.

The plaintiff claimed, and introduced evidence tending to show, that the gutter on the easterly side of the two story building was defective and leaky, and that at its northerly end over the sidewalk there was an opening in the joint through which the water it accumulated was wrongfully discharged upon the walk where it froze forming a dangerous accumulation of ice, that was an obstruction of the walk, and caused her injuries without fault on her part.

The defendant denied this claim, and testified that the gutter was not defective, that water was not discharged from it upon the

walk, and that on the morning of the day of the accident he passed over this sidewalk and saw there no accumulation of ice as the plaintiff alleged.

There can be little or no doubt, however, from all the evidence, that there was at the time of the plaintiff's accident, and had been for some time prior thereto, a defect in the gutter through which water was unnaturally discharged upon the sidewalk causing ice to form thereon abreast the junction of the two buildings.

No one saw the plaintiff fall, and the defendant claims that she failed to prove due care on her part. She was found, with her hip fractured, at the place where the ice was. She says she slipped and fell on the ice. There is nothing in the case suggesting that she had any infirmity on account of which she should have refrained from using the public streets. On the other hand it appears affirmatively that she was accustomed to travel upon the streets, and was active and spry for one of her age.

Her statement as to her conduct at the time was: "I was walking along the sidewalk as I usually do, paying attention to my business." The jury had a right to understand from that statement that she was "paying attention" to where and how she was walking. That is evidence of due care. Whether or not she did in fact exercise due care was an issue for the jury. That issue they must have decided for the plaintiff, and their decision should control.

It will serve no useful purpose to incorporate here any extended review of the evidence, which is somewhat conflicting. From an examination of the whole case we are of opinion that a jury would be warranted in finding that the sidewalk was obstructed by an accumulation of ice resulting from water artificially collected and discharged upon it by a defective gutter of the defendant's building, over which he had control as to its physical condition and repair; and that while rightfully using the sidewalk as a traveller, and in the exercise of due care, the plaintiff was injured by that obstruction.

If upon these facts and conditions the action is maintainable then the defendant's motion for a new trial must be denied.

But, notwithstanding those facts, the defendant contends that he did not create the obstruction by any wrongful act, or cause its

existence by the neglect of any duty owing by him to the plaintiff; and furthermore that he was a mere landlord, and not the occupant of the building, and that those in occupation as tenants are liable, if any one is liable, for the alleged obstruction.

We have already observed that the jury were warranted in finding as a fact that the building, at least that part of it including the defective gutter, was under the general care of the defendant, and that he had such control of the premises as was necessary to keep them in proper and safe condition. His own testimony established that fact. In answer to the question: "What arrangement, if any, had you made for the repairs of the two-story building?" he said: "Well, I made all repairs. When I was informed any thing was needed, or if I discovered any thing was out of repair, I had it fixed." He not only retained the right to make repairs, but the liability to keep the building in proper and safe condition continued to rest upon him notwithstanding the letting.

Whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising from a neglect to repair. Such liability rests upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor. *Kirby* v. *Boylston Market Association*, 14 Gray, 249; *Shepley* v. *Fifty Associates*, 101 Mass. 251, 254; and 106 Mass. 194 and 200; *Larue* v. *Farren Hotel Co.*, 116 Mass. 67.

The same principle governs in actions between tenant and landlord for damages arising from defects and want of repair of the premises. See *Toole* v. *Beckett*, 67 Maine, 544; *Simonton* v. *Loring*, 68 Maine, 164; *McCarthy* v. *York County Savings Bank*, 74 Maine, 315; *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47. In all the cases the criterion of liability is, the obligation to maintain and repair with the right of control for that purpose.

As bearing upon the defendant's liability it is also to be noticed that the duty here neglected was to repair the gutter and maintain it in a reasonably suitable condition to keep the water it collected from the sidewalk, and not merely to keep the gutter free from such

obstructions of ice or snow as would be likely to occur from storms and sudden climatic changes in the winter season. The latter duty may rest upon the occupant, although the owner is bound to maintain and repair. But that is not this case. Here the neglect to repair allowed the water to fall upon the walk unnaturally. It was the defendant's neglect, because the duty to repair rested on him.

Was the defendant's failure to repair the gutter so that the water it collected should not be discharged unnaturally upon the public way the neglect of a duty he owed to the plaintiff?

The proprietor of land may maintain a structure thereon up to the line of a public way, but he can not thereby unreasonably obstruct such way with impunity.

The defendant by his building intercepted and artificially collected the snow and rain which would have been harmless if allowed to reach the ground as it fell from the clouds. It was his duty to control the water so collected, and not discharge it or allow it to escape to the injury of others.

It is too well settled to need the citation of authorities that no one may artificially collect water on his own land, by means of a building or otherwise, and discharge it unlawfully upon his neighbor's property upon which it would not have naturally fallen. If he does so he is liable for the resulting damages. Neither has he the right to discharge water so collected upon the public way where it would not have naturally fallen, if in so doing he obstructs such way. No one would contend that an abutter upon a public way would have the right to obstruct such way by discharging water thereon from his cistern. Wherein is the distinction between such case and the one before us? The same duty to refrain from obstructing the public way arises in the one case as in the other. In either case the water would be discharged upon the way unnaturally in consequence of the use made of adjoining property.

The reason why the defendant owed a duty to the plaintiff not to cause her injury by turning the water from his building upon the public way is very aptly stated in *Shepley* v. *Fifty Associates*, 106 Mass., page 197, in these words: "The plaintiff, at the time of

the accident, was where she had a right to be, and was not guilty of any want of due and reasonable care. For the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple. The case in our judgment depends upon the same rules, and is to be decided on the same principles, as if it raised a question between adjoining proprietors, in which the lands or building of one were injured by the manner in which the other had seen fit to occupy or use his own land and buildings. In contemplation of law the person is at least as much entitled to protection as the estate."

If one may not use his property to the injury of his neighbor's land, he certainly may not use it to the injury of his neighbor's person while rightfully travelling upon the public way.

The right of travellers to use the public way may be temporarily interrupted, and the traveller must submit to some inconveniences occasioned by the use of adjoining property for business purposes. Such necessary interruptions and unavoidable inconveniences are not unlawful obstructions. But in this case the jury have found that the sidewalk was unlawfully obstructed as the result of the defendant's neglect to keep his building in safe condition.

From both reason and authority the defendant must be held liable for the obstruction which caused the plaintiff's injury.

An obstruction placed within the limits of a public way is a nuisance at common law as well as by statute. R. S., chapter 22, sec. 5; *Corthell* v. *Holmes*, 88 Maine, 376. One who suffers special injury from a common nuisance may recover damages in an action at law from the person creating it. R. S., chap. 22, sec. 13; *Holmes* v. *Corthell*, 80 Maine, 31; *Brown* v. *Watson*, 47 Maine, 161; *Dudley* v. *Kennedy*, 63 Maine, 465; *Staples* v. *Dickson*, 88 Maine, 362.

But the defendant further contends that he is not liable because it was the duty of the occupants of the building to remove the snow and ice from the sidewalk adjoining the building. Assuming that such duty did devolve upon the occupants, we think the neglect of that duty did not discharge the defendant from his liability in this

action. He who creates an obstruction in the public way is not relieved from liability for damages to travellers resulting therefrom, notwithstanding that some other person has neglected his duty to remove the obstruction. The defendant's liability here arises from the fact that he *caused* the obstruction, and not because an obstruction, which he did not cause, was suffered to exist on the walk adjoining his property. The motion must be denied.

The exceptions. At the conclusion of the charge, counsel for the defendant requested the court to instruct the jury:

"That if there was an understanding that the landlord should make repairs for the tenant, if there were any defects, he would not be liable until he got notice from the tenant." To which the court replied: "I shall decline to give that, except as I have already explained."

The question whether the liability to repair was upon the defendant or his tenants under the letting was clearly presented to the jury as an issue of fact, and as to the defendant's knowledge of the particular defect, the court said: "He would not be liable for anything which he was absolutely ignorant of, either as understanding how this gutter was originally made, or having his attention by observation called to its condition, if it seemed to be absolutely perfect as he observed it from day to day. But if he did, by his constant observation of his building, being a practical man, observe what the condition of this gutter was, having an opportunity as he passed by to see whether it was leaking or not, or whether there was ice being formed underneath it, the jury would determine whether, as a matter of fact, he knew of its condition, or would, by reasonable diligence, have been bound to know. So if you find that he had the control of the roof and was bound to make the repairs upon it, and that the tenants were not, then he would be liable, provided there was such a public nuisance caused by him as obstructed the sidewalk and made it dangerous at the time."

The case does not show that there was any understanding that the tenants were to have any care over the exterior of the building, or even to report to the defendant any defect which they might observe therein. We think the requested instruction was properly

refused. The instructions given upon the matter of notice to the defendant were as favorable as he could claim. The exceptions must be overruled. The entry is to be,

Motion and exceptions overruled.
Judgment on the verdict.

FRANKLIN H. HAZELTON *vs.* SPERRY H. LOCKE.

Cumberland. Opinion April 23, 1908.

Special Property Gives Plaintiff a Remedy. Trover for Money. Same may be Maintained, When. Declaration. Trover for Money as Between Principal and Agent.

When the manager of a life assurance society appoints an agent to canvas for applications and collect premiums on all policies obtained by him, which premiums so collected are to be paid by the agent to the manager of the society, then as between the manager and the agent the manager has a special property in the premiums collected by the agent and is entitled to receive them, and this right gives him a remedy against the agent upon his refusal to pay over the same as directed.

In a declaration in an action of trover for the alleged conversion of money, only the same certainty is required as in indictments and it is not necessary to set out the money verbatim, the description in a general manner being sufficient.

Legal currency may be the subject of an action of trover as there is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained.

Where the relation of a plaintiff and defendant is that of principal and agent, it is necessary in determining whether trover or assumpsit is the proper remedy for money collected by the agent but not turned over, to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the agent in receiving and retaining the money collected by him.

From its nature the title to money passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods

ordinarily used in business for its safe keeping and transmission, and an agent unless restricted by his contract would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit.

When the defendant is the agent of the plaintiff for the collection and paying over not of a single premium of insurance but such as are payable for all policies affected by him and he is entitled to receive as commission a certain percentage of such premiums when paid over, an action of trover by the principal might be unjust to the agent by depriving him of his right of set-off and other legal defenses.

In the case at bar, the relation of principal and agent existed between the plaintiff and the defendant and the principal brought an action of trover against the agent for money alleged to have been collected by the agent and converted to his own use. *Held:* That under all the circumstances of the case the action could not be maintained.

On exceptions by plaintiff. Overruled.

Action of trover for the alleged conversion of $51.13 "in lawful current money of the United States," brought in the Superior Court, Cumberland County. For pleadings, the defendant filed the general issue together with a "special plea" interposing his discharge in bankruptcy as a defense. The case was heard before the Justice of said Superior Court without the intervention of a jury. At the conclusion of the plaintiff's evidence the Justice ordered a nonsuit and the plaintiff excepted. The specific defense presented by the "special plea" was not considered by the Law Court, but the case was decided on the questions raised by the general issue.

The case appears in the opinion.

Harvey D. Eaton, for plaintiff.

Llewellyn F. Hobbs, for defendant.

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

PEABODY, J. This was an action of trover for the conversion of $51.13 in the money of the United States. The writ was dated July 8, 1905.

The defendant's plea was the general issue and a brief statement setting out his discharge in bankruptcy under the Bankrupt Act of 1898, and that the claim, demand, debt or action declared on was provable against his estate from which he is discharged, not being excepted by said Act.

The case was tried before the Justice of the Superior Court for Cumberland County without the intervention of a jury.

At the conclusion of the plaintiff's evidence, upon motion of the defendant's attorney, the presiding Justice ordered a nonsuit to which ruling and action the plaintiff excepts and the case is before this court upon the exceptions.

The following is a summary of the facts upon which the nonsuit was ordered:

The plaintiff and defendant entered into a written contract dated February 2nd, 1904, for transacting the business of canvassing for applications for life insurance in the Equitable Life Assurance Society of the United States of which the plaintiff was manager for the State of Maine, upon certain specific terms and conditions among which, that the defendant was to receive commissions on the premiums under various forms of policies which were to accrue only as the premiums were paid to the plaintiff or the Society in cash.

On January 10, 1905, the defendant received of George C. Fuller $51.13 in currency, consisting of bills and silver which was for the premium on a policy of insurance issued on the life of his wife by the Equitable Life Assurance Society, on the first day of April, 1905. The attorney for the plaintiff called on the defendant and asked him for this sum of $51.13, also on two other occasions prior to the commencement of the action, and he declined and refused to deliver the same.

As we view the case it is not necessary to consider the specific defense presented by the brief statement. The general issue raises the following questions:

1. The nature of the property as a proper subject of this form of action and the sufficiency of its description. As specified in the writ the property was money in the currency of the United States and the evidence is that it consisted of bills and silver amounting to

$51.13. Legal currency may be the subject of an action of trover. There is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass, *Burns* v. *Morris*, 47 Tyrw. R. 485; *Royce, Allen & Company* v. *Oakes*, 20 R. I. 252; *Walter* v. *Burnett*, 16 N. Y. 250; *Farrelly* v. *Hubbard*, 148 N. Y. 592; *Conaughty* v. *Nichols*, 42 N. Y. 83; *Vaudelle* v. *Rohan*, 73 N. Y. Supp. 285; *Reeside's Executor* v. *Reeside*, 49 Penn. State, 322; *Ringo* v. *Field*, 6 Ark. 43; *Wood* v. *Blaney*, 107 Cal. 291; *Michigan Carbon Works* v. *Schad*, 49 Hun. 605; *Wallace* v. *Castle*, 14 Hun. 106; *Duguid* v. *Edwards*, 50 Barbour, 288; *G. T. R. R. Company* v. *Edwards*, 56 Barbour, (N. Y.) 408; *Graves* v. *Dudley*, 6 N. Y. Appeals, 76; or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained. *Murphey* v. *Virgin*, 47 Neb. 692; *Donohue* v. *Henry*, 4 Ed. Smith, 162; *Coffin* v. *Anderson*, 4 Blackf. Ind. 395. In *Moody* v. *Keener*, 7 Por. Ala. 2181, it was held that in actions of tort only the same certainty is required as in indictments, that it was not necessary to set out the money verbatim, that the description in a general manner is sufficient. This is in accordance with the decisions of this State. *Stinchfield* v. *Twaddle*, 81 Maine, 273; *Manufacturing Company* v. *Lumber Company*, 96 Maine, 537.

2. The title of the plaintiff. It is contended that the evidence shows that the money belonged to the Equitable Life Assurance Society of the United States. It appears from the evidence that the plaintiff was the manager of this Society in the State of Maine and that the money in question was a premium due to it on one of its life insurance policies. By the contract the defendant was appointed by the plaintiff to canvass for applications and to collect the premiums on all policies obtained by him, and to pay over forthwith to the plaintiff or to the Assurance Society. As between the parties the plaintiff having a special property in the premiums collected was entitled to receive them. This right gave him a remedy against the defendant upon his refusal to pay over the same as directed. *McKenzie* v. *Nevius*, 22 Maine, 138.

3. In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title to money passes by delivery and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe keeping and transmission. An agent unless restricted by the terms of his contract would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover but might be the ground for an action of assumpsit. *Orton* v. *Butler*, 4 Eng. C. L. 224; *Hennequin* v. *Clews*, 111 U. S. 676; Vol. 1, Federal Statutes Annotated, 580-582.

The defendant was the agent of the plaintiff for the collection and paying over not of a single premium of insurance but such as were payable for all policies effected by him in his business of canvassing, and he was entitled to receive as commission a certain percentage of these premiums when paid over. An action of trover by the principal might, under these circumstances, be unjust to the agent by depriving him of his right of set-off and other legal defenses. *Orton* v. *Butler*, supra.

Exceptions overruled.

JOHN W. HAYHURST

vs.

MICHAEL J. MORIN AND J. A. LETOURNEAU, Trustee in Bankruptcy.

Kennebec. Opinion May 8, 1908.

Mortgagor and Mortgagee. Mortgage Contracts. Oral Agreement to Attach new Debt to Mortgage Debt. Same not Enforceable in Action at Law to Foreclose Mortgage. Different Rule Obtains in Bill in Equity by Mortgagor to Redeem.

A mortgagee is entitled to have his mortgage upheld and enforced according to the terms and stipulations of the contract therein specified which the mortgage was originally designed to secure, and no mere change in the form of indebtedness, without actual payment of the debt, is deemed sufficient to entitle the mortgagor to a discharge or release.

In an action at law to foreclose a real estate mortgage, an oral agreement even for a valuable consideration cannot be enforced for the purpose of attaching a new debt to the debt which the mortgage was originally given to secure.

After an actual extinguishment of the debt secured by a real estate mortgage, the mortage cannot be revived by an oral agreement to keep it in force to secure any new and independent debt which can be made the foundation of a conditional judgment in an action at law brought by the mortgagee against the mortgagor to foreclose the mortgage.

If a mortgagor for a new consideration makes an oral agreement that the mortgage shall be continued in force as security for a new loan, and advances have been made by the mortgagee to the mortgagor upon the faith of such agreement, a court of equity in a bill in equity brought by the mortgagor to redeem will refuse to extend its aid to relieve the mortgagor from such valid oral agreement on the principle that he who seeks equity must do equity.

In the case at bar, a writ of entry was brought for the purpose of foreclosing a real estate mortgage given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of a note for $900 given to the plaintiff by the defendant Morin payable at the rate of $200 per year. October 3, 1903, the amount due on the mortgage note was $450. November 9, 1903, the defendant Morin gave a second mortgage of the same premises to one Marshall to secure the payment of $800 excepting in the covenant against incumbrances the first mortgage to the plaintiff and expressly stat-

ing that the amount then due thereon was $450. At the time the action was brought, the note for $800 secured by the second mortgage to Marshall remained unpaid and proceedings for the foreclosure of that mortgage were pending. October 3, 1905, the defendant Morin obtained from the plaintiff a loan of $200 and gave the plaintiff a note therefor payable on demand, and November 6, 1905, the defendant Morin obtained from the plaintiff another loan of $250 for which he gave the plaintiff a note payable in one year. A few days after the last named loan was obtained the plaintiff and the defendant Morin agreed that the last named loans amounting to $450 should be secured by the aforesaid mortgage given by the defendant Morin to the plaintiff October 3, 1899. At the time this agreement was made the plaintiff had actual notice of the second mortgage to Marshall. March 5, 1906, the defendant Morin was adjudicated a bankrupt and thereafterwards the defendant Letourneau was duly appointed and qualified as trustee in bankruptcy of the defendant Morin's estate, and in his capacity as trustee he appeared in defense in the plaintiff's action to represent the interest of the creditors of the defendant Morin. The mortgage given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of the aforesaid note of $900 contained no stipulation respecting any other debt or further advances and it did not appear that at the time the mortgage was given there was any oral agreement in regard to such advances.

Held: (1) That while it is competent in answer to a bill in equity to redeem a mortgage, for the defendant to show that it would be inequitable to allow the plaintiff to do so upon the payment of the amount apparently due thereon when it appears that further advances have in fact been made in pursuance and upon the faith of a valid oral agreement that the mortgage should remain as security for such further advances, yet such oral agreement cannot be set up against a subsequent mortgagee or attaching creditor, nor can it be invoked against the mortgagor himself or his assignee in an action at law brought by the mortgagee to foreclose the mortgage.

(2) That there was no new or valuable consideration for the oral agreement made "a few days" after the new loans of October 3 and November 6, 1903, respectively were made; that such advances did not appear to have been made upon the faith of such oral agreement and that such oral agreement entered into without any new consideration and not in pursuance of any understanding between the parties before the advances were made was not a valid agreement and cannot be enforced against the mortgagor himself in any proceeding at law or in equity.

(3) That the plaintiff was only entitled to judgment as of mortgage for $450 with interest from October 3, 1905.

On agreed statement. Judgment for plaintiff.

Writ of entry brought for the purpose of foreclosing a real estate mortgage given by the defendant Morin to the plaintiff to secure the payment of $900. When this cause came on for hearing at

nisi prius an agreed statement of facts was filed and the case was then reported to the Law Court for that court to render such judgment "as the law and the facts require." The agreed statement of facts is as follows:

"It is agreed that on October 3rd, 1899, said Morin borrowed of said Hayhurst the sum of nine hundred dollars and gave a note secured by the mortgage in this cause covering the land described in the plaintiff's writ; that on different dates between said October 3rd and the third day of October, 1903, payments had been made on said note amounting to the sum of four hundred and fifty dollars as witnessed by the indorsements on said note to be applied to the principle sum of said note; that all interest had been paid up to the last named date; that on November 9th, 1903, said Morin gave to Peter Marshall of Waterville in said county a mortgage on same real estate to secure a note for the sum of $800.00 still unpaid and in said mortgage said Morin reserved and excepted from the covenant against incumbrances a certain mortgage given to John W. Hayhurst 'on which there is now due the sum of four hundred and fifty dollars;' that said Marshall has begun foreclosure proceedings on his said mortgage; that on October 3, 1905, and on November 6th, 1905, said Morin borrowed of said Hayhurst the sum of four hundred and fifty dollars and gave notes therefor, signed by himself and his wife, Alice Morin; that an agreement was made a few days after said last named date that said sum should be secured by the mortgage first given by said Morin; that at the time of said agreement said Marshall's mortgage was not recorded; that interest on all sums due from the said Morin to the said Hayhurst was paid to October 3d, 1905; that said Hayhurst had notice of the mortgage that was given by said Morin to said Marshall; that said Morin was adjudicated a bankrupt on March 5th, 1906, and J. A. Letourneau qualified as trustee of his estate March 25th, 1907, and succeeded a former trustee who had resigned and he now comes into this cause to be heard in his said capacity; that said Hayhurst never had but one mortgage on said real estate."

F. W. Clair, for plaintiff.

Letourneau & Matthieu, for defendants.

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

WHITEHOUSE, J. This is a writ of entry brought for the purpose of foreclosing a mortgage of real estate given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of $900 for which Morin gave a note signed by himself and his wife Alice Morin, payable at the rate of $200 each year. The case is reported to the Law Court upon an agreed statement of facts for the purpose of determining the amount for which the conditional judgment shall be entered.

The facts disclosed by the agreed statement are as follows:

By reason of the payments of principal and interest made on the note prior to October 3, 1903, the amount due at that date on the note which the mortgage was given to secure, was $450. November 9, 1903, the defendant Morin gave to one Marshall a second mortgage to secure the payment of a note for $800 with the following provision in the covenant against incumbrances: "Reserving and excepting a certain mortgage given to John W. Hayhurst on which there is now due the sum of $450;" and it is agreed that Hayhurst never had but one mortgage on the premises. The note for $800 secured by Marshall's mortgage remains unpaid and proceedings for a foreclosure of that mortgage are pending.

October 3, 1905, the defendant Morin obtained from the plaintiff a loan of $200 and gave him a note therefor signed by himself and wife, payable on demand; and November 6, 1905, obtained from the plaintiff another loan of $250 for which he gave a note signed by himself and wife, payable in one year. A few days after the last mentioned loan was obtained, an agreement was made between the parties that these loans of October 3 and November 6, 1905, amounting to $450, should be secured by the mortgage in question of October 3, 1899, first given by Morin to the plaintiff. At the time of this agreement the mortgage of November 9, 1903, from defendant Morin to Marshall had not been recorded, but the plaintiff then had actual notice of that mortgage.

March 5, 1906, the defendant was adjudicated a bankrupt and on the 25th of the same month, J. A. Letourneau was duly qualified as trustee in bankruptcy of Morin's estate, and in that capacity he appeared in defense of this cause to represent the interests of the creditors.

The plaintiff claims that he is entitled to a conditional judgment for a total principal of $900 with interest on the first two notes from October 3, 1905, and on the last two notes from Nov. 6, 1905, to which dates respectively the interest on the notes specified appears to have been paid. But since a judgment for this amount would include the $450 represented by the two loans of Oct. 3 and Nov. 6, 1905, made by the plaintiff after he had notice of the second mortgage given by Morin to Marshall two years before, it is conceded by the plaintiff's attorney that the lien created by the Marshall mortgage must have priority over the lien claimed to have been created by the oral agreement that the last two notes should be secured by the plaintiff's mortgage, and he consents that if a conditional judgment is rendered for the entire $900, that part of it represented by the last two notes above specified may, if possible, be made subject to the prior lien of Marshall as second mortgagee.

The defendant trustee in bankruptcy contends that the judgment should be for $450, and interest from October 3, 1905, that being the balance due on the original note of $900 after deducting the payments of principal and interest made thereon.

It has been seen that the mortgage in question was given by Morin to the plaintiff Oct 3, 1899, to secure a particular debt evidenced by a note of $900. There is no stipulation in the mortgage respecting any other debt or further advances, and it is not claimed that at the time the mortgage was given there was any oral agreement in regard to such debt or advances. The payments of principal and interest made on the note between 1899 and 1903, reduced the amount due on the note to $450. Those payments were all indorsed on the note, and it is not in controversy that the effect of these payments was to extinguish that portion of the particular debt specified in the mortgage. Thereupon, on the 9th of November following, the defendant Morin borrowed $800 of one Marshall and gave

him as security therefor a second mortgage on the same property expressly referring to the plaintiff's mortgage as one upon which there was then due the sum of $450. Two years later Morin negotiates a new loan with the plaintiff for $200, giving a note signed by himself and wife, payable on demand. It is not suggested that any allusion whatever was made to the mortgage at that time or that there was then any understanding that this loan should be secured by the mortgage. A month later, on November 6, 1905, Morin obtained from the plaintiff another loan of $250, giving his note therefor as before and it was not suggested that there was any agreement or understanding at that time that either of these last named notes should be secured by the plaintiff's mortgage. But in the words of the agreed statement "an agreement was made a few days after said last named date (Nov. 6, 1905) that said sum ($450) should be secured by the mortgage first given," although the plaintiff then had knowledge of the second mortgage to Marshall.

The plaintiff is entitled to have his mortgage upheld and enforced according to the terms and stipulations of the contract therein specified which the mortgage was originally designed to secure, and it is unnecessary to cite the authorities which are numerous in support of the proposition that no mere change in the form of the indebtedness, without actual payment of the debt, is deemed sufficient to entitle the mortgagor to a discharge or release. The reasoning in all the cases by which this familiar doctrine is established proceeds upon the assumption that there has never been an actual payment of the indebtedness secured by the mortgage. But it is equally well established that after an actual extinguishment of the debt, the mortgage cannot be revived by an oral agreement to keep it in force to secure any new and independent debt which could be made the foundation of a conditional judgment in an action at law by the mortgagee against the mortgagor to foreclose the mortgage. *Joslyn* v. *Wyman*, 5 Allen, 62; *Stone* v. *Lane*, 10 Allen, 74; *Upton* v. *National Bank*, 120 Mass. 153; *Merrill* v. *Chase*, 3 Allen, 339. In the last named case the court say: "The demandant relies on a parol agreement between the parties that the mortgage should continue as a valid security for future advances. . . . But the

difficulty of supporting such an agreement is this, that a conveyance of land in mortgage is a conveyance by a deed defeasible on a condition subsequent. By the performance of the condition the title of the mortgage is defeated and the mortgagor is in of his former estate." See also Jones on Mortgages, Vol. 1, sect. 357, and cases cited, and Cyc. Vol. 27, page 1073.

It is true that if the mortgagor for a new consideration makes an oral agreement that the mortgage shall be continued in force as security for a new loan, and advances have been made by the mortgagee upon the faith of it, a court of equity in a bill brought by the mortgagor to redeem, will refuse to extend its aid to relieve the mortgagor from such valid oral agreement on the principle that he who seeks equity must do equity. In *Upton* v. *National Bank*, 120 Mass. supra, the court say: "While an indebtedness other than that for which the mortgage is given cannot legally be attached to such mortgage, yet it is competent, in answer to a bill in equity to redeem a mortgage, for the defendant to show that it would be inequitable to allow the plaintiff to do so upon the payment of the amount apparently due thereon, inasmuch as the defendant had for valuable consideration orally agreed that it should not thus be discharged, but should remain as security for other debts." The same equitable doctrine prevailed in *Joslyn* v. *Wyman*, 5 Allen, and *Stone* v. *Lane*, 10 Allen, supra. But in all of these cases the rule of law was clearly stated that such an oral agreement could not be set up against a subsequent mortgagee or attaching creditor; nor could it be invoked against the mortgagor himself or his assignee in an action at law brought by the mortgagee to foreclose the mortgage. See also 27 Cyc. 1179, and *Balch* v. *Chaffee*, 73 Conn. 318, 47 Atl. 327.

In the case at bar, as already stated, the plaintiff concedes that this oral agreement between himself and Morin respecting the loan of Oct. 3 and Nov. 6, 1905, cannot be set up against the second mortgage to Marshall of which the plaintiff had actual notice. The plaintiff admits that as to the $450 represented by those new notes, his mortgage must be held subject to the prior lien of the Marshall mortgage.

But the plaintiff insists that this oral agreement could be set up against the mortgagor himself, the defendant Morin, and since the rights of the defendant Letourneau, the trustee in bankruptcy, cannot be superior to those of Morin, the oral agreement must also be enforced against the trustee. It has been shown, however, by the authorities above cited that in an action at law to foreclose the mortgage, an oral agreement for a valuable consideration cannot be enforced for the purpose of attaching a new debt to that which the mortgage was originally given to secure. But according to the facts stated in the agreement of the parties there is another insuperable objection to the plaintiff's claim. It is distinctly stated that the oral agreement was made some days after the loans were obtained. It does not appear that the advances were made upon the faith of the oral agreement that they should be secured by the mortgage. For aught that appears they were made without any reference whatever to the mortgage. There was no new or valuable consideration for an oral agreement thus made at a different time and on a separate occasion, "a few days" after the advances were made. An oral agreement entered into without consideration under such circumstances, and not made in pursuance of any understanding between the parties before the advances were made, is not a valid agreement, and cannot be enforced against the mortgagor himself in any proceeding at law or in equity.

It is accordingly the opinion of the court that the plaintiff is only entitled to

Judgment as of mortgage for $450 with interest from October 3, 1905.

JOHN H. GOLDEN *vs.* JACOB M. ELLIS et al.

York. Opinion May 11, 1908.

Master and Servant. Assumption of Risk. Nonsuit.

A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands.

The duty of inspection, by an employer, of the appliances used by his employees, does not extend to the small and common tools in every-day use, of the fitness of which the employees using them may reasonably be supposed to be competent to judge.

If a servant continues in the services of his employer after he has knowledge of any unsuitable appliances, in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under such circumstances. Such assumption of the risks of any employment by a servant will bar recovery independently of the principle of contributory negligence.

Although a hammer is made of suitable material and properly tempered, yet it is a matter of common knowledge that when it is used with great force upon other steel implements small chips or scales of steel are liable to break off and fly from one implement or the other.

When the evidence presented by a plaintiff with all the inferences which a jury would be justified in drawing from the same, is insufficient to support a verdict in his favor, so that it would be the duty of the court to set aside such a verdict, if rendered, the presiding Justice is not bound to submit the case to the jury but may properly order a nonsuit.

The plaintiff and a fellow servant were engaged in squaring up a certain stone from which a corner had been broken. The plaintiff was holding a bull-set, a steel implement, along one of the lines marked on the stone. His fellow servant then struck the bull-set with a steel striking hammer and a small piece of steel chipped off one corner of the face of the hammer and flew into the plaintiff's left eye, resulting eventually in the loss of both eyes. The plaintiff was employed by the defendants primarily as a blacksmith to sharpen tools and when not engaged in that capacity he was to work "elsewhere as an all-round" man. His experience as a tool sharpener comprised a period of fifteen years and he had learned from his experience that steel implements were rendered brittle by overheating and overhardening in the process of manufacture or sharpening and that in the use of

such tools, pieces of steel were liable to be broken off and fly from a hammer as well as from other tools. Prior to the accident he had noticed numerous fire cracks or checks on the face of the hammer used by his fellow servant and knew that it had been burned and was brittle and that it was liable to break and chip whenever used, but he never made any complaint in regard to the defective condition of the hammer and never made any request or suggestion that it should not be used in connection with any work that he was required to perform. He had never received from the defendants any request to continue in their service until another and suitable hammer should be supplied or any assurance that any other or different hammers would be used in connection with his work. He was not placed in a position where he was exposed by the nature of his duties to any undisclosed or unknown dangers. The precise condition of the defective hammer was not concealed from him nor the danger of using it unknown to him. *Held:* (1) That as the plaintiff fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of the overhardened hammer in connection with any branch of his work, he must be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the hammer used in connection with the service which he was required to perform. (2) That a nonsuit was properly ordered.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendants, and caused by the alleged negligence of the defendants, and which injuries resulted in the loss of both of the plaintiff's eyes. Plea, the general issue.

Tried at the May term, 1907, Supreme Judicial Court, York County. At the conclusion of the testimony offered by the plaintiff, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case appears in the opinion.

Fred A. Hobbs, and Geo. F. & Leroy Haley, for plaintiff.

Verrill, Hale & Booth, and Cleaves, Waterhouse & Emery, for defendants.

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

WHITEHOUSE, J. This case comes to the Law Court on exceptions to the ruling of the presiding Justice ordering a nonsuit on the plaintiff's testimony.

In the fall of 1905, the defendants were engaged in building a stone bridge across the Mousam river at Kennebunk in pursuance of a contract with the Boston and Maine Railroad. The plaintiff was employed to work for the defendants primarily as a blacksmith to sharpen tools, and when not engaged in that capacity, he was to work "elsewhere as an all-round man." On the morning of October 2, among the "all round" duties imposed upon him, he was directed by the foreman to "square up" a certain stone from which a corner had been broken. After lining off the face of the stone with a "redwood and square," the plaintiff undertook to break off and cut the edges of a stone up to the lines marked upon it, by means of a bull-set and a large striking hammer. The bull-set is a steel implement five or six inches long. One end of it corresponding to the peen of a mason's hammer, is $\frac{3}{4}$ of an inch thick and suitably shaped and tempered for breaking stone. The other end, the head of the set, is left with the steel as manufactured without hardening. When duly equipped with a wooden handle, this bull-set bears a general resemblance to a hammer. The large striking hammer was a piece of steel with a head about two inches square, the corners being chamfered so as to give it an octagonal shape. The face of it was flat and showed the fine checks or fire cracks caused by overheating in the process of manufacture. There was only one other large striking hammer used on the job.

The plaintiff was holding the bull-set along one of the lines marked on the stone, and a fellow servant called for that purpose undertook to wield the striking hammer. A light blow was first struck on the head of the bull-set for the purpose of gauging the distance, and when the second blow was struck, a small piece of steel chipped off of one corner of the face of the hammer and flew into the plaintiff's left eye, resulting eventually in the loss of the sight of both eyes.

It is alleged that the striking hammer used on that occasion was defective and unsafe, and this action was brought by the plaintiff to recover damages for the injury suffered by him on account of the alleged failure of duty on the part of the defendants in not providing suitable tools to be used in connection with the service required of him.

The plaintiff was 46 years of age. He had worked as a stone mason for twenty-five years, and his experience as a tool sharpener comprised a period of fifteen years. He had learned from his experience as a blacksmith that steel implements were rendered brittle by overheating and overhardening in the process of manufacture or sharpening and that in the use of such tools, pieces of steel were liable to be broken off and fly from the hammer as well as from other tools. A week or ten days before the accident, he put a new handle into this defective hammer, and he states in his testimony that he noticed the fire cracks or checks on the face of it, and knew that it had been burned and was brittle, and that it was liable to break and chip whenever it was used. The plaintiff knew that the other striking hammer in use had a round face, while this one it has been seen had a square face, the corners being slightly chamfered. When the fellow servant came up to do the striking, the plaintiff admits that he neither inquired nor looked to see whether the hammer in his hands was the round faced one, or the square faced one with the fire cracks on it. He knew that it must be one or the other, but even when the striker gently laid it upon the head of the bull-set, held by the plaintiff, for the purpose of "getting the distance," the plaintiff did not look to see which one it was. He states in his testimony, it is true, that he supposed it was the good hammer, that the striker was using, but he gives no reason for this assumption. For aught that appears, it was as likely to be the defective hammer as the good one. He testifies that after that piece of steel had gone into his eye, at a time when he must have been suffering severe pain, he "noticed that it was the flat faced hammer with the cracks on it." But he admits, that he afterward said to some one at the hospital that he "couldn't tell until he saw it" whether the piece of steel that flew into his eye came from the hammer or the bull-set.

With respect to the defendant's knowledge of the defective condition of the hammer, the plaintiff testifies that on one occasion when the workmen "were all sitting around eating their dinner, somebody spoke about this hammer being in bad condition, the face of it being cracked, and the foreman said it was a new hammer

when they started the job." There is no evidence that the plaintiff himself ever gave the defendants or their representative in charge of the work, any information or made any complaint in regard to the defective condition of the hammer, or that he ever made any request or suggestion that it should not be used in connection with any work that he was required to perform. It does not appear that he ever received from them any request to continue in this service until another and a suitable hammer should be supplied in place of the one alleged to be defective, nor any assurance whatever that any other or different hammers would be used in connection with the service required of him. According to the testimony, the plaintiff himself appears to have had more precise and definite knowledge in regard to the alleged defects in the hammer in question than any representative of the defendants. He states that he could plainly see "somewhere in the neighborhood of a hundred" fire checks or cracks on the face of this hammer. He was a man of mature years and a workman of large experience both as a stone mason and as a blacksmith in sharpening tools. He knew that such fire cracks indicated overhardening and brittleness and that when a heavy blow is struck with such a hammer upon other steel implements, chips of steel are liable to fly from it. Even if a hammer is made of suitable material and properly tempered, it is a matter of common knowledge that when it is used with great force upon other steel implements, small chips or scales of steel are liable to break off and fly from one implement or the other. In *Hopkinson Bridge Co.* v. *Burnett*, 85 Texas, 16, cited in Thompson on Negligence, Vol. 4, sect. 4613, the "flying" or "chipping" of these scales or splinters of steel from hammers sufficiently hardened to be used in striking against steel, was held to be one of the ordinary risks incident to the employment.

But in considering the exceptions to the ordering of a nonsuit, full probative force must be given to all of the plaintiff's testimony. It is accordingly assumed that the plaintiff's grevious injury was caused by a small piece of steel which was splintered off from a defective hammer used in a proper manner by a fellow servant.

It has been seen that the plaintiff was not placed in a position where he was exposed by the nature of his duties to any undisclosed

or unknown dangers. The precise condition of the defective hammer was not concealed from him, nor the danger of using it unknown to him. The implement had been in his own hands within ten days prior to the accident, while he was fitting a new handle to it, and he admits that he then discovered those fire checks upon the face of it, which to his experienced eye were an infallible indication that the steel had been rendered brittle by overheating in the process of manufacture. The conclusion is therefore irresistible that he fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of an overhardened hammer in connection with any branch of his work. Under the circumstances of this case upon a well settled and familiar principle of law, he must therefore be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the implement used in connection with the service which he was required to perform.

This rule of law has been forcibly illustrated and fully considered in many of the recent decisions of this court. In *Conley* v. *Express Co.*, 87 Maine, 352, it is said in the opinion on page 356: "It is now settled law in this state that if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances, in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances. Such an assumption of the risks of an employment by a servant will bar recovery independently of the principle of contributory negligence." See also *Cunningham* v. *Iron Works*, 92 Maine, 501; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400; *Welch v. Bath Iron Works*, 98 Maine, 361.

In Thompson on Negligence, Vol. 4, sections 4707 and 4708, the author says: "It is a part of this doctrine that the servant assumes the risks of known defects in machinery, tools, appliances,

etc., or of improper appliances furnished for the performance of a particular task, or where no proper appliance is furnished, although the defect or danger results from the negligence of the master."

"A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood. It is a part of this doctrine that the duty of inspection, by an employer, of the appliances used by his employees, does not extend to the small and common tools in every-day use, of the fitness of which the employees using them may reasonably be supposed to be competent judges."

It is accordingly the opinion of the court that the nonsuit was properly ordered. The evidence presented by the plaintiff with all the inferences which the jury could justifiably have drawn from it, was insufficient to support a verdict in his favor, so that it would have been the duty of the court to set aside such a verdict if it had been rendered. Under such circumstances, it is the established rule of procedure in this State that the court is not bound to submit the case to a jury, but may properly order a nonsuit. This rule of practice is too well settled to require the citation of authorities in support of it.

Exceptions overruled.

ALBERT A. YOUNG *vs.* JAMES E. CHANDLER.

Cumberland. Opinion June 3, 1908.

Verdict. Instructions. Same Sustained.

When, on a motion to have a verdict set aside, it appears that the issues were peculiarly within the province of the jury and the evidence shows no sufficient basis for interfering with the conclusions of the jury, the verdict will not be disturbed.

When by a former decision under the evidence then presented, it has been determined that the title to certain property is in the defendant and not in the plaintiff, then in a second trial of the same action, involving in part such property, if there is nothing in the evidence at the second trial to change the legal aspect of such title, it is proper for the presiding Justice to instruct the jury to leave such property entirely out of consideration.

When in an action of tort it is apparent that the jury were not misled by the instructions of the presiding Justice in reaching the conclusion that certain articles of personal property belonging to the plaintiff, were intentionally abandoned by the plaintiff, and that the defendant was not chargeable with any violent act of dominion over them, exceptions to the instructions will be overruled.

When a verdict is for the defendant, it must be assumed that the jury were not influenced by any instruction given by the presiding Justice relating to the measure of damages.

On motion and exceptions by plaintiff. Overruled.

Action of trespass with a count in trover, brought in the Superior Court, Cumberland County. This case was formerly tried at the February term, 1906, of said Superior Court, and at the conclusion of the plaintiff's testimony the presiding Justice ordered a verdict for the defendant and the plaintiff excepted. The Law Court sustained the exceptions, set the verdict aside, and ordered a new trial. The case is reported in 102 Maine, 251. The case was again tried at the April term, 1907, of said Superior Court. Plea, the general issue as in the former trial. Verdict for defendant. The plaintiff then filed a general motion to have the verdict set aside and also during the trial excepted to certain instructions given to the jury by the presiding Justice. Certain of the exceptions were not considered by the Law Court.

The material facts appear in the opinion and in *Young* v. *Chandler*, 102 Maine, 251.

Dennis Meaher, for plaintiff.

L. L. Hight and H. P. Sweetser, for defendant.

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

PEABODY, J. This was an action of trespass with a count also in trover, the writ being the same as in *Young* v. *Chandler*, 102 Maine, 251.

Upon trial of the cause before a jury the verdict was for the defendant.

The case is before the court on motion by the plaintiff for a new trial, and on exceptions to the charge of the presiding Justice.

The motion for a new trial would seem to have no sufficient basis since the issues were peculiarly within the province of the jury.

In the decision of the court above referred to, it was held that the greenhouse had become a part of the mortgage security and by foreclosure the defendant became the owner by accession as there was no evidence of his consent that the greenhouse should remain personal property after annexation. There being nothing in the evidence at the second trial to change the legal aspect of this title, the presiding Justice properly charged the jury that in view of this decision they were to leave the greenhouse entirely out of consideration. The plaintiff's first exception was to that portion of the charge and cannot be sustained.

It only remains to ascertain whether the plaintiff presents by his other exceptions any error in the charge of the presiding Justice which may have prejudicially influenced the jury in their verdict.

The second exception is to that part of the charge which relates to the abandonment of certain of the property described in the writ. The evidence tended to show that while the plaintiff was removing portions of the greenhouse from the defendant's premises the defendant ordered him to desist, making some reference to an official badge which he wore at the time but with no attempt to use actual

force. There is some doubt whether the act of the defendant had particular reference to the day, which was Sunday, or to the particular property which the plaintiff was removing at the time, or whether it was a general prohibition against removing any of the property to which the plaintiff claimed title, but it appears that the plaintiff actually made no further attempt to remove either the remaining portions of the greenhouse or any of the compost, plants, etc., specified in the writ.

The presiding Justice instructed the jury that "the law requires men to use a reasonable amount of diligence and firmness in asserting rights to their property. They cannot, on the simple say-so of some one else, relinquish their personal property and allow that property to go to waste and ruin." . . . . . "Unless his action at that time was that of an ordinarily and reasonably prudent man, a man of ordinary courage and spirit in the assertion of property rights, he could not abandon his property under those circumstances and the property be allowed to go to decay and then recover the value of it."

The presiding Justice further said:

"Of course if the circumstances were such that he foresaw that a personal collision, a personal encounter would result, he would then be justified in abandoning the property because no man is required to break the law in order to enforce the law."

It is apparent, therefore, that the jury were not misled by these instructions in reaching the conclusion that the compost and a few of the plants and other chattels which clearly belonged to the plaintiff were intentionally abandoned by him, and that the defendant was not chargeable with any violent act of dominion over them. This applies to a very small part of the property upon which the plaintiff founds his action, since it has been already determined that the greenhouse belonged to the defendant, and uncontradicted evidence in the case tended to show that the greater part of the plants remaining on the premises had been given to the defendant's wife by the prior owner and so were not included in the property sold by him to the plaintiff.

In an action of trespass as well as an action of trover the wrongful act of the defendant constitutes the gist of the action. A verdict for the defendant therefore determines that he did not commit the acts complained of, and it must be assumed that the jury were not influenced by any instruction relating to the measure of damages.

The third, fourth, fifth and sixth exceptions relate to damages and need not, therefore, be considered, since the jury did not reach that question.

Motion overruled.
Exceptions overruled.

JOHN CHAPLIN *vs.* AMOS F. GERALD et als.

Sagadahoc. Opinion June 29, 1908.

Written Contracts. Oral Contract as Collateral to Written Contract. Clear and Convincing Evidence Required to Establish such Oral Contract. Written Contract not to be Varied by Oral Evidence, When.

When a plaintiff attempts to establish an oral agreement as collateral to a written one, the scales of proof at the start are materially borne down against the plaintiff by the presumption that the written contract contains the whole agreement, and the plaintiff should be required to adduce clear, strong and convincing evidence to outweigh such presumption, otherwise the stability of written contracts will be impaired and resulting confidence therein destroyed.

July 23, 1902, the plaintiff lost his right foot in a collision between two cars on the defendants' street railway, one of which he was operating as a motorman. He did not bring any action to recover damages for his injuries. Also the defendants denied all liability in the matter. February 9, 1903, the plaintiff received and accepted from the defendants the sum of $1000 and at the same time an instrument under seal and of the following tenor was executed in duplicate:

"In consideration of the sum of one thousand dollars ($1,000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns, do hereby release Amos F. Gerald, E. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland & Brunswick Street Railway, from any claim by me of any name or nature in the past or at

the present time, or that may arise in the future: by reason of the accident occurring during the summer of 1902, at or near Mallet's Gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment, Amos F. Gerald, for the associates, Cyrus W. Davis, Treasurer Portland & Brunswick Street Railway, for the Portland and Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed, that the above settlement shall be final and conclusive, made in duplicate this ninth day of February A. D. 1903." This instrument was duly signed by the defendants, Gerald and the Portland & Brunswick Street Railway, and also by the plaintiff. The plaintiff claimed that at the time the aforesaid instrument was executed the defendants orally agreed in addition to the $1000, named in the aforesaid instrument as the consideration therefor, to furnish him employment at $65 per month so long as he could work and that afterwards having entered the employ of the defendants he continued to work for them until March 2, 1904, when he was wrongfully discharged. The plaintiff then brought an action of assumpsit to recover damages for breach of the alleged oral contract. The defendants denied that any such oral contract was made. The jury returned a verdict for the plaintiff for $6944.19.

Held: (1) That to establish by parol evidence such an extraordinary agreement, as a part of the consideration for the aforesaid written release, wherein it was stipulated to be given in consideration of the sum of $1000, the proof must rise above the mere conflict of testimony and become clear, convincing and conclusive.

(2) That the unsupported testimony of the plaintiff, resting only upon his memory of a conversation that occurred four years before the trial, was not such clear, convincing and conclusive proof as should be required to establish a contract so indefinite in its term of duration and so unreasonable and improbable, as that upon which the plaintiff's action was founded.

(3) That the finding of the jury that such a contract was made was so manifestly against the weight of evidence that it ought not to stand.

Although in the case at bar no exception was taken to the admission of the testimony of the plaintiff that the defendants agreed, in addition to the $1000 expressed in the release as the consideration therefor, to furnish him employment so long as he should be able to work, and consequently the question of the admissibility of such testimony was not directly raised, yet the court is of the opinion that the plaintiff's testimony was subject to the general rule that oral evidence will not be received to add to or vary the terms of a written contract which is complete on its face and appears to embrace an entire contract between the parties, and that the plaintiff's testimony was not competent.

On motion by defendants. Sustained.

Action of assumpsit to recover damages for breach of an alleged oral contract to furnish the plaintiff employment at $65.00 per

month so long as he could work. The action was against "Amos F. Gerald, E. J. Lawrence and S. A. Nye and A. B. Page, all of Fairfield, in the County of Somerset and State of Maine, Cyrus W. Davis and Henry M. Soule, all of Waterville, in the County of Kennebec and said State, Associates, and the Portland and Brunswick Street Railway, a corporation created by law and having its office at Waterville, in the County of Kennebec and said State of Maine." Writ dated September 9, 1905. Ad damnum $10,000. Plea, the general issue with brief statement alleging "that the contract declared on was not in writing and no memorandum thereof was signed by the defendants to this suit or either of them."

Tried at the April term, 1907, Supreme Judicial Court, Sagadahoc County. Verdict for plaintiff for $6944.19. The defendants then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Foster & Foster, and C. E. Sawyer, for plaintiff.

Edward W. Wheeler, and Wm. H. Newell, for defendants.

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

KING, J. This cause is before the court on defendants' motion to set aside a verdict against them of $6944.19 rendered in an action of assumpsit for breach of an alleged oral contract to furnish the plaintiff employment at sixty-five dollars per month so long as he could work.

July 23rd, 1902, the plaintiff sustained the loss of his right foot in a collision between two cars on the defendants' railway one of which he was operating as motorman. No action for damages was brought for his injuries, but on the 9th of February 1903, he met the defendants in Waterville at the office of Mr. Davis, where he received from them $1000, and the following contract or agreement was executed in duplicate:

"In consideration of the sum of one thousand dollars ($1000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns

do hereby release Amos F. Gerald, E. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland & Brunswick Street Railway, from any claim by me of any name or nature in the past or at the present time, or that may arise in the future: by reason of the accident occurring on the line of the Portland & Brunswick Street Railway during the summer of 1902, at or near Mallet's Gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment Amos F. Gerald, for the associates, Cryus W. Davis, Treasurer, Portland & Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed that the above settlement shall be final and conclusive. Made in duplicate this ninth day of February A. D. 1903.

A. F. GERALD (Seal)
PORTLAND & BRUNSWICK STREET RAILWAY
by Cyrus W. Davis (Seal)
JOHN CHAPLIN (Seal) "

In his action the plaintiff alleges that at the time the above release was executed the defendants "promised him that if he would sign a certain acknowledgment of satisfaction, and accept the sum of one thousand dollars in money, they, on their part, would pay him one thousand dollars and give him employment at sixty-five dollars per month as long as he could work:" that afterwards he did "enter the employ of the defendants at their car barn and power house at Freeport, Maine, and continued in their employ in a faithful attempt to perform his duties for them until the second day of March 1904," when he was wrongfully dismissed. The writ is dated September 9, 1905.

The defendants contended that no such oral agreement was made, that the plaintiff became so inefficient, remiss and negligent in his work that his discharge was justifiable, but that in fact he secured a position elsewhere and left their employ without being discharged.

The testimony of the plaintiff in support of the alleged oral agreement is contained in his answer to the following question:

Q. Now, what other consideration other than that contained in the writing, was offered you at that time?

A. Mr. Davis had a clerk read that paper to me and then passed it to me and asked me if I would sign it. I says, "I don't hardly think I can. It don't look to me as if there was anything after the bills were paid." He says, "Look here, we are going to employ you; we are going to make a further agreement from that paper and give you a chance to work in the Freeport car-barn and give you $65 a month, same as you were getting when you were hurt, and give you employment as long as you are able to do any work." "Furthermore," he says, "there will be no time, if we should sell out the Brunswick and Portland Railroad, there will be no time but some one of us men are doing business and we will see you have a job." "If you are going to use me that way it is all right;" I says "I don't think I should sign that paper for $1,000 unless I have a writing for my continuing labor." They says, "You don't mean to doubt our word, do you?" I says, "No sir; if you say you will honestly and justly give me $65 a month as long as I am able to work to earn my living, I will sign the paper." Mr. Page says, "We will certainly do that, Jack, just as we say we will."

No exception was taken to the admission of this testimony. The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies, we think, to such a release as the one above quoted.

The only exception to the rule is found where from an inspection of the instrument it appears to be incomplete and not to embrace the entire contract. In such case resort may be had to oral testimony to supplement but not to vary or contradict the written instrument.

The instrument in the case at bar is not incomplete but comprehensive and appears to embrace an entire contract between the parties. It is not merely a receipt for money, which may be explained by parol; on the contrary, it is a formal release witnessing in plain and explicit terms an agreement discharging the defendants from all liability to the plaintiff for the injury he had received and which was

to "be final and conclusive." The testimony of the plaintiff that the defendants agreed in addition to the $1000, expressed as the consideration for the release, to furnish him employment as long as he should be able to work is, we think, inconsistent with and tends to vary and contradict the written instrument.

Myron v. *Union Railroad Co.*, 19 R. I. 125; *White* v. *Richmond & D. R. Co.*, 110 N. C. 456 (15 S. E. R. 197); *Horn* v. *Miller*, 142 Pa. St. 557; *The Cayuga*, 95 Fed. R. 483; *James* v. *Bligh*, 11 Allen, 4; *Goss* v. *Ellison*, 136 Mass. 503.

The above authorities are cited not merely in support of the general rule but as showing its applicability to the case at bar.

However, in view of the fact that the question of the competency of this testimony is not presented by exceptions, and upon which counsel have not been heard, we pass to a consideration of the motion for a new trial upon the evidence as presented to the jury.

It is of the utmost importance, we think, in passing judgment upon conflicting testimony in cases where an attempt is being made to establish an oral agreement as collateral to a written one not to forget the old and salutary rule that when parties reduce their contract to writing the law presumes that the writing contains the whole agreement.

In such cases the scales of proof at the start are materially borne down against the plaintiff by that presumption. He should, therefore, be required to adduce clear, strong and convincing evidence to outweigh it, otherwise the stability of written contracts will be impaired and resulting confidence therein destroyed.

The oral agreement, as claimed to have been made at the meeting in Waterville, is most extraordinary. The defendants did not admit liability on account of the accident to the plaintiff. The $1000 paid over to the plaintiff by the defendants was made up of the amount of the plaintiff's lost time between the time of the accident and February 9, 1903, at full wages, his expenses for medical attendance, nursing, etc. But, notwithstanding a denial of liability on the part of the defendants, and the payment of the $1000, the plaintiff claims that the defendants further agreed to furnish employment for him so long as he should be able to work.

The full import and meaning of the alleged oral agreement is now clearly manifested by what has since transpired as the result of it. The services of the plaintiff while in the defendants' employment after Feb. 9th, 1903, were unsatisfactory, at least, and the cause of much annoyance to them. The cessation of those services has produced litigation resulting in this verdict of $6944.19 as damages for the alleged breach of that oral agreement.

To establish by parol evidence such an extraordinary agreement, as part of the consideration for a written release, wherein it is stipulated to be given in consideration of the sum of one thousand dollars, the proof "must rise above the mere conflict of testimony and become clear, convincing and conclusive." *Liberty* v. *Haines*, 103 Maine, 182.

All the individual defendants, except Henry M. Soule, viz: Amos F. Gerald, E. J. Lawrence, S. A. Nye, A. B. Page, and Cyrus W. Davis were present at the Waterville conference of Feb. 9th, 1903, and J. W. Amick, a director of the railway company, was also present.

Page, Gerald and Amick were witnesses at the trial; Lawrence and Nye were sick, and Davis was in New York. Each of these witnesses in defense testified that no such oral agreement was made. We deem it useful to quote in part some of their testimony.

Mr. Page testified:

Q. Who suggested the basis of settlement between you and your associates and Mr. Chaplin, at this conference at Waterville on February 9, 1903? A. Mr. Chaplin. Q. Will you explain to the jury exactly what his proposition of settlement was made at that time? A. In a general way, he said his medicine cost so much, his doctor's bills were so much, he had been out of employment so long, and he ought to have a thousand dollars. Q. Did he at that time name any other sum? A. No. Q. Was his proposition accepted by you and your associates? A. It was. Q. Did you or any of your associates that were present at that conference tell Mr. Chaplin whether or not you recognized any liabilities from his injuries? A. We did. Q. What did you say to him? A. We told him we didn't consider we were in any way liable for

the accident. Q. Was any promise, or agreement made by you, or your associates, as a consideration of Mr. Chaplin's signing this written contract or release, except the consideration of one thousand dollars, stated in the paper? A. None whatever. Q. Was any promise made by you, or your associates, that Mr. Chaplin should have employment by you? A. None whatever, except in a general way. Q. Was anything said about his having wages at $65 a month? A. I think not. Q. Or that he should have employment as long as he was able to work? A. It never was mentioned. . . . Q. Did Mr. Chaplin request you and your associates to agree with him that he should have employment? A. Yes sir, he asked us. Q. Did he ask that as a condition of his signing this agreement? A. He wanted it inserted in the agreement. Q. What answer was made to him? A. We refused to do it. Q. Did you give him any reason why you declined to do it? A. I think Mr. Gerald cited something about it where he had some trouble once. Q. What further was said about including that in the written agreement? A. I don't remember, but he flatly refused to do it. . . . Q. Will you state to the jury the entire conversation relating to Mr. Chaplin's employment by you and your associates. A. At that time? Q. Yes sir. A. He asked, as I remember it, if he could have a job in the car-barn, and it was assented to. I think Mr. Gerald made the remark, if I remember right, that he had a job there which we could probably give him if he could attend to it, and was satisfactory. Q. Were any wages stated? A. Nothing. Q. Or the time of the employment? A. It was not mentioned.

Amos F. Gerald also testified:

Q. Was there any other promise or agreement made by you and your associates with Mr. Chaplin as a condition, or consideration, of his signing this paper marked "Plff's Ex. A," except the consideration stated in the instrument itself? A. Nothing whatever. Q. Was this paper written before or after Mr. Chaplin met the directors and associates in Mr. Davis's office? A. It was written, the whole of it, after he had been there and had discussed the amount of his bill and what he wanted, and had had a general conversation

in regard to the amount. Q. Did Mr. Chaplin ask that you and your associates would provide him with employment? A. Yes sir. Q. Did he ask that that promise be made to cover his employment as long as he was able to work? A. Yes sir, I think so. Q. Without any wages stipulated that he was to receive? A. No sir. Q. Did you consent to making such an agreement with Mr. Chaplin? A. No sir. Q. Was any such agreement made? A. No sir. Q. What reply did you make to Mr. Chaplin when he requested you to make such a promise? A. If permitted I would like to give an illustration.

COURT. Just the conversation, what was said and done.

Q. State the entire conversation so far as you can recollect it. A. I told him that we had had trouble enough in hiring men for a given length of time without any other condition connected with it, and I says we will never do it again for even a very short time. We hired a man in Bath, at the Bath car-barn, as a painter. I hired him myself at a thousand dollars a year. He was to take charge of the painting in the car-barn. The man's name was Mr. Dale. After he had been there a short time he took the notion in his head to paint the cars in another color, and any designs he saw fit, and he told me one day it was none of my business how he painted the cars. He was boss of those cars and he told the men afterwards that I couldn't discharge him because he had been hired for a year. I undertook to discharge him and he stayed a day or two longer, but the next time I went out he went out and didn't come back, and he commenced a lawsuit for a year's time, and I gave that as a reason for not doing it. Q. At that time did Mr. Chaplin request you to insert such provision as that in the written agreement for settlement? A. Yes sir. Q. And what answer did you make? A. I emphatically refused it, that is the reason I made the illustration.

Mr. Amick also testified that no such oral agreement was made.

Against the testimony of these three witnesses is the plaintiff's uncorroborated statement, unless, perhaps, the circumstance that he went to work in the car-barn soon after Feb. 9th, 1903, and the letters from Mr. Gerald, the general manager, in answer to his,

may have some tendency to support his position. But the fact that the plaintiff went to work in the car-barn is not inconsistent with the defendants' contention about his subsequent employment, and for that reason can have no material probative weight in support of his testimony.

Neither do the letters of Mr. Gerald recognize any agreement to furnish the plaintiff employment, but rather the contrary is indicated therein. In his letter of March 1, 1904, Mr. Gerald says in part: "I always put all the power of hiring and discharging men in the Supers hands and never do it myself for they are responsible for their helps labors. I have written Mr. Strout to act as he thinks best about letting you go. And I think by his letter that he will do so."

It is unnecessary, were it possible within reasonable limits, to analyze all the testimony in the record and point out that which militates against the plaintiff's contention. It is worthy of note, however, that the plaintiff asserts with emphasis that no check for the $1000, was made to him, and even when shown the cancelled check with his name endorsed upon it he denied the signature with an imputation that it was a forgery. The significance of this testimony is not merely that it is manifestly untrue, but rather that it demonstrates the unreliability of his memory, and its apparent lack of capacity of being readily refreshed.

The Waterville conference was had more than four years before the trial—a long period through which to carry the exact words of a conversation, such as the plaintiff attempts to reproduce in his testimony.

A slight change in the words of that conversation as reproduced would account for the difference between the contentions of the parties. The defendants admit that they assented, but without any reference to the release and entirely independent of it, to the plaintiff's request for a place to work provided he was able to attend to it and was satisfactory; his contention is that they promised him, as a part of the consideration for the release, to furnish him employment so long as he should be able to work.

The former contention is natural, reasonable, and consistent with the situation of the parties at the time; the latter, however, is improbable, unnatural, and irreconcilable with the circumstances and conditions of the defendants.

The unsupported testimony of the plaintiff, resting only upon his memory of a conversation that occurred four years previous, is not such clear, convincing and conclusive proof as should be required to establish a contract so indefinite in its term of duration, and so unreasonable and improbable, as that upon which the plaintiff's action is founded.

And when against that unsupported testimony is placed the positive statements of the three witnesses for the defense that no such oral agreement was made by the defendants, together with the weight of that written release in which the plaintiff himself declares that the settlement therein recited "shall be final and conclusive," the conclusion is irresistible that the finding by the jury that such contract was made is so manifestly against the weight of the evidence as shown by the record that it ought not to stand.

Accordingly the entry must be,

Motion sustained.
New trial granted.

LOUISE M. GETCHELL *vs.* ELBRIDGE A. ATHERTON.

Penobscot. Opinion July 8, 1908.

Deed. Description. Ambiguity.

1. When upon applying to the surface of the earth the language used in a deed to describe the land conveyed, an ambiguity in the language is revealed, the court, in order to determine the ambiguity, may receive and consider evidence of the situation and the circumstances and of the acts of the parties previous and subsequent to the conveyance.
2. The owner of a double tenement conveyed one tenement by a deed describing it as "the northerly tenement," and describing the dividing line as "running a westerly course by the partitions as they now stand, etc." At the westerly end of the building were two partitions, both running westerly and enclosing between them a small yard. *Held:* That a latent ambiguity was revealed as to which of these two partitions was the one intended by the parties to the deed.
3. It appeared from the evidence that the small yard could be entered only from the southern tenement, that it had been used before and after the conveyance almost exclusively by the tenants of the southern tenement as a part of that tenement, and that the southern tenement could have no other yard, while the northern tenement had ample room for a yard. *Held:* That in the conveyance of the northern tenement the parties intended the northern of the two partitions and that the yard south of it was not conveyed.

On report. Judgment for plaintiff.

Trespass quare clausum fregit. Writ dated September 10, 1907. The declaration in the plaintiff's writ was as follows:

"In a plea of trespass, for that the said defendant, at said Bangor, on the first day of August, A. D. 1907, with force and arms broke and entered the plaintiff's close in said Bangor, and then and there dug up and subverted the soil and earth, and then and there caused to be put, placed and erected a wooden building in and upon the said close, and kept and continued the said wooden building so there put, placed and erected, without the leave or license and against the will of the said plaintiff, for a long space of time to wit, from the said first day of August, A. D. 1907, hitherto; and thereby and therewith, during all the time aforesaid, greatly

incumbered the said close, and hindered the said plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as she might and otherwise would have done. And other wrongs to the said plaintiff the said defendant then and there did, against the peace of the State, and to the damage of said plaintiff (as she says) the sum of three hundred dollars."

Plea, the general issue, with brief statement "That the premises described in the writ and declaration of the plaintiff are not the property of the said plaintiff, but is now and was at the date of the plaintiff's writ and prior thereto the property and freehold of the said defendant; and the defendant says that he is not guilty of the acts of trespass complained of in said writ and declaration of the plaintiff."

Tried at the January term, 1908, Supreme Judicial Court, Penobscot County. At the conclusion of the evidence, the case was reported to the Law Court "for determination upon so much of the evidence as would be legally admissible. If judgment be for the plaintiff, damages to be awarded to be ten dollars and costs."

All the material facts are stated in the opinion.

A. J. Merrill, for plaintiff.

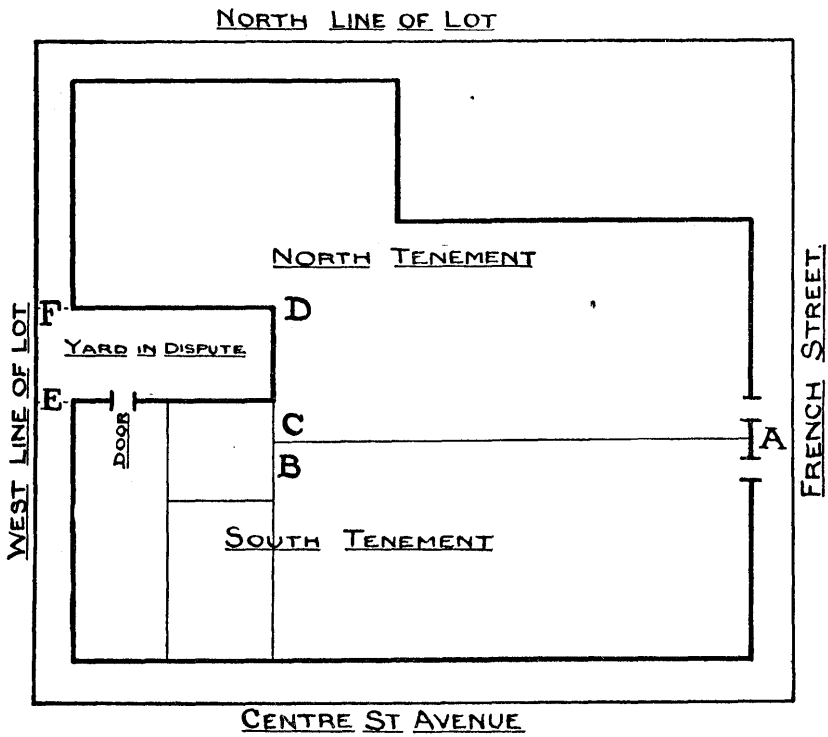
P. H. Gillin, for defendant.

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

EMERY, C. J. The question is which party has title to a small open space or yard, 12 x 21 feet in extent, in the rear of a double tenement house in Bangor bounded on the east by French street. The title to the whole house and lot including both tenements was in the same person from 1870 to Dec. 30, 1890, though the occupants of the different tenements were different persons. In 1890, Dec. 30, the owner of the whole property divided it by granting the northerly tenement with the following description. "Beginning at a point on the west line of French Street between the front doors and running a westerly course by the partitions as they now stand to the west line of land described in a deed recorded in the Penobscot

Registry of Deeds, Vol. 386, Page 379. Meaning to convey the land north of the partitions, being the northerly tenement, and as a part of the consideration the partitions are to remain as they now are between said tenements." The defendant's title to the northerly tenement is derived from this deed while the plaintiff owns the southerly tenement and the question is thus narrowed to this, viz: Is the small yard in the rear included in the description in the deed?

In applying this description to the premises as they were at the date of the deed we find they were as indicated upon the plan here sketched from the surveyor's plan in the case, though not to scale.



The parties agree that the division line in the deed starts from the point A, between the doors on French street and runs west by the main partition to the point, B, where it meets a north and south

partition and then runs north by that partition to the point C. The defendant contends that from the point C the line runs west again by the partition C E. This would include the yard in the deed of the northerly tenement owned by him. The plaintiff contends that the line from the point C continues to run north by the partition C D, and then west again by the partition D F. This would leave the yard attached to the southern tenement owned by her.

A latent ambiguity is disclosed. There were two partitions in the back part of the tenements with the yard between. The language of the deed does not in terms distinguish between them. It does not specify the dividing partition as north or south partition, nor as first or second partition, nor in any other way. It uses the plural, "partitions." We are thus compelled to resort, as we may lawfully do, to evidence of the whole situation and surroundings and as to the use or non use of the yard by the occupants of each tenement before and after the division of the title, in order to ascertain, if possible, which of the two partitions is to be taken as that referred to in the deed.

In the southern partition was and is a door opening into the yard from the southern tenement while there was and is no door from the northern tenement into the yard. The yard was regularly and without interruption used by the occupants of the southern tenement as a part of that tenement both before and after the division of the title in 1890 until after the defendant took possession of the northern tenement in 1899. The yard was used by the occupants of the northern tenement only for putting on and taking off outside windows on that side of their house, except an isolated instance when some beans were planted in it next to the wall of the northern tenement. Further it appears that the southern tenement of the house is so near the lot lines, only eight feet distant, that it has no other room for yard purposes, while there appears to have been ample room for yard purposes north of the north tenement next to French street.

From these proven facts we think it clear that the parties to the division deed of Dec. 30, 1890, and their successors in title down

to the defendant in 1899 understood the yard to be a part of the southern tenement, and that the northern partition, excluding the yard from the grant of the northern tenement and leaving it a part of the southern tenement, was the partition referred to and named in the deed as the dividing partition at that place.

It is true that in case of doubts in grants the presumption is against the grantor, but that presumption can be overcome by other proper considerations and we think it is in this case.

The defendant urges that when he purchased the northern tenement he was assured by the real estate agent that the yard went with the northern tenement and that he purchased with that understanding, but of course that was merely the opinion of the agent and is not to be considered.

It follows that the title to the yard is in the plaintiff and according to the stipulation of the parties, judgment must be for the plaintiff with damages assessed at ten dollars.

So ordered.

BRADLEY LAND AND LUMBER COMPANY et als.

vs.

EASTERN MANUFACTURING COMPANY.

Penobscot. Opinion July 10, 1908.

Trover. Logging Permit. Title to Logs Retained by Owner of Land. Such Owner Cannot Recover Full Value in Trover, When. R. S., chapter 84, section 17.

1. It is only when the plaintiff has the sole right or interest in the property, or is accountable therefor to some third party, that he can recover the full value in an action of trover. Whenever he would have to account to the defendant or the defendant's vendor for the amount of the latter's interest in the property, he can recover only the value of his own interest.
2. When by the terms of a logging "permit" the land owner retains the title to the logs until the operator shall have fully performed all his obligations, but leaves to him the right to any balance of the proceeds of the logs after deducting all sums due from the operator to the land owner under the permit, the latter in an action of trover for the logs against the operator or his vendee can recover only the amount so due him.

On exceptions by defendant. Sustained.

Trover brought by the plaintiffs against the defendant to recover the value of 9,555 spruce logs containing 869,470 board feet, alleged to have been converted by the defendant. These logs were cut by one Charles W. Mullen on the plaintiffs' land, under a written permit, and by him were sold to the defendant. The defendant seasonably notified Mullen to come in and defend the action and he appeared and assumed the defense. "The defendant pleaded the general issue and a brief statement setting up the title to the logs and lumber in Charles W. Mullen," and also stated therein certain alleged facts in reduction of damages.

Tried at the October term, 1906, Supreme Judicial Court, Penobscot County. At the conclusion of the testimony, the presiding Justice directed the jury to return a verdict for the plaintiff for the value of the logs at the time of the conversion, and interest from

the date of the writ, amounting in all to $14,656.33. The defendant excepted to this ruling and also to certain rulings during the trial whereby certain evidence offered by the defendant was excluded.

The case is stated in the opinion.

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

P. H. Gillin, and J. F. Gould, for defendant.

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

EMERY, C. J. The plaintiff land owners and Charles W. Mullen made an agreement in writing in the form known as a "permit," by which Mullen was to enter upon certain timber land of the plaintiffs and cut and remove therefrom and drive to market certain kinds of timber, and pay therefor a fixed stumpage price per M. In the permit were various stipulations. Mullen was to cut all the burnt timber on the land during the lifetime of the permit, and all the burnt timber left uncut was to be scaled and was to be paid for by Mullen according to the terms of the permit. The stumpage was to be paid in full by July 1 of each year and all the other requirements of Mullen in the permit were to be performed by him, and it was further stipulated that all the logs and timber cut on the land should remain the property of the plaintiffs until stumpage bills were paid "and all other matters pertaining to this license were fully adjusted;" also that if all these were not done within ten days after July 1, the plaintiffs might "take possession of and sell at either public or private sale for cash any or all of the lumber cut under this permit wherever situated and whether manufactured or not, and after deducting reasonable expenses, commissions and all sums which may then be due or may become due from any cause whatever as herein expressed, the balance, if any there be, they shall pay over on demand to said grantee after a reasonable time for ascertaining and liquidating all amounts due or which may become due either as stumpages or damages."

Under this permit Mullen entered on the land each year and cut and hauled and drove to market a quantity of logs and lumber. A part of these, viz. 9,555 spruce logs, he sold to the defendant.

The plaintiffs afterward, claiming that the stumpage had not been paid and other stipulations of the permit had not been performed, made a demand on the defendant for the logs, which not being complied with, they brought this action of trover against the defendant for conversion of the logs. Upon notice from the defendant, Mullen appeared and assumed the defense of the action.

At the trial the principal, if not the only, controversy was over the matter of the burnt timber named in the permit. The plaintiffs claimed that a large amount of burnt timber which Mullen was bound by the terms of the permit to cut and pay for, or bound to pay for if left uncut, was left uncut and not paid for. Mullen claimed that he had not left uncut any burnt timber within the terms of the permit. The defendant claimed and offered evidence to show that the full amount due the plaintiffs from Mullen for all damage of any kind due them under the permit was $5166.55 and asked to have the question of those damages determined in this action of trover. The court excluded the evidence and instructed the jury to return a verdict for the plaintiffs for the full value of the logs at the time of the conversion, and interest from the date of the writ, which amount was $14,656.33. To these rulings the defendant excepted.

To sustain these rulings we should need to hold that the transaction between the plaintiffs and Mullen as evidenced by the written permit was only a conditional sale to Mullen of the logs and lumber cut, hauled and driven to market by him under the permit, and that by his failure to perform in full by the time fixed any of the conditions of the sale, he forfeited and lost all interests and rights in the logs and lumber, and the plaintiffs could take them or recover the full value of them free from any obligations to Mullen. The decisions in *Brown* v. *Haynes*, 52 Maine, 578; *Hawkins* v. *Hersey*, 86 Maine, 394; and in other cases similar to them were made on that ground.

We think, however, that this case is not within the principle of those cases; that there is a wide difference between them. By the agreement in this case if the plaintiffs took the logs and lumber for non-performance of any condition in the agreement, they were to

sell them or account for them as sold, and pay over the proceeds to Mullen after deducting all amounts due them under the agreement. Mullen did not lose all interest and right in the logs and lumber he had cut, hauled and driven to market, even though he did not seasonably and fully perform some one of the terms of the contract. He retained the right that they should be sold or accounted for as sold, and that after deduction of all sums the plaintiffs were entitled to under the agreement, the balance should be paid to him. There were no logs nor lumber when the agreement was made. There were only trees annexed to the plaintiffs' realty. It was the purpose to have these made into logs and lumber and put in the market to the mutual profit of the parties. The spirit, the real nature, of their agreement was that Mullen should sever the trees from the land, convert them into logs and other lumber, and get them to market at his own expense, thus greatly adding to their value, and that the plaintiffs should retain the title simply as security for the payment of what might be, or become due them under the agreement. That amount, whatever it might be, with the right to enforce payment of it, was the full extent of their interest or property in the logs and lumber, and in an action of trover against Mullen, or his assignee or vendee, that is all they are entitled to recover, since that amount would fully idemnify them for the conversion. It is only when the plaintiff has the sole interest or right in the property, or is accountable therefor to some third party, that he can recover the full value in an action of trover. Whenever he would have to account to the defendant for the amount of the latter's interest in the property, he can only recover the value of his own interest. *Chamberlain* v. *Shaw*, 18 Pick. 278; *Fowler* v. *Gilman*, 13 Met. 267; *White* v. *Allen*, 133 Mass. 423; *Spoor* v. *Holland*, 8 Wend. 445; *Warren* v. *Vallily*, 13 R. I., page 487; *Ganong* v. *Green*, 71 Mich. 7. "If the plaintiff, having but a limited title brings his action against one having the remaining interest or against one claiming under such residuary owner, he can then recover only according to his interest." Southerland on damages (2nd. Ed.) sec. 1136, and cases cited. See also *Warren* v. *Kelley*, 80 Maine, 512. This rule of damages in such

cases is equitable and reasonable, since it saves the parties the expense, and the court the burden, of a second suit to compel an accounting and refunding in case a plaintiff should be recalcitrant; and also since under it the defendant would run no risk of the plaintiff's insolvency. In this case at bar we find no evidence of facts or conditions requiring a separate suit for the adjustment of the amount due the plaintiffs from Mullen under the permit, since he has come in and assumed the defense. So far as the defense in reduction of damages is equitable only, it was pleaded, and is available in this action under R. S., ch. 84, sec. 17; and whether legal or equitable the question of the amount or value of the plaintiff's interest in the property, so far as now appears, can be fully determined in this action. *Ganong* v. *Green*, 71 Mich. 7.

If difficulties develop requiring it, an auditor can be appointed, or the case held until other necessary proceedings are had. It may be that the whole amount due the plaintiffs from Mullen under all the terms of the permit would exceed the full value of the logs converted by the defendant. In such case the plaintiffs would be entitled to the full value, but the defendant has the right to be heard upon that question and have it determined before being condemned.

It follows that the ruling directing a verdict for the full value of the logs and excluding evidence as to the amount due the plaintiffs was erroneous, and that the exceptions to that ruling must be sustained. This makes it unnecessary to consider the other exceptions.

Exceptions sustained.
New trial ordered.

JAMES E. CUNNINGHAM *vs.* INHABITANTS OF FRANKFORT.

Waldo. Opinion June 9, 1908.

Ways. Defects. Actions. Presumptions. Burden of Proof. Liability. Repairs. Trial. Revised Statutes, chapter 23, sections 56, 76.

To maintain an action against a defendant town to recover damages for personal injuries received by reason of an alleged defect in a highway which such defendant town is obliged by law to maintain and keep in repair, it is incumbent on the plaintiff after proving the notices required by the statute, to prove affirmatively that such highway was not safe and convenient for travelers at the point where the accident occurred, that no want of ordinary care on his part contributed to cause the accident and that his injury was occasioned through the defect alone.

Section 56 of chapter 23, R. S., declares that "highways, town ways and streets, legally established shall be opened and kept in repair so as to be safe and convenient for travelers," etc., and section 76 of the same chapter provides that "whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . . in any highway . . . . may recover for the same in a special action on the case." These two sections were clearly intended to be in harmony with each other and counterparts of the same enactment. They have always been construed to mean that a plaintiff is entitled to recover damage only when he suffers it through any defect or want of repair that will prevent the way from being safe and convenient for travel.

The only measure of duty prescribed by the statute and the only test of liability created by it, will be found in the requirement that the way shall be kept "safe and convenient for travelers." But in the practical application of the statute to the highways of the State, it has uniformly been held by the court of Maine that the words "safe and convenient" are not to be construed to mean entirely and absolutely safe and convenient but reasonably safe and convenient in view of the circumstances of each particular case.

The words "safe and convenient" are considered to be relative terms and the question of safety and convenience must be determined with reference to the special facts and conditions existing in each case, such as the location of the way, the nature and extent of the travel to be accommodated and all the circumstances which may reasonably influence the conclusion. A condition that might readily be accepted as reasonably safe and convenient on

a crossroad in a country town, might be grossly unsafe for an important thoroughfare that is in constant use for public travel.

Towns are not made insurers against accidents and injuries on the highways. The statute does not impose upon them the obligation to guarantee the safety of public travel within their limits.

The question is not whether in a given case the town used ordinary care and diligence in the construction and maintenance of the way, but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers.

The methods of constructing and repairing town ways are necessarily determined in the first instance by the officers of the town to whom that duty is committed, but whether the result fulfills the requirement of the statute is a question which must be ultimately passed upon by the court and jury when it arises.

While a view taken by the jury of the scene of an accident upon a highway may render the testimony more intelligible and otherwise afford valuable assistance, yet it does not authorize the jury to ignore physical facts or disregard settled rules of law.

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

Special action on the case brought under the provisions of Revised Statutes, chapter 23, section 76, to recover damages for personal injuries received by the plaintiff by reason of an alleged defect in a highway which the defendants were obliged by law to maintain and keep in repair. Plea, the general issue.

Tried at the September term, 1907, of the Supreme Judicial Court, Waldo County. Verdict for plaintiff for $1000. The defendants filed a general motion to have the verdict set aside and also excepted to the ruling of the presiding Justice that "for the purposes of the trial" the notice given by the plaintiff to the municipal officers of the defendant town within fourteen days after the injuries complained of in the writ, contained "a sufficient description of the nature and location of the defect" and was "sufficient in law to enable the plaintiff to maintain his action under the evidence introduced." The exceptions were not considered by the Law Court.

The case appears in the opinion.

W. P. Thompson, for plaintiff.

Dunton & Morse, for defendants.

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

WHITEHOUSE, J. This is an action to recover damages for personal injuries received by the plaintiff on the nineteenth day of August, 1905, by reason of an alleged defect in a highway which the defendants were obliged by law to maintain and keep in repair. In the plaintiff's declaration the accident is alleged to have occurred on "a certain public highway leading from the road which leads from Black's Corner in Searsport to Frankfort Marsh, about one-third of a mile westerly from the dwelling house of Charles Robinson and at the four corners of the road," and the defect is described as "a large rock in the travelled part of said way protruding about eighteen inches above the ground or top of the road and in the wheel track of the road." With respect to the cause of the accident, the declaration further states that the plaintiff was riding along this road with his son-in-law Adelbert Small, in a top-buggy drawn by one horse, when the wheel of the carriage came in contact with the rock described and the carriage was thereby overturned, causing a fracture of the plaintiff's left leg and the other injuries of which he complains.

In the notice given by the plaintiff to the municipal officers of the defendant town on the 28th day of August, eight days after the accident, the defect is described as a "large rock in the traveled part of the highway, about eighteen inches thick," without stating that it was protruding above the ground or top of the road" as was alleged in the declaration. It also satisfactorily appeared from the evidence that the rock was not actually in the traveled part of the way. The defendant further claimed that the plaintiff's description of the location of the rock in both the declaration and the notice, was inaccurate in stating it to be at the "four corners, a third of a mile westerly from the house of Charles Robinson," since it appeared from the evidence that the direction of the "four corners" where the accident occurred is not in fact "westerly" from the house of Charles Robinson, but north 35 degrees east from his house. It is also shown by the evidence that there are two other crossings of the ways making "four corners" at two other points north-westerly from the

house of Charles Robinson, and at such a distance therefrom that either of the last mentioned four corners would correspond more nearly with the description contained in the notice, than the four corners where the accident happened. It was accordingly contended by the defendant that there was a fatal variance between the notice and the evidence respecting both the nature and location of the defect. But for the purposes of the trial the presiding Justice instructed the jury that the notice contained a sufficient description of the nature and location of the defect, and was sufficient in law to enable the plaintiff to maintain his action under the evidence introduced. To this ruling the defendant took exceptions.

The jury returned a verdict in favor of the plaintiff for the sum of one thousand dollars, and the case comes to the Law Court on exceptions to the ruling of the presiding Justice holding the notice sufficient, and on a motion to set aside the verdict as against the law and the evidence.

To maintain his action against the defendant town, it was incumbent upon the plaintiff after proving the notices required by statute to prove affirmatively that the highway was not safe and convenient for travelers at the point where the accident occurred; that no want of ordinary care on his part contributed to cause the accident and that his injury was occasioned through the defect alone.

Section 56 of chapter 23, R. S., declares that "highways, town ways and streets, legally established shall be opened and kept in repair so as to be safe and convenient for travelers," etc., and section 76 of the same chapter provides that "whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . in any highway . . . may recover for the same in a special action on the case." These two sections were clearly intended to be in harmony with each other and counterparts of the same enactment. They have always been construed to mean that a plaintiff is entitled to recover damage only when he suffers it through any defect or want of repair that will prevent the way from being safe and convenient for travel.

Thus the only measure of duty prescribed by the statute and the only test of liability created by it, will be found in the requirement

that the way shall be kept "safe and convenient for travelers." But in the practical application of the statute to the highways of the State, it has been uniformly held by this court that the words safe and convenient are not to be construed to mean entirely and absolutely safe and convenient but reasonably safe and convenient in view of the circumstances of each particular case. They are considered to be relative terms and the question of safety and convenience must be determined with reference to the special facts and conditions existing in each case, such as the location of the way, the nature and extent of the travel to be accommodated and all the circumstances which may reasonably influence the conclusion. A condition that might readily be accepted as reasonably safe and convenient on a crossroad in a country town, might be grossly unsafe for an important thoroughfare that is in constant use for public travel. A condition of perfect safety beyond the possibility of an accident is of course unattainable; a condition of reasonable safety only is required. Towns are not made insurers against accident and injury on the highway. The statute does not impose upon them the obligation to guarantee the safety of public travel within their limits. And the question is not whether in a given case the town used ordinary care and diligence in the construction and maintenance of the way; but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers.

The methods of constructing and repairing public ways are necessarily determined in the first instance by the officers of the town to whom that duty is committed, but whether the result fulfills the requirement of the statute is a question which must ultimately be passed upon by the court and jury when it arises. *Moriarty* v. *Lewiston*, 98 Maine, 482. "A defect such as the statutes contemplates must be something which unlawfully impairs the reasonable safety and convenience of the way." *Bartlett* v. *Kittery*, 68 Maine, 358.

The highway in question in the case at bar, upon which the plaintiff was traveling in going from Belfast to Mosquito Mountain, is a country road with but little travel upon it, being chiefly used

by the workmen going to and returning from their work at the granite quarry. It appears to have been constructed more than fifty years ago, and in the process of building at the four corners in question some rocks were evidently removed and deposited upon the right hand side as the traveler passes around the curve from one road to the other in the direction in which the plaintiff was traveling when he received his injuries. These rocks have never been moved since the road was built. It is a matter of common observation that it is the natural tendency of travel in turning the corner of a highway, to swerve toward the outside of the road and that granite posts or guides are frequently erected to prevent it. It is undoubtedly true that the result of this tendency was to bring the wheel track nearer the rocks in the course of fifty years. But according to measurements made by surveyor Brock of Searsport a short time before the trial, there was a smooth and unobstructed road bed fifteen feet in width between the rock which the plaintiff's carriage wheel is alleged to have struck, and the northerly side of the road. This witness further states that no part of this rock is in the wheel track; that as he drove around the corner in his carriage he allowed his horse "to take her own way," that she followed the horse path and that the wheel of the carriage as it went around passed about two feet from the base of the rock. It also appears from his testimony, corroborated by the photographs in evidence, that for some distance west and south of this rock there is a ridge of earth with grass growing upon it, between the horse path and the right hand wheel track. Mr. Brock was called by the defendant, but he appears to have been a disinterested witness.

It is alleged in the plaintiff's declaration and notice that the rock complained of was in the traveled part of the road, but there is no evidence in the case which would warrant a jury in so finding. The plaintiff himself gives no testimony in support of the allegation but simply states that the rock "sits right on the edge" of the wheel track. The plaintiff's son-in-law Adelbert Small, who was driving the team gives contradictory testimony in both direct and cross examination, but the full extent of his claim is expressed by his statements that the rock was a foot in height above the ground and

"clear up to the wheel track," "perfectly flush with the wheel track." The highway surveyor in that district called by the plaintiff, testifies that the rock was from "one to two feet" from the wheel track. By reason of the intersection of the two roads at this point, the two wheel tracks come together nearly opposite this rock, and according to actual measurements made by Mr. Clark, chairman of the board of selectmen, the face of the rock was two feet and six inches from the wheel track of the straight road that leads from the Frankfort road past the rock, and six inches from outer edge of the wheel track going easterly.

Thus it appears that the alleged defect was a structural condition which had existed without material change for more than fifty years with an ample width of well wrought road where two teams approaching to meet might safely and conveniently pass each other without coming in collision with this rock.

The defendant earnestly contends that a country road in such a situation and condition, with the amount and character of the travel accommodated by this one, must be deemed reasonably safe and convenient.

In *Perkins* v. *Fayette*, 68 Maine, 152, the facts of which were closely analogous to those at bar, the subject is thus treated in the opinion by Judge Peters: "A question arose at the trial as to what extent towns were responsible for injuries to travelers, occasioned by their teams coming in collision with obstructions on the side of the road beyond the traveled way. The judge instructed the jury that towns were not required to render the road passable for the entire width of the whole located limits, and that the duty of the town was accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers. He also directed the jury that the town had the right, in making or repairing a road, to remove stones and stumps onto the sides of the way and leave natural obstructions there, provided the same were situated so far from the traveled track that persons passing over the road with teams might pass without danger of coming in collision with them. We think it would be utterly

impossible for towns, as a general rule, to do more than that. No doubt there is a chance that the team of a traveler, in the dark or from fright of a horse or some other mishap, might strike against a rock on the side of the way. So, if the rock was not there, it might get into a ditch or bog or against a railing or fence, or encounter some other disaster. It is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. All possible accidents cannot be provided against by anybody."

In that case it appeared that the plaintiff's horse became frightened at cows in the road having boards on their horns, and being beyond the control of the driver, ran out of the traveled way until the wagon came in collision with a rock which had been left on a line with the outside of the ditch and two feet from the traveled road. The jury were instructed in accordance with the settled law in this State that "if the accident was produced by the fright at the cows and also by a defect in the way, by the combined action of both causes, the plaintiff could not recover." A verdict was returned in favor of the town, and in overruling the exceptions, the court say in the last sentence of the opinion: "In this particular case it would be difficult to see that in any just and proper sense, any defect in the way was even one of a combination of causes producing the accident."

The defendant insists that there is also a striking similarity between that case and the case at bar with respect to the fright of the horse and the real cause of the accident. It appears from the testimony of Mr. Clark, chairman of the selectmen, that the plaintiff's son-in-law Adelbert Small, called to see him on Monday August 21, 1905, two days after the accident, to inquire what action the town proposed to take in regard to the plaintiff's injury. Mr. Clark had not heard of the accident and inquired how it happened. Small said: "It happened about half a mile from Charles Robinson's at the four corners where you go through by what is called the Sally Mack (?) road. They were going to Mosquito Mountain; and when he got to those corners a dog jumped out of the bushes on the opposite side, and the horse got

scared and went on a rock and hove Mr. Cunningham out and broke his leg."

The same afternoon Mr. Clark went to the scene of the accident as located by Small. Reference has already been made to the two measurements made by Clark fixing the location of the rock in relation to the wheel tracks of the two roads. He states that he then found, twenty inches back from the large rock nearest to the wheel track, a smaller one from which the moss had been freshly scraped, and upon which were two fresh marks of carriage wheels. Both of these rocks are disclosed in the photographs. Mr. Clark also noted that the dry bush and twigs had been freshly broken on the east side of the rock. This testimony in regard to the rocks and brush is uncontradicted and Small admits that in answer to Clark's inquiry if he "saw anything that scared the horse," he told him he "saw the dog." He denies, however, that the horse was frightened by the dog, and "should say the horse was in the horse track." It is conclusively shown, however, by testimony and the photographs, that if the horse had been traveling in the well beaten horse path, the wheels of the carriage would not have gone within two feet of the large rock. From this evidence the defendant confidently claims the truth to be that from fright or some other cause the horse went out of the traveled road into the brush, and brought the wheels on the right side of the carriage in contact with the face of a rock twenty inches back from the face of the larger rock claimed to be "on the edge of the wheel track."

The defendant asserts that this is the only rational explanation of an accident which is alleged to have occurred, under the circumstances disclosed, at eleven o'clock in the forenoon of a fair day.

It is true that the jury visited the scene of the accident and saw the road and the rocks. But it is not questioned that the photographs are a correct representation of both. A view may render the testimony more intelligible, and otherwise afford valuable assistance, but it does not authorize the jury to ignore physical facts or disregard settled rules of law.

It is the opinion of the court that under the evidence in this case, the way in question must be deemed reasonably safe and convenient

"in view of such casualties as might reasonably be expected to happen" to the travelers accommodated by it. This conclusion renders it unnecessary to consider further the question of proximate cause or the sufficiency of the notice.

Motion sustained.
Verdict set aside.
New trial granted.

JOHN J. HONE AND DAVID A. HONE

vs.

PRESQUE ISLE WATER COMPANY.

Aroostook. Opinion June 9, 1908.

Demurrer. Declaration. Insufficient Allegations. Contracts. Want of Privity. Municipal Corporations. Water Company Contracting with Municipality to Furnish Water to Extinguish Fires. Such Company not liable to Individual Property Owners for Losses Caused by Failure to Furnish Water. Revised Statutes, chapter 4, section 76.

A demurrer only admits such facts as are well pleaded in the declaration.

A demurrer does not confess a matter of law deduced by either party from the facts pleaded.

In a declaration an allegation of duty alone is not sufficient. There must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective.

Negligence which consists merely in the breach of a contract will not afford ground for an action by one who is not a party to the contract, and not a person for whose benefit the contract was avowedly made.

A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen.

Although a municipal corporation maintaining a fire department, levies and collects a tax to pay a water company for water furnished under a contract between the corporation and the water company for the use of such fire

department, yet that fact does not create any privity of interest between the water company and a citizen or a resident or a taxpayer of the corporation.

Where a village corporation authorized to maintain a fire department for the extinguishment of fires within its limits, contracted with a water company to furnish water for the use of its fire department, and certain buildings situate within such limits, and owned by individuals, were destroyed by fire by reason of the failure of the water company to furnish an adequate supply of water for the extinguishment of fires, *Held:* That the water company was not liable to the individual owners of the property destroyed.

In an action on the case brought by individual owners of property situate within the limits of a village corporation and destroyed by fire, to recover damages from a public service water company for their loss on the ground that the loss resulted from the negligent failure of the water company to keep a certain hydrant in proper condition for use, the declaration contained two counts. The first count contained no averment of any express contract either directly between the water company and the plaintiffs or between the water company and the village corporation in which the individual property destroyed by fire, was situated, but simply stated as a legal conclusion from its undertaking to render service as a public water company, that it was the defendant's duty arising therefrom to maintain its hydrants at all times in a proper condition for use, while the second count contained a general allegation that the defendant water company undertook to furnish a supply of water under a contract with the village corporation and stated as a legal conclusion that it was the defendant's duty under the contract to keep its hydrants at all times in proper condition for use, but failed to specify what the stipulations of the contract were which would justify such a conclusion.

Upon demurrer to the declaration, *Held:* (1) That individual owners of property destroyed by fire cannot maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes or from a general contract on the part of the water company with the municipality to furnish water for such purposes without a specification of any particular thing to be done to that end and without any stipulation respecting liability for losses by fire. (2) That the declaration was not sufficient in substance and that the action was not maintainable.

On exceptions by plaintiffs. Overruled.

Action on the case brought by the plaintiffs against the defendant water company to recover damages for the loss of certain buildings owned by them and destroyed by fire, on the ground that the loss resulted from the negligent failure of the defendant water com-

pany to keep a certain hydrant in proper repair and condition for use. The declaration contained two counts which are as follows:

"In a plea of the case; for that the said defendant is a public service corporation, created and organized under the provisions of Chapter 3 of the Private and Special Acts of 1887 of the State of Maine, duly authorized to lay water pipes and mains in the village in said Presque Isle, and furnish water for public and private purposes in said Presque Isle, and that said defendant did under and by virtue of said special act construct a system of water works by pipes and mains under the streets in said village, and assumed and undertook the duties of a public water company, and began to furnish water for public and private uses including the furnishing of water in hydrants to be used in extinguishing fires in said village and on the fourth day of April, 1905, was and for a long time prior thereto had been furnishing water for said purposes, and especially for the extinguishment of fires for a reward paid to it by the Presque Isle Village Fire Department, and as such water company organized as aforesaid it was the duty of the defendant at all times to keep the hydrants connected with its said system of water works in proper repair and condition to be used at any such time for extinguishing fires in said village; that a long time prior to said fourth day of April, 1905, said Water Company constructed and placed in position, connected with its said mains, a certain hydrant, a part of its system, located near and in front of a building existing on the main street in said village known as Presque Isle Opera House, then and there the property of the plaintiffs, which said hydrant said defendant corporation then and there undertook and was bound to maintain and keep in proper repair and condition to be used in extinguishing fires in its vicinity, but said defendant so carelessly and negligently maintained said hydrant that the water in said hydrant on said fourth day of April, 1905, was and for a long time prior thereto had been frozen, and said hydrant thereby was and had been rendered useless; that on said April 4th, 1905, a fire broke out in the basement of said building known as the Presque Isle Opera House in said village of Presque Isle, and in the immediate vicinity of said hydrant, frozen as aforesaid, and the

plaintiffs and the Village Fire Department in said Presque Isle relying, as they had a right to do, on the said defendant keeping said hydrant in proper repair and condition for use as aforesaid, then and there connected their hose to said hydrant for the purpose of obtaining water with which to extinguish said fire, but by reason of the careless and negligent conduct of the said defendant in failing to keep said hydrant in proper condition and repair as aforesaid, were unable to obtain water therefrom, and were compelled to change to other hydrants at a great distance therefrom, and after great loss of time, during which said time and as a result of said careless and negligent maintenance of said hydrant the said fire became unmanageable and spread beyond the control of said Fire Department, and entirely consumed said Presque Isle Opera House, and therefrom spread to and entirely destroyed another building of the plaintiffs then and there occupied by tenants of the plaintiffs, both of said buildings being of the value of Thirty Thousand Dollars. And the plaintiffs aver that said loss and damage was sustained by them solely by reason of the carelessness and negligence and breach of duty on the part of said defendant in failing to keep and maintain said hydrant in proper repair and condition for use.

"Also, for that the said defendant is a public service corporation, created and organized under the provisions of chapter 3 of the Private and Special Laws of 1887, of the State of Maine, duly authorized to lay water pipes and mains in the village of said Presque Isle, and to furnish water for public and private purposes in said Presque Isle, and to contract for a supply of water for the extinguishment of fire or other purposes for a term of years with the town of Presque Isle, or Village Corporation, and other persons and corporations, and that said defendant did under and by authority of said special act, construct a system of water works and lay water pipes and mains under the streets in said Presque Isle, and assumed and undertook the duties of a public water company, and began under a contract with The Presque Isle Village Fire Department, a corporation created and organized under the provisions of chapter 575 of the Private and Special Laws of said State for the year 1885, to furnish water for public and private uses, including the

furnishing of water and hydrants to be used in extinguishing fires in said village of Presque Isle, and on said fourth day of April, 1905, was and for a long time prior thereto had been under said contract, for a valuable and sufficient consideration, furnishing water and hydrants for said purposes, and as such Water Company, under said contract, it was the duty of the said defendant at all times to keep the hydrants connected with its said system of water works in proper repair and condition to be used at any time for the extinguishment of fires in said village; that a long time prior to said fourth day of April, 1905, said Water Company constructed and placed in position, connected with its said water pipes and mains, a certain hydrant located near and in front of a building belonging to the plaintiffs, and situated on the west side of Main Street in said village, known as the Presque Isle Opera House, which said hydrant said defendant then and there undertook and was bound to keep in proper repair and condition to be used in extinguishing fires in its vicinity, but maintained said hydrant so carelessly and negligently that on said fourth day of April 1905, the water in said hydrant was and for a long time prior thereto had been frozen, and said hydrant was thereby rendered useless; that on said fourth day of April, 1905, a fire broke out in the basement of the plaintiffs' said building, known as the Presque Isle Opera House, and in the immediate vicinity of said hydrant, frozen as aforesaid, and the plaintiffs and the Fire Department of said village, relying as they had a right to do on the defendant keeping said hydrant in proper repair and condition for use as aforesaid, as the defendant had agreed and was required and bound by law to do, then and there connected their hose to said hydrant for the purpose of obtaining water with which to extinguish said fire; but by reason of the careless and negligent conduct of said defendant in failing to keep said hydrant in proper repair and condition for use as aforesaid, were unable to obtain water therefrom, and were compelled to change to other hydrants at a great distance therefrom and after great loss of time, during which said time, and as a result of said carelessness and negligence on the part of the defendant in failing to keep said hydrant in proper repair and condition to use, the said fire became unmanageable, and

spread beyond the control of the plaintiffs and of said Fire Department, and entirely destroyed said plaintiffs' said building, and therefrom spread to and entirely destroyed another building of the plaintiffs, both of which said buildings were then and there of the value of Thirty Thousand Dollars. And the plaintiffs aver that said loss and damages were sustained by them solely by reason of the carelessness and negligence and breach of duty on the part of said defendant in failing to keep and maintain said hydrant in proper repair and condition for use."

The defendant Water Company filed a general demurrer to the declaration. The demurrer was sustained by the presiding Justice and the plaintiffs excepted.

The case appears in the opinion.

Powers & Archibald, and Louis C. Stearns, for plaintiffs.

Ira G. Hersey, and Charles F. Daggett, for defendant.

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

WHITEHOUSE, J. This is an action on the case brought by individual owners of property destroyed by fire, to recover damages for their loss against the defendant water company on the ground that it resulted from the negligent failure of the defendant to keep its hydrants in proper condition for use.

The defendant filed a general demurrer to the plaintiffs' declaration. The demurrer was sustained by the presiding Justice, and the case comes to the Law Court on exceptions to that ruling.

It is alleged in the first count in the declaration that by virtue of a special act of the legislature, the defendant company, a public service corporation, constructed a system of water works and undertook the duties of a public water company and began to furnish water for public and private uses including the furnishing of water in hydrants to be used in extinguishing fires within the limits of the village corporation in Presque Isle, known as the Presque Isle Village Fire Department; that it thereby became the duty of the defendant to keep its hydrants in proper condition for use in the extinguishment of fire in that village; that its hydrants were so

carelessly maintained that the water in the hydrant opposite the Presque Isle Opera House owned by the plaintiffs, was frozen, and the hydrant rendered useless, and that in consequence of the defendant's negligence in that behalf, the Opera House and another building owned by the plaintiffs, were entirely destroyed by fire.

In the second count it is alleged that in pursuance of a special act of the legislature the defendant constructed a system of water works in Presque Isle and under a contract with the Presque Isle Village Fire department began to furnish water for public and private uses, including the furnishing of water and hydrants to be used in extinguishing fires in the village of Presque Isle; that under its contract it was the duty of the defendant at all times to keep its hydrants in proper condition for use in extinguishing fires; that this duty was so carelessly performed by the defendant that the water in the hydrant in front of the Presque Isle Opera House, owned by the plaintiffs, was allowed to freeze and the hydrant to become useless; and that in consequence of the defendant's negligence in that behalf, the Opera House and another building owned by the plaintiffs of the total value of $30,000 were entirely destroyed by fire.

It thus appears that the first count contains no averment of any express contract either directly between the water company and the plaintiffs, or between the water company and the village corporation in which the individual property destroyed by fire, was situated, but simply states as a legal conclusion from its undertaking to render service as a public water company that it was the defendant's duty arising therefrom to maintain its hydrants at all times in a proper condition for use. The second count contains a general allegation that the defendant water company undertook to furnish a supply of water under a contract with the village corporation, and states as a legal conclusion that it was the defendant's duty under the contract to keep its hydrants at all times in proper condition for use, but fails to specify what the stipulations of the contract were which would justify such a conclusion. An allegation of duty alone, however, is not sufficient. There must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective. A demurrer only admits such facts as are well

pleaded in the declaration. It does not confess a matter of law deduced by either party from the facts pleaded. *Nickerson* v. *Bridgeport Co.*, 46 Conn. 24.

It may therefore be a matter of grave doubt whether the important question argued by counsel is properly raised by the pleadings; but inasmuch as this objection appears from the argument to have been waived by counsel the case has been considered upon the assumption that it was the duty of the water company, as between the village corporation and itself, to keep its hydrants in proper condition for use in furnishing water for the extinguishment of fires in winter as well as in summer.

This court is thus for the first time brought face to face with the question whether an individual owner of property destroyed by fire can maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes or from a general contract on the part of the water company with the municipality to furnish water for such purposes without a specification of any particular thing to be done to that end and without any stipulation respecting liability for losses by fire. But the question has been decided in numerous other jurisdictions, state and federal, and it must be admitted, and it is conceded by the plaintiffs, that the overwhelming weight of authority is against the maintenance of the action. It is insisted, however, in behalf of the plaintiffs that although an action ex contractu might not be maintainable, yet the water company having received valuable franchises under its charter and compensation for the service from taxation of individual property owners in the municipality, it is bound as a matter of public duty to perform its contract, and for any negligence on its part is liable in damages to the individual sufferers, the contract serving only as a measure of the duty resting upon such a public service corporation. The plaintiffs recognize the general rule of law that one who is not a party to a simple contract and from whom no consideration is received, cannot maintain a suit on the contract, and that a promise

made by one person to another for the benefit of a third who is a stranger to the consideration will not support an action by the latter, but it is contended that in this class of cases the consideration does move from the individual taxpayer of the municipality.

It is contended in behalf of the defendant water company that its contract with the Village Corporation known as the Presque Isle Village Fire Department, to furnish water through hydrants for the extinguishment of fires, did not make the plaintiffs parties or privies to that contract, and that those who are not parties or privies to a contract cannot maintain an action of tort for the breach of a duty arising solely out of the contract.

It is the opinion of the court that the plaintiffs' declaration is not sufficient in substance, and that the action is not maintainable.

The distinctive character of municipal corporations in this State, and the circumstances and conditions under which the officials chosen by them are deemed to act either as corporate agents or as public officers engaged in the discharge of duties imposed by general law, have been subjects of frequent examination and discussion in the recent decisions of this court. *Lovejoy* v. *Foxcroft*, 91 Maine, 367; *Burrill* v. *Augusta*, 78 Maine, 118; *Mitchell* v. *Rockland*, 52 Maine, 118.

It is only necessary to be reminded here that the inhabitants of the several cities and towns in this State are not voluntary associations or business corporations, but political agencies created for the more effectual discharge of certain duties of political government, and that the powers and liabilities of these agencies are only such as are conferred and created by the legislature.

It may be observed then, in the first place, that when a municipal corporation itself by authority of its charter maintains a system of water works for the use of its fire department, it is performing a public or governmental duty, and it is uniformly held upon what seems to be entirely satisfactory reasoning that in such a case the municipal corporation is not liable to individual taxpayers for failing to provide an adequate supply of water for the extinguishment of fires, unless expressly made so by provisions of the statute. 2 Dill. Mun. Corp. 976; *Tainter* v. *Worcester*, 123 Mass. 311;

Miller v. *Minneapolis*, 77 N. W. 788; *Mendel* v. *City of Wheeling*, 28 W. Va. 233; *Vanhorn* v. *City of Des Moines*, 63 Iowa, 447 (19 N. W. 293); *Hayes* v. *Oshkosh*, 33 Wis. 314.

If now instead of maintaining a system of water works of its own for the purpose of supplying water for the extinguishment of fires, a municipal corporation contracts with a water company to furnish water for that purpose, the numerous decisions of the courts of last resort in other States and in the Federal Courts, as before indicated, are practically unanimous in holding that the water company is not liable to the individual owner of property which has been destroyed by fire by reason of the company's failure to furnish an adequate supply of water to extinguish fires. The apparent exceptions will be noted and considered hereafter. As stated by the court in *Mott* v. *Water Co.*, 48 Kan. 12 (28 Pac. 989), "The fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or a resident of the city. In making such contract the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. A water company could not proceed directly against a citizen or resident in the first instance, for unpaid money due under the contract from the city. . . . . If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract in such a case is between the city and the water company only . . . . The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city for a breach of the same."

In this State section 76 of chapter 4, R. S., empowers municipal corporations to "contract for a supply of water for municipal uses," but it was obviously not the design of this statute to authorize cities and towns to make contracts to indemnify individual owners for the loss of property by fire resulting from the neglect of its officials to furnish an adequate supply of water to extinguish it, and there is

no suggestion in this case that any such express contract was in fact ever made or attempted to be made between the village corporation and the defendant water company.

One of the earliest cases in which this question was directly involved was *Nickerson* v. *Bridgeport Hydraulic Company*, 46 Conn. 24, which came before the Supreme Court of that State in 1878. Two of the counts in the declaration are strikingly similar to those in the case at bar, and the case has been cited above upon the question of pleading. The essential averments were that the water company had negligently failed to provide a supply of water for the hydrants to enable the city to perform a public duty which it owed to the plaintiffs and others to extinguish fires. In the opinion the court say: "The most that can be said is, that the defendants were under obligation to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water and so the city was unable to perform its duty. We think it clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In 1887 the question came before the Supreme Court of Pennsylvania in the case of *Beck* v. *Kittanning Water Co.*, 11 Atl. 300 (Pa.) The defendant was under contract to supply the town and its residents with water. The plaintiff's brewery was destroyed by fire by reason of the neglect of the defendant to provide a supply of water for the hydrant in that vicinity. But the court say: "The plaintiff in this case had no contract with the defendant for a supply of water for the extinguishment of fires, hence it owed him no duty in this respect, and on the basis of such contract he had, of course, no cause of action. As to the contract with the borough, with that he had nothing to do. That was a matter between the municipality and the water company, and his interest in it is too remote to raise such a privity therein as would enable him to maintain this suit."

In *Davis* v. *The Clinton Water-Works Co.*, 54 Iowa, 59, (6 N. W. 126) the plaintiff sought to recover the value of her buildings destroyed by fire, upon the ground that the loss resulted from the defendant's failure to perform its contract with the city to supply

water for the extinguishment of fires. It was held that there was no such privity of contract between the plaintiff and the city or between the plaintiff and the defendant water company, as would enable her to maintain an action against the water company upon the facts stated. In the opinion the court say: "The city in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government." *Nickerson* v. *Bridgeport Co.*, supra, was one of the authorities cited in support of the decision.

This doctrine was reaffirmed in *Vanhorn* v. *Des Moines*, 63 Iowa, 448, (19 N. W. 233) and in *Becker* v. *Keokuk Water Works*, 79 Iowa, 419, (44 N. W. 694) although in the Des Moines case the city had taken a contract from the company to protect it from liability which might arise from the negligence of the company; and in the latter case, it was provided by ordinance that the water company should be liable for all injuries to persons or property caused by its negligence.

To the same effect was *Howsman* v. *Trenton Water Co.*, 119 Mo. 304 (1893) where it was held that a water company that contracts with a town to furnish an adequate supply of water to extinguish fires and agrees to be liable for damages from fire result-

ing from its negligence, cannot be sued on the contract by a citizen though he and other citizens pay a special tax to the company under the contract. In the opinion the court give the following reasons among others: "A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen."

"The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefor could not make such a contract that would be binding on another."

It is true that special reference is made in the opinion to the fact that this was an action on the contract. But the existence of a duty to the plaintiff was an indispensable element of any legal claim. Negligence which consists merely in the breach of a contract will not afford ground for an action by any one who is not a party to the contract, and not a person for whose benefit the contract was avowedly made. *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503; *Nickerson* v. *Bridgeport Water Co.*, 46 Conn. 24, supra; *Shearman* v. *Redfield* on Neg. sect. 116. "The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort direct or indirect, to the private property of an individual, though he be a tax payer to the government. Unless made so by statute, the city is not liable for failing to protect the inhabitants against the destruction of property by fire." *Fowler* v. *Athens City Water Works Co.*, 83 Ga. 219, 9 S. E. 673; *House* v. *Houston Water Works Co.*, 88 Texas, 233, (31 S. W. 179).

The question arose in Wisconsin in 1892, in the case of *Britton* v. *Green Bay Water Works Company*, 81 Wis. 48, (51 N. W. 84), and it was held that a water company under contract with a municipal corporation to furnish water for the extinguishment of fires, does not become liable to suit by a private citizen for loss of his property by fire owing to the negligence of the company in not

furnishing a sufficient supply of water. It is said in the opinion: "It seems to be impossible to find any sound legal principle on which the liability of the defendant to the plaintiff can be predicted. . . . . Could the defendant have reasonably supposed that by this contract with the city, it was contracting with or incurring liability to each of its inhabitants and that it might be sued by each one indirectly and separately? . . . . Is it a hardship that the plaintiff cannot recover in such a case? So it is in case the city is sued for neglect of its duty in not furnishing the necessary machinery for putting out fires. It is not greater hardship in one case than in the other; the duty of furnishing water and using it to put out fires still remains in the city. That duty has not been, if it could be, transferred to the company. The company is bound only by its contract and liable to the city alone as the other contracting party."

In 1894 the question came before the Supreme Court of Indiana in *Fitch* v. *Seymour Water Company*, 139 Indiana, 214, (37 N. E. 982), and upon demurrer to the complaint charging facts similar to those in *Britton* v. *Water Co.*, 81 Wis. supra, it was held that the water company had undertaken no public duty which would make it liable to the plaintiff, and that the plaintiff had no privity in the contract of the city with the water company.

In the very recent and carefully considered case of *Lovejoy* v. *Bessemer Water-Works Co.*, in the Supreme Court of Alabama, 41 South. Rep. 76, 1906, the court reached the same conclusion, citing eighteen decisions in support of it. The opinion there says: "The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is a want of privity between him and the defendant which disables him from suing for a breach of the contract or for the breach of duty growing out of the contract. It is impossible at this late day to say anything new upon the subject, and it would be affectation to attempt any elaborate discussion of the question involved."

"We recognize that the absence of a remedy by suit for damages for a failure by a water company to furnish water for fire purposes, according to its contract with a city, leaves the subject 'in an

extremely unsatisfactory position,' as stated in the note to *Britton* v. *Waterworks Company*, 29 Am. St. Rep. 856, 863, yet, as the learned annotator suggests, 'the only security would seem to be in legislation or in the incorporation of some suitable provision in future contracts of this description, whenever the taxpayer desires to reserve a personal remedy against the water company.' It is not the function of a court to make law to fit hard cases."

See also *Allen & C. Mfg. Co.* v. *Waterworks Co.*, 37 South, 950 (La.); *Eaton* v. *Waterworks Co.*, 37 Nev. 546 (56 N. W. 201); *Bush* v. *Artesian Water Co.*, 43 Pac. 69; *Wilkison* v. *Light H. & W. Co.*, 28 South, 877 (Miss.); *Ferris* v. *Water Co.*, 16 Nev. 44 (40 Am. Rep. 485).

In the Federal Courts the adjudications have been to the same effect.

In the recent case of *Metropolitan Trust Co.* v. *Topeka Water Co.*, 132 Fed. Rep. 702, the court said: "The question of the liability of a water company to respond in damages to a resident of a city, the owner of property destroyed by fire, on account of the failure of the water company to fulfill its contract with the city in furnishing an adequate supply of water and a stipulated pressure for the extinguishment of fires, has many times received the consideration of the courts of last resort in this country, and the almost universal holding is that there is no such privity of contract between the individual citizen, though a taxpayer who contributes to the fund disbursed by the city in the payment of hydrant rentals, and the water company, as will authorize any recovery for damages so sustained. *Boston Safe Deposit & Trust Co.* v. *Salem Water Co.*, (C. C.) 94 Fed. 238."

On the other hand three cases are cited in support of the plaintiff's contention that such an action for negligence is maintainable in favor of an individual owner of property against a water company under contract with the municipality to furnish a supply of water. The first case in which this doctrine is held is *Paducah Lumber Co.* v. *Paducah Water Co.*, 89 Ky. 340, 12 S. W. 554. But it distinctly appears in the opinion in that case that there was a private contract directly between the water company and the plaintiff lumber com-

pany, and no cases are cited in the opinion, and the case itself is not an authority, to sustain the plaintiff's contention at bar. *Gorrell* v. *Greensboro Water Co.*, 124 N. C. 328, (32 S. E. 720), and *Mugge* v. *Tampa Water Works Co.*, 42 South, 81, (Fla.) follow the Paducah case in Kentucky, although the facts are materially different. It is sufficient to observe that the reasoning in those cases is not satisfactory.

These numerous expressions of judicial opinion have been so nearly unanimous, and the conclusions reached by so many courts of eminent respectability and authority have been so uniformly opposed to the maintenance of such actions by individual property owners, that the rule may properly be regarded as settled law, and while this court has never been unmindful of the flexibility and creative power of the law to meet the progressive developments of the age, it has never hastily or inconsiderately rejected principles established by sound reason or doctrines sanctioned by long experience.

The proposition advanced by the plaintiffs would require water companies to assume, to some extent, the responsibility of insurers, and it does not satisfactorily appear that such a doctrine would be more in harmony with considerations of public policy, or more consonant with reason and justice, than the established rule. Ample opportunities are already afforded for all property owners to obtain insurance against losses by fire, and the assumption of such risks by water companies, even in a modified degree, would result in double insurance and largely increased water rates. Furthermore, capital would not readily seek investments in enterprises involving a public service exposed to incalculable hazards and constant litigation. In the practical administration of the law the established rule has not been found the cause of extraordinary hardships or the occasion for exceptional complaints.

The entry must accordingly be,

Exceptions overruled.
Demurrer sustained.
Declaration adjudged insufficient.

INHABITANTS OF MILFORD

vs.

BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot. Opinion June 11, 1908.

Case. Assumpsit. Concurrent Remedies. Contracts. Breach of Same. Damages. Water Company Liable for Loss to Municipality, When. Degree of Care Required of Water Company. Private and Special Laws, 1891, chapter 331; 1905, chapter 46. Revised Statutes, chapter 4, section 76; chapter 47.

Case will lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract.

In many cases where assumpsit is a concurrent remedy, case will also lie for a violation of the duty which the contractual relations of the parties involve.

Although assumpsit will usually lie for breach of a contract, yet an action on the case for the breach of the common law duty is oftener the better remedy.

When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as the probable result of the breach of it.

In an action on the case brought by the plaintiff town against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, the property of the town, which were destroyed by fire by reason of the alleged negligence of the defendant corporation in failing to perform its contract to supply through its pipes water of sufficient current, pressure and volume to extinguish fires within the range of its hydrants, it appeared, among other things, from the allegations in the plaintiffs' declaration that the defendant corporation entered into a contract with the plaintiff town whereby for the sum of $800 per year, it agreed to supply the plaintiff town with sixteen post hydrants and water for the same before the first day of August 1902; that it also agreed that said hydrants should have two nozzles and should be supplied with pipes at least four inches in diameter; that it also agreed that said hydrants should

be so placed that proper protection against fire should be secured; that it also agreed that the water works should be supplied by a pump or pumps of a capacity of not less than one million gallons per day; also that the defendant corporation engaged and became bound and obliged to furnish through its pipes and hydrants water of sufficient current, pressure and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in or communicated to the aforesaid building and property of the plaintiff town.

Upon demurrer to the declaration, with the right to plead anew, *Held:* (1) That upon proof of the facts stated in the declaration the defendant corporation would be liable to the plaintiff town in an appropriate action for the damages caused by its negligence in failing to perform a duty arising from its contractual relations with the plaintiff town. (2) That the plaintiff town was legally entitled to bring an action on the case to recover damages for the consequential injuries resulting from the negligent manner in which the defendant corporation performed a duty created by its express contract with the plaintiff town.

With respect to the issue presented in the aforesaid action for negligence, the defendant corporation was required to use ordinary care to maintain pipes and furnish water of the pressure and volume stipulated in its written contract. It was only required to exercise such prudence, vigilance and precaution as would meet the requirements of ordinary care according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be effected by it and the manifest consequences of a failure to perform it.

On report. Demurrer overruled. Defendant to plead anew.

Action on the case brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality and were destroyed by fire in April 1905. It was alleged that this loss was caused by the negligence of the defendant corporation in failing to perform its contract to supply through its pipes water of sufficient current, pressure and volume to extinguish fires within the range of its hydrants.

The two counts especially relied upon by the plaintiff town were the second count in the original declaration and an "amended count," both of which appear in the opinion.

The defendant corporation filed a general demurrer to the declaration, with joinder by plaintiff town, and then by agreement the cause was reported to the Law Court for determination, with the stipulations that the case should "be heard by the Law Court on

declaration as amended, demurrer and joinder. If the demurrer is overruled, defendant shall have the right to plead anew; if sustained, the plaintiff shall be nonsuited."

The case appears in the opinion.

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

E. C. Ryder, for defendant.

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

WHITEHOUSE, J. This is an action on the case brought by the Inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality and were destroyed by fire in April 1905. It is alleged that this loss was caused by the negligence of the defendant in failing to perform its contract to supply through its pipes water of sufficient current, pressure and volume to extinguish fires within the range of its hydrants.

A general demurrer to the declaration was filed by the defendant; and it was stipulated by the parties that the cause should be heard by the Law Court on the amended declaration, demurrer and joinder, that if the demurrer was overruled the defendant should have the right to plead anew, and if sustained, the plaintiff should be nonsuited.

The two counts especially relied upon by the plaintiffs are the second count in the original declaration and the "amended count." The second count is as follows:

"Also for that there was on the 23rd day of July, A. D. 1891 a corporation called the Penobscot Water & Power Company, organized under the laws of Maine, among other things for the purpose of supplying towns and communities with water for domestic use and the extinguishment of fires, and said corporation then and there entered into a contract with the plaintiffs whereby for the sum of $800 per year it agreed, among other things, to supply the plaintiff with sixteen post hydrants, and water for the same before the first day of August, 1892; it also agreed that said hydrants would

have two nozzles and should be supplied with pipes at least four inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured; it was also agreed that the water works to be established under the contract should be supplied by a pump or pumps of a capacity of not less than one million gallons per day; and the plaintiffs say that said hydrants were erected according to contract and that they ever paid the sum of $800 per annum to the said Penobscot Water and Power Company; and the plaintiffs say that said Penobscot Water & Power Company assigned said contract, by its deed in writing, with all its property and franchises, to a corporation called Public Works Company, organized under the laws of Maine and having its principal place of business in Bangor in said County, whereupon the Public Works Company maintained said hydrants and supplied them with water and the plaintiffs paid them by and after the same rate of $800 per year for the use of the same until the 7th day of April, 1905; on said 7th day of April the Public Works Company, by its deed in writing duly executed, assigned and delivered to a corporation called Bangor Railway & Electric Company, the defendant, all its property and franchises including said contract, whereupon the said Bangor Railway & Electric Company undertook to maintain said mains and hydrants and assume control thereof and to supply the same with water and the plaintiffs say that they paid the said company up to and beyond the 28th day of April, 1905, for the use of said hydrants by and after the rate of $800 per year, in accordance with the terms of their contract with the Penobscot Water & Power Company, and now the plaintiffs say that by reason of the premises and the matters hereinbefore stated the defendant was bound and obliged and owed the duty to maintain said hydrants with a supply of water therein for the extinguishment of fires in the town of Milford, and particularly for the extinguishment of fires communicated to the property of the inhabitants of said town as a corporation; and the plaintiffs further say that on said 28th day of April they were the owners of a certain public building called a town hall, of the value of $5000, and of a certain large number of planks constituting a sidewalk of the value of $250, and a hose pipe

of the value of $250; now on said 28th day of April the defendant did not fulfil its duty and obligation to furnish water in said hydrants, but on the contrary wrongfully and negligently failed to supply said hydrants with water capable of use for the extinguishment of fires, and left the same empty and useless; and on said 28th day of April said building of the plaintiffs took fire and although the defendant's hydrants were in easy reach of said building they supplied no water, and albeit the plaintiffs used their utmost endeavor to extinguish said fire they failed because of the lack of water and pressure of water in said hydrant; and the building and the sidewalk and the hose aforesaid were utterly consumed, all which results were entirely due to the wrongful conduct of the defendent in not supplying water in said hydrants according to its obligation and duty."

The "amended count" is as follows:

"In a plea of the case, for that on the 28th day of April, A. D. 1905 the said inhabitants of Milford were the owners of a certain public building called a Town Hall, of the value of five thousand dollars, and certain planks and timbers constituting a sidewalk of the value of two hundred and fifty dollars, and certain fire hose of the value of two hundred and fifty dollars; and the plaintiffs aver that on said 28th day of April 1905 the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes and hydrants, the same being laid and placed in the streets of said plaintiffs' town, water of sufficient current pressure and volume to extinguish fire within range of said hydrants, and especially and particularly fires originating in or communicated to plaintiffs said building and property, in consideration of the sum of eight hundred dollars per annum paid to it by said plaintiffs; Now the plaintiffs say that on said 28th day of April a fire started in a board pile at a considerable distance, to wit, a quarter of a mile, from plaintiffs said building and property, which said fire might easily have been extinguished and put out had there been any pressure and volume of water in said mains and hydrants, but the defendant unmindful of the duty and obligations in this behalf wrongfully, carelessly and negligently suffered and allowed said mains, pipes and hydrants to be destitute of any current of water of sufficient pressure,

force and volume to be of any value or utility in extinguishing said fire or any fire, so that the plaintiffs were unable by the use of the greatest diligence and the strongest efforts to quench the fire in said pile of boards, although they were in the use of due care in this behalf; and the plaintiffs aver that said fire in said board pile was communicated to the said buildings and property of plaintiffs by sparks, firebrands or cinders, so that the same were utterly burned and consumed, although hydrants were at hand and in close proximity to said buildings and property, and competent and capable men were at hand with suitable hose and appliances ready to extinguish the fires started by said cinders and firebrands upon plaintiffs said building and property and were prevented from doing so solely by the lack and want of water in said hydrants which it was the duty and obligation of said defendant to furnish. And the plaintiffs aver that the sole cause of the said loss and damage was the wrongful neglect of duty of said defendant, to the damage of said plaintiffs (as they say) the sum of six thousand dollars."

In support of the demurrer the following statement of the defendant's claims was presented as the basis of the argument in its behalf, viz:

"1. The Company does not agree to extinguish fires or to insure property against loss by fire. Its agreement is simply to furnish a water system and supply it with water. It is impossible to say that failure to furnish water was the proximate cause of the loss, and consequently no action can be maintained to recover for the loss of property by fire; the cause of the loss is too remote and the damages too uncertain to allow of a recovery.

"2. Damages must be such as were in contemplation at the time the contract was made. It cannot be claimed that it was the intention of the company to make good loss by fire for the small compensation which it received for installing its plant.

"3. In making a contract with a water company for the protection of property against fire, the town acts for the general public good. The town as a property owner derives the same benefit that every other property owner does. The contract does not protect any particular property, but is for the benefit of all.

"4. If an action can be maintained it must be an action of assumpsit. There is no statute or common law duty imposed upon the defendant to furnish water to the municipality. The duty imposed grows out of the contract itself. Recovery, if any there be, must be by virtue of the contract, and not on account of any legal duty independent of the contract."

The important question thus raised by the pleadings and contentions of the parties has never before been presented to this court, nor, so far as appears, has the precise question ever been directly involved and expressly determined in any jurisdiction, state or federal, in this country, the only analogous case cited by counsel being distinguishable from this in essential particulars. There is no prevailing American doctrine upon the question and no precedent in this State that can in any way embarrass this court in its efforts to reach a solution of the problem that shall appear to be warranted by the well established and fundamental law of contracts, consonant with the principles of justice and sound reason and in harmony with the considerations of public policy involved in the inquiry.

The plaintiffs are a municipal corporation, and by sect. 76 of chapter 4, R. S., such corporations are empowered to "contract for a supply of water, gas and electric light for municipal uses upon such terms as may be mutually agreed . . . . and may raise money therefor." The plaintiff town of Milford was also specially authorized by chapter 331 of the Private and Special Laws of 1891, "to contract with the Penobscot Water and Power Company for a supply of water for municipal and sanitary purposes and for the extinguishment of fires," and it appears from the averments in the plaintiffs' declaration that the defendant corporation acquired all the powers, privileges and franchises and assumed all of the obligations of the Penobscot Water and Power Company.

It is provided by chapter 46 of the Private and Special Laws of 1905 that the defendant corporation "shall have, possess and enjoy all of the powers of a corporation formed under the provisions of chapter 47 of the Revised Statutes" of Maine, and it thus appears to have been invested with full power to make contracts and to sue and be sued.

It is not in controversy therefore that both of the parties to this suit were competent to enter into the contract set out in the plaintiffs' declaration. According to the allegations therein contained, the defendant entered into a contract with the plaintiffs whereby for the sum of $800 per year, it agreed to supply the plaintiffs with sixteen post hydrants and water for the same before the first day of August 1902; it also agreed that said hydrants should have two nozzles and should be supplied with pipes at least four inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured; it was also agreed that the water works should be supplied by a pump or pumps of a capacity of not less than one million gallons per day. The defendant also engaged and became bound and obliged to furnish through its pipes and hydrants water of sufficient current, pressure and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in or communicated to the plaintiffs' said building and property. The hydrants were duly erected and the plaintiffs paid to the defendant corporation the sum of $800 per annum, in accordance with the terms of the contract up to and beyond the time of the fire in which the plaintiffs' property was destroyed.

Here then is a formal written contract entered into by parties competent to make it. It is not in controversy that it was complete, definite and certain; that it was free from misapprehension, fraud or mistake, and entirely fair and reasonable in all its parts. It was not characterized by any lack of mutuality either in the terms of the contract when made or in the remedies available to both parties. The plaintiffs had fully performed the contract on their part and it contains no clause or phrase that would afford the defendant any reasonable ground for claiming exemption either from the legal obligation or the moral duty of performing on its part a contract so manifestly indispensable to the protection of the plaintiffs' property and so vitally important to the welfare of the people. With respect to the issue presented in this action for negligence the defendant was required to use ordinary care to maintain the pipes and hydrants and furnish water of the current pressure and volume as stipulated

in its written contract. It was only required to exercise such prudence, vigilance and precaution as would meet the requirement of ordinary care, according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it. There is nothing in the contract to indicate and nothing in the situation of the parties to suggest that the performance of its duty would have been attended with any oppression or hardship on the defendant.

But the demurrer admits the truth of the plaintiffs' allegations that the defendant "wrongfully, carelessly and negligently suffered and allowed the mains, pipes and hydrants to be destitute of any current of water of sufficient pressure, force and volume to be of any value or utility in extinguishing said fire or any fire." And the plaintiffs aver that the "sole cause of the said loss and damage was the wrongful neglect of duty of said defendant."

But it is suggested in behalf of the defendant that the corporation does not agree to extinguish fires or to insure property against loss by fire; that its agreement is simply to furnish a water system; that it is impossible to say that failure to furnish water was the proximate cause of the loss, and that damages can only be such as were in contemplation at the time the contract was made.

That the defendant did not agree to extinguish fires or to insure property against fire is unquestioned. The statement is true but the argument is fallacious. The conclusion which is evidently sought to be deduced, that the defendant is not liable for the damages resulting solely from a breach of its contract to furnish water to extinguish fires, does not necessarily follow. A corresponding statement directing attention to the particular thing which the defendant agreed to do or not to do, could with equal propriety be made respecting every cause of indirect damages. This method of reasoning obviously excludes from consideration the distinctive character of consequential damages for the breach of a contract, and hence affords no aid in determining the question of liability. In the leading English case of *Hadley* v. *Baxendale*, 9 Exch. 353, so often cited as authority in this country, the plaintiffs gave the

broken shaft of their mill to the defendant carrier to be forwarded immediately to an engineer to serve as a model for a new one. The delivery was delayed and the mill remained idle for want of the new shaft. The plaintiffs claimed damages for loss of profits while the mill was idle. The carrier only undertook to deliver the broken shaft immediately. He did not contract to provide a new shaft or to furnish business for the mill. But the familiar rule was then enunciated "that when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." So in what has been termed the leading American case of *Griffen* v. *Colver*, 16 N. Y. 489, it was held that the plaintiff was entitled to damages for the loss of the ordinary rental of his mill, resulting from the breach of the defendants' contract to deliver a steam engine built for the purpose of running the mill. But the defendant did not contract to run the mill, or to supply business for it. He only agreed to deliver a steam engine to furnish power for it. The statement of the rule of damages is substantially identical with that in the English case of *Hadley* v. *Baxendale*, supra.

Equally pertinent illustrations are readily found in our own State. In *Grindle* v. *Eastern Express Company*, 67 Maine, 317, the plaintiff's intestate delivered $24.90 to the defendant Express Company, at Castine to be sent to Belfast to pay a premium on his life policy which by its terms would lapse in eight days if the premium was not paid. It was held that for failure to deliver the money according to its undertaking the defendant was liable for the net value of the policy on the day it lapsed, on the ground that both parties must be presumed to have contemplated such damages from a knowledge of the circumstances. But the defendant's only undertaking was to carry a package of money. See also *Frye* v.

M. C. R. R. Co., 67 Maine, 414, and *McPheters* v. *Moose River Log Driving Co.*, 78 Maine, 329.

Further apposite illustrations are found in numerous cases involving facts more closely analogous to those at bar. In *Watson* v. *Needham*, 161 Mass. 404, the defendant town, acting through its water commissioners, undertook to furnish the plaintiff with water for use in a boiler to generate steam to heat his greenhouse, but omitted to use proper diligence to discover a leak in the main pipe and the plaintiff failed to receive a sufficient supply of water whereby his plants were damaged by freezing to the extent of $400. Here the defendant had not contracted to heat the plaintiff's greenhouse or to insure his plants against freezing; it had only contracted to furnish water to make steam. But the court held that subject to the right to shut off the water when necessary to make extensions and repairs, which had been expressly reserved, "the town was bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for the plaintiff's use so long as the contract remained in force." The plaintiff was accordingly allowed to recover the full amount of his damage by freezing.

In *Stock* v. *Boston*, 149 Mass. 410, a similar contract existed between the parties, and the plaintiff sustained damage by the freezing of his plants caused by the neglect of the defendant to furnish water according to the contract. It was contended in behalf of the defendant that the damage was too remote, but the court said that the defendant was "liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries, as according to the common experience of men, are likely to result from his act . . . . The true inquiry is whether the injury sustained was such as according to common experience and the usual course of events, might reasonably be anticipated." See also *Metallic C. C. Co.* v. *Fitchburg R. R.*, 109 Mass. 277; *Hand* v. *Brookline*, 126 Mass. 324.

The same doctrine is exemplified in *New Orleans & N. E. R. Co.* v. *Meridian Water Works Co.* in the Circuit Court of Appeals, 72 Fed. Rep. 227. This case is precisely analogous to the case at bar, being distinguishable only by the fact that the plaintiff in this

case is a railroad company instead of a municipal corporation. In the Federal case, the water company, in consideration of $1200 per year, contracted to furnish the tanks and shops of the railroad company with a full and sufficient supply of water, "not less than 60 pounds pressure for all purposes for which water may be needed or used at said shops," and as a part of this agreement the defendant water company laid its pipes to the plaintiff's premises and attached hydrants thereto to enable the plaintiff to run the water as a protection against fire, knowing that the railroad company had no other available source of water supply and no other means of extinguishing fires on its premises; but it was alleged in the declaration that the plaintiff's shops and tanks were destroyed by fire in consequence of the defendant's failure to furnish water at 60 pounds pressure. It was held that upon these facts the plaintiff was entitled to recover. In the opinion the court say: "The breach of contract occurred when the defendant failed to furnish the plaintiff's servants with an adequate supply of water at not less than 60 pounds pressure. . . . The plaintiff's declaration alleges that the proximate cause of its damages was not the fire but was in the fact of the defendant's failure to furnish water at 60 pounds pressure. If such be the fact, the plaintiff's damages were not too remote or consequential to be sustained by the law applicable to the facts, quoting in extenso, the rule in *Hadley* v. *Baxendale*, 9 Exch. 341.

In *Knappman Whiting Co.* v. *Middlesex Water Company*, 64 N. J. L. 240 (45 Atl. 692) the Supreme Court of New Jersey on a claim for recoupment set up in an action of contract, rigidly enforced the obligations of the defendant's contract. In that case the water company in consideration of $600 per year, agreed to furnish the plaintiff company with water "suitable for use in steam boilers and with a pressure sufficient for fire purposes," but by reason of a leak in the water main and the consequent failure of the company to furnish water according to the contract, the plaintiff's factory was destroyed by fire causing damage to the extent of $20,000. In an action of contract by the water company to recover the amount due for water supplied, the plaintiff in error presented its claim for recoupment based on the failure of the water company to perform

its agreement to supply water of sufficient pressure for fire purposes, and it was held that under such a clear and unqualified contract, the water company was liable for the damages sustained by the consumer from fire in consequence of a failure in the water pressure, though the failure was due to a break in its pipes without the water company's fault. In the opinion the court say, inter alia; "The principle underlying all these cases is that where the contract is express, as it is in this case,— to furnish water with a pressure sufficient for fire purposes,—to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert, for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement."

It will be perceived that in this action of contract the exercise of reasonable care and diligence by the water company was not made the criterion of its liability.

In *Skowhegan Water Company* v. *Skowhegan Village Corporation*, 102 Maine, 323, the competency of the parties to make a contract for a constant and ample supply of water "under sufficient pressure for the extinguishment of fires," and the obligation of the defendant to perform its contract were distinctly recognized. The water company brought suit to recover the rental stipulated in the contract, but the defendant contended that the plaintiff had failed to furnish water of sufficient pressure for the extinguishment of fires, and was therefore not entitled to recover the rental specified. The court sustained a verdict in favor of the defendant, saying in the opinion, "The plaintiff was entitled to recover the fair value of the service, having regard to the contract price and considering how much less the service was worth to the corporation by reason of the plaintiff's breach of the contract." . . . . "The question of

recoupment, properly so termed, is not involved. But if the plaintiff's breach of the contract be such as to subject the defendant to consequential damage, that may be the foundation for a legitimate claim to recoupment with respect to which the burden of proof would be upon the defendant."

The case of *Ukiah City* v. *Ukiah Water & Imp. Co.*, 142 Cal. 173, (75 Pac. Rep. 773) is cited by counsel for the defendant as a "case on all fours" with the principal case, and as a direct authority against the plaintiff's contention. But as already suggested, that case differs materially from this, and is legally distinguishable from it. In that case there was no express contract, written or oral, between the defendant water company and the plaintiff town respecting the quantity of water to be furnished or the manner and means of furnishing it. As stated by the court in the opinion "the same relations existed between the town and the defendant as to the furnishing of water for general fire purposes as ordinarily exist between the private consumer and the water company as to water for domestic purposes." The water company had not agreed to supply the town with any definite number of hydrants, or specified the number of nozzles for the hydrants, the diameter of the pipes with which they should be supplied, or the manner in which the hydrants should be placed to afford protection against fire. It had not agreed that its works should be supplied by pumps of any stated capacity, or become bound to furnish through its pipes and hydrants water of "sufficient current, pressure and volume to extinguish fire within the range of such hydrants," or made any special reference to "fires originating in or communicated to" the property of the municipality. It was principally for want of a contract on the part of the defendant water company to do any specific thing, that judgment was given for the defendant. After enumerating the many cases in different jurisdictions in which it has been held that a water company is not liable to individual owners of property destroyed by fire by reason of its failure to perform its contract to supply the town with sufficient water to extinguish fires, the opinion proceeds to show that *Paducah Lumber Co.* v. *Water Co.*, 89 Ky. 34, (12 S. W. 445) and *Gorrell* v. *Water Co.*, 124 N. C. 328,

(32 S. E. 720) in which the opposite conclusion was reached, are to be distinguished from the California case against the Ukiah Water Company by reason of the fact that in the case of the Paducah Lumber Co. and in the Gorrell case, there was an express contract to do certain specific things, which appear to have been equivalent to the stipulations in the plaintiff's contract in the case at bar. The court further say: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which in the exercise of its governmental functions the plaintiff had obtained for the whole town."

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire by reason of its failure to furnish him a sufficient supply of water. . . . It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more."

It has been seen that in the written contract as set out in the plaintiff's declaration in the case at bar, the defendant water company in consideration of $800 per annum, did expressly agree to furnish water for sixteen post hydrants which should have two nozzles each and be supplied with pipes four inches in diameter, and that its works should be supplied with pumps of a capacity of 1,000,000 gallons per day.

It also expressly "engaged" to furnish through its pipes and hydrants water of sufficient pressure and volume to extinguish fire within range of its hydrants "and especially and particularly fires originating in or communicated to the plaintiffs' said building and property." But instead of the pressure and volume specified, the plaintiffs allege that by reason of the defendant's negligence these pipes and hydrants had become destitute of any current of water of sufficient pressure and volume to be of any utility in extinguishing fires, and that this negligence on the part of the defendant was the sole cause of the plaintiffs' loss and damage.

The defendant corporation proceeded to construct and operate its plant and entered upon its public service and the performance of its contract. It well knew that the plaintiff town relying upon its express contract with the defendant would omit to make any other arrangements for the supply of water, or provide any other means for the extinguishment of fires. The defendant's servants did not need to be informed that the elaborate provisions of the contract respecting the supply of water through its hydrants were for the purpose of affording protection against the destruction of property by fire. They well knew the disastrous results likely to flow from any neglect on their part to perform the contract to furnish water of sufficient volume and pressure to extinguish fires. Under such circumstances damages from loss of property by fire are not only the natural consequences of the defendant's wrongful neglect but "such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it." The injuries sustained are manifestly such as, according to common experience and the usual course of events might reasonably be anticipated. Indeed it is impossible to conceive of any class of contracts, or of contracts relating to any subject matter, with respect to which the consequences of a breach are more palpably natural or more readily anticipated.

Under the stipulation in the report, the defendant is entitled to plead anew in the event that the demurrer is overruled. All of the other objections interposed by the defendant to the maintenance of

the action, involve a question of fact to be heard upon the trial of the cause. Whether the defendant's breach of duty in connection with the performance of its contract was culpable negligence, and if so whether such breach of duty on its part or "the negligence of the plaintiffs themselves, or the criminal act of a stranger, or an atmospheric condition" was the proximate cause of the plaintiffs' loss are questions not raised by the demurrer, but are determinable by the trial court. The solution of them may often be attended with difficulty, but there is no reasonable ground for apprehending that such difficulty will be essentially different from that experienced in numerous other cases of a similar character.

When therefore the established principles of law are applied to this case as to all others, and the contract between these parties is held to possess the binding force and efficacy of all other analogous contracts, the conclusion is irresistible that upon proof of the facts stated in the declaration the defendant would be liable to the plaintiffs in an appropriate action, for the damages caused by its negligence in failing to perform a duty arising from its contractual relations with the plaintiffs.

2. But the defendant further contends that the plaintiffs have misconceived their remedy and that if any action can be maintained it must be an action of assumpsit and not of tort.

It is the opinion of the court that this contention is not sustainable either upon reason or authority. As observed by the court in *Ashley* v. *Root*, 4 Allen, 504: "This is one of a numerous class of cases where a party may elect to sue either in contract or tort. At common law he might sue in assumpsit for breach of contract or in case for breach of duty." In that action a principal was allowed to recover in an action of tort against his agent for all the damage caused by a breach of duty by the agent including his neglect to pay over on demand money which he had collected as agent. Either case or assumpsit may also be supported for a false warranty in the sale of goods. *Mahurin* v. *Harding*, 28 N. H. 128, (8 Foster, 128). In the opinion the court say: "The warranty is none the less a contract because it is the means by which a fraud is accom-

plished and the fraud is in no way diminished because the seller has at the same time bound himself by a warranty."

In Am. & Eng. Encyc. of Law, (2nd Ed.) Vol. 28, page 625, it is said: "Case will also lie for a violation of the duty which the contractual relations between the parties involve, in many cases where assumpsit is a concurrent remedy. . . . Although assumpsit will also usually lie for a breach of the contract, action on the case for the breach of the common law duty is often the better remedy. . . . It will also lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract." *Burnett* v. *Lynch*, 5 Barn. & Cres. 589. (12 E. C. L. 327) is cited in support of the last statement. In that case the defendant had taken an assignment of a lease subject not only to the payment of rent, but to the performance of the covenants, and had thereby made it his duty to pay the rent and perform the covenants. It was held by Abbott, C. J. that either assumpsit or case was maintainable for a breach of that duty, citing *Kinlyside* v. *Thornton*, 2 Wm. Bl. 1111. In the opinion of Bailey, J. it is said: "It is unnecessary to go through the cases in which it has been decided, that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickson* v. *Clifton*, 2 Wils. 319, there can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo; but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for the breach of which an action of tort might be maintained." See also Chitty on Plead. (16 Ed.) Vol. 1, page 162, with the observations of Lord Ellenbourgh on *Govett* v. *Radnidge*, 3 East, 70, there cited, and Broom's Legal Maxims, 201-202 and cases cited.

In the case at bar an action on the case is brought to recover damages for the consequential injuries resulting from the negligent manner in which the defendant company performed a duty created

by an express contract between the parties. It is not properly speaking an action based on the non-feasance of the defendant. It is not brought to recover damages for the refusal of the defendant to perform the contract. It sufficiently appears that the defendant laid the pipes, erected the hydrants and fully established its plant, and for a time operated it to the satisfaction of the plaintiff. The action is based on the defendant's negligence in the operation and management of the plant, negligence which would be exemplified by a want of vigilance and attention in discovering a leak or adjusting a shut-off. An action ex contractu might have been maintainable, as in *Knappman Whiting Co.* v. *Water Co.*, 64 N. J. L., supra, where the obligation of the contract was enforced and the water company held liable for a loss by fire resulting from a failure in the water pressure which was not due to any negligence of the company. But here the plaintiffs elected to bring case as they were legally entitled to do, a form of action obviously more favorable to the defendant, since it imposes upon the plaintiffs the burden of proving negligence on the part of the defendant respecting the duty which it engaged to perform.

According to the stipulations in the report, the entry must therefore be,

Demurrer overruled.
Defendant to plead anew.

INHABITANTS OF WELLINGTON *vs.* INHABITANTS OF CORINNA.

Piscataquis. Opinion June 11, 1908.

Ordering Verdict. Rule Relating Thereto. Pauper Notices. Waiver of Defects Therein. Failure to Answer. Effect of Such Failure. Overseers of the Poor. Defective Election Records. Alleged Invalid Divorce. Illegitimate Children. Revised Statutes, chapter 1, section 6, rule XX; chapter 4, sections 12, 14; chapter 27, section 1, paragraph III, sections 39, 40.

It is a well established rule in this State that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand.

Although a pauper notice given by the overseers of the poor of a plaintiff town to the overseers of the poor of the defendant town, states that the pauper named therein "and wife and children" have fallen into distress but fails to state either the names or the number of the children and in that respect is an insufficient compliance with the statute, yet the overseers of the poor of the defendant town as the authorized agents of the town may waive any objection arising from such an informality or defect in the notice, and if they accept such notice without objection as a sufficiently definite statement of the facts, they must be deemed to have waived any objection arising from the failure of the notice to give a more definite description.

Where the overseers of the poor of a defendant town failed to return an answer, within two months, as required by Revised Statutes, chapter 27, section 40, to a pauper notice sent to them by the overseers of the poor of the plaintiff town in compliance with the provisions of section 39 of said chapter, and representing that the pauper named in the notice had a legal settlement in the defendant town and requesting his removal, *Held:* That while under the provisions of the aforesaid section 40 the defendant town was estopped to deny that the settlement of the pauper was in any other than the plaintiff town, yet the defendant town was not precluded from showing that the settlement was in fact in the plaintiff town.

Where the record of a plaintiff town, which had brought an action against the defendant town in a pauper matter, failed to show that the overseers of the poor of the plaintiff town were elected by ballot or major vote *Held:* that such failure was not a fatal defect, it being presumed in the absence

of any evidence to the contrary that the town proceeded in the usual and legal manner, and even if the record were not thus to be credited, it would be sufficient for the plaintiff town to prove that the pauper supplies were furnished by a majority of the acting overseers of the poor of the plaintiff town and that notice was given by one of the acting overseers.

Where the legality of a marriage was denied on the ground that the divorce obtained by the wife from a former husband was invalid for the reason that the libel was not signed by the wife, and it appeared that the wife was unable to write her name and the libel was signed by mark and that the maiden name of the wife was Mary Jane Farrer and that her name after she married her first husband was Mary Jane Mears, and that she was represented in the libel to be Mary Jane Mears but that her counsel inadvertently wrote her maiden name so that her signature appeared to be "Mary Jane $\overset{\text{her}}{\underset{\text{mark}}{\text{x}}}$ Farrer" instead of Mary Jane Mears, and there was evidence to show that she made the mark for the name of Mary Jane Mears and not Mary Jane Farrer, *Held:* That there was no room for doubt respecting the identity of the libelant and the person who made her mark on the libel and that the decree of divorce was valid.

In this State there are distinct and separate statutes concerning illegitimate children; one relating to their pauper settlement and one relating to their right of inheritance. The statute declaring that when the parents of such children intermarry they are deemed legitimate and have the settlement of their father, applies to the pauper settlement of illegitimate children of parents who are living together in a state of adultery at the time of the birth of such children.

Where four children were born to parents who were living together in adultery at the time of the birth of such children, but who afterward intermarried, *Held:* That under the provisions of Revised Statutes, chapter 27, section 1, paragraph III, such children are deemed legitimate and have the pauper settlement of their father.

In the case at bar, *Held:* That the legal evidence would not support a verdict for the defendant town.

On exceptions by defendants. Overruled.

Action of assumpsit brought against the defendant town to recover the expense incurred by the plaintiff town for pauper supplies furnished to one Frank M. Moody, his wife and four minor children, and whose pauper settlement was alleged to be in the defendant town. Writ dated August 17, 1905. Plea, the general issue, with brief statement as follows:

"That the woman called Jane Moody is not the legal wife of Frank M. Moody.

"That the children called Jennie Moody, Harry Moody, Herbert Moody and Benney Moody are not the legal children of Frank M. Moody.

"That Frank M. Moody had no legal wife and no legal children at the date of this writ in this action.

"That Frank M. Moody had no legal wife and no legal children at the time of the alleged furnishing of supplies, as set out in this writ in this action."

Tried at the February term, 1907, Supreme Judicial Court, Piscataquis County. At the conclusion of the evidence, the presiding Justice directed the jury to return a verdict for the plaintiff town for the amount claimed in the writ with interest from the date of the writ, and thereupon the jury returned a verdict for the plaintiff town for $218.83. To this ruling the defendant town excepted and also took exceptions to the admission of certain evidence during the trial.

The case appears in the opinion.

Hudson & Hudson, for plaintiffs.

J. B. & F. C. Peaks, and Charles W. Hayes, for defendants.

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

WHITEHOUSE, J. This is an action of assumpsit brought to recover the expense incurred by the plaintiff town for pauper supplies furnished between February 21, 1904, and June 4th, 1905, to Frank M. Moody, his wife and four minor children. After the introduction of evidence was closed on both sides, the presiding Justice on motion of the plaintiffs' counsel, directed the jury to return a verdict in favor of the plaintiff for the amount claimed in the writ with interest. The jury thereupon returned a verdict for the plaintiff for $218.83. The case comes to the Law Court on exceptions to this ruling and also to the admission of certain evidence during the progress of the trial.

It is a well established and familiar rule of procedure in this State that the court may properly instruct the jury to return a

verdict for either party when it is apparent that a contrary verdict would not be allowed to stand. *Bennett* v. *Talbot*, 90 Maine, 229; *Bank* v. *Sargent*, 85 Maine, 349, and cases cited. In *Woodstock* v. *Canton*, 91 Maine, 62, it clearly appeared from the testimony introduced by the plaintiff, which was not contradicted in any material point, that the pauper had gained a settlement in the defendant town, and the presiding Justice, finding that the evidence would not authorize a verdict for the defendant, directed the jury to return a verdict for the plaintiff. In the opinion of the Law Court, overruling the exceptions to this order, the following quotation is made from *Heath* v. *Jaquith*, 68 Maine, 433, viz: "It would be but an idle ceremony to submit the case to the jury by instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it, and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence to support it." See also *Young* v. *Chandler*, 102 Maine, 251.

The question accordingly presented for the determination of the court in the case at bar, is whether the material and admissible evidence in the case afforded sufficient proof to support a verdict in favor of the defendant. If not, and it would have been the duty of the court to set aside such a verdict if it had been rendered, the ruling of the presiding Justice directing a verdict for the plaintiff was obviously correct.

It was not in controversy that the supplies charged in the plaintiffs' account were actually furnished by the plaintiff town, during the period above stated and that they were necessary for the relief of Frank M. Moody and his family, consisting of Mary J. Moody who was living with him as his wife, and their four minor children named in the declaration, and that the expenditures for which the plaintiff town seeks reimbursement in this action were actually made by the town for the supplies thus furnished. It was satisfactorily established by uncontradicted evidence that the supplies in question were received and consumed in the family of Frank M. Moody, composed of the members above stated, with full knowl-

edge on the part of Frank M. and Mary J. Moody that they were pauper supplies, and that the prices charged therefor were reasonable. It also appeared that two notices dated March 28, 1904, and March 22, 1905 respectively, were seasonably given by the plaintiff town to the defendant purporting to state the facts respecting the Moody family in question, in compliance with section 39 of chapter 27, R. S., and representing that they had a legal settlement in the defendant town and requesting their removal.

It is admitted that no answer was returned to these notices by the overseers of the defendant town, within two months as required by section 40 of chapter 27, R. S., stating their objections to the removal; but the defendant town, besides interposing an objection to the sufficiency of the first notice, now invokes the rule of law settled in *Turner* v. *Brunswick*, 5 Green. 31, that while under the provisions of the statute last cited, the defendant is estopped to deny that the settlement of the paupers in question is in any other than the plaintiff town of Wellington, it is not precluded from showing that it was in fact in that town. The defendant claims that there is evidence showing that pauper settlement of Frank M. Moody was in fact in the town of Wellington during the period in question. But the defendants' principal contention appears to be in accordance with the defense set up in his brief statement that even if the settlement of Frank M. Moody himself was in the defendant town, Mary J. Moody was not his lawful wife and had a separate settlement of her own, and the four minor children were illegitimate and had a separate settlement derived from their mother, and if such were the fact it is conceded that the defendant would not be estopped to show it by reason of its failure to return an answer to the plaintiffs' notices above specified. *Glenburn* v. *Oldtown*, 63 Maine, 582.

These objections urged by the defendants' counsel in support of the exceptions will be considered in their order, and the conclusions of the court stated without extended discussion of the testimony.

With respect to the objection to the sufficiency of the notice from the plaintiff to the defendant town, dated March 28, 1904, the statute above cited provides that overseers "shall send a written

notice . . . . stating the facts respecting a person chargeable in their town, to the overseers of the town where his settlement is alleged to be, requesting them to move him, which they may do." The statement of "facts" must contain a sufficiently definite description of the person whose distress has been relieved to enable the overseers receiving the notice, at least by reasonable inquiry, to establish the identity of the person described. *Thomaston* v. *Greenbush*, 98 Maine, 140.

The notice in question of March 28, 1904, states that "Frank M. Moody, and wife and children" have fallen into distress, etc. It fails to give either the names or the number of the children, and in that respect is obviously an insufficient compliance with the statute as interpreted by the court. But as the authorized agents of the town, the overseers of the poor may waive any objection arising from such an informality, or defect in the notice. *Unity* v. *Thorndike*, 15 Maine, 182. Although the overseers of the defendant town failed to make any reply to this notice within two months, it appears that on the 4th of the following February, an answer was in fact returned by them, as follows, viz:

"We send you herewith check for amount of the enclosed bill for medical attendance on Frank Moody. Please receipt bill and return and in regard to the bill of $73.49 for supplies furnished said Moody and family, we will say that upon investigation it does not appear clear to us that Mrs. Moody and children are paupers of this town. It will be further investigated and what bills you have for the support of Frank Moody himself we will settle and investigate the other."

It appears from this letter which was authorized by a majority of the overseers of the defendant town, that the notice to which this was a reply, was accepted without objection as a sufficiently definite statement of the facts to enable the overseers to investigate the question of the liability of the defendant town for the support of the "wife and children" of Frank M. Moody. The overseers thereby admitted that "Mrs. Moody and children" were sufficiently identified to them, and they must be deemed to have waived any objection arising from the failure of the notice to give a more definite description. *York* v. *Penobscot*, 2 Maine, 1; *Embden* v. *Augusta*,

12 Mass. 307; *Shutesbury* v. *Oxford*, 16 Mass. 101; *Weymouth* v. *Gorham*, 22 Maine, 385; *Auburn* v. *Wilton*, 74 Maine, 437.

The notice of March 22, 1905, was admitted without objection arising from any alleged defect or informality therein and it appears to be sufficient. It states that Frank M. Moody and his wife Jane Moody and their four minor children have fallen into distress, etc. Construed in connection with the information already possessed by the overseers, as disclosed by their letter of the preceding month above quoted, this notice unquestionably afforded the defendant overseers all the information which they desired in regard to the Moody family at that time. *Holden* v. *Glenburn*, 63 Maine, 579; *Woodstock* v. *Bethel*, 66 Maine, 569.

The defendant further objected to the introduction of the notices on the ground that the record of the election in the plaintiff town for each of the years 1904 and 1905, fails to show that the overseers of the poor were elected "by ballot" or "by major vote." The records for each of these years states that the town "voted and chose" the persons named "overseers of the poor." Sections 12 and 14 of chapter 4 also provide that overseers of the poor shall be chosen "by major vote" and "by ballot." In this case the record is silent as to the mode of choice; the town "voted and chose" the overseers of the poor. But in the absence of any evidence to the contrary it is to be presumed that the town proceeded in the usual and legal manner. Omnia presumuntur rite esse acta. If the record is not impeached, it imports a legal choice, and the overseers are presumed to have been legally elected. *Mussey* v. *White*, 3 Maine, 290; *Blanchard* v. *Dow*, 32 Maine, 557; *Gerry* v. *Herrick*, 87 Maine, 219.

But even if the record were not thus to be credited, it was sufficient for the plaintiffs to prove that the supplies were furnished by a majority of the acting overseers of the poor and that notice was given by one of the acting overseers. *New Portland* v. *Kingfield*, 55 Maine, 172; *Belfast* v. *Morrill*, 65 Maine, 580.

With respect to the second proposition, it satisfactorily appears from uncontradicted testimony that from February 21, 1904, to June 4, 1905, the period during which the supplies in question

were furnished, Frank M. Moody had his pauper settlement in the defendant town of Corinna and not in the plaintiff town of Wellington. It has been seen that no written denial was returned to the overseers of the plaintiff town within two months from the receipt of either of the notices above considered, and while the defendant was not thereby precluded from showing in defense that Moody's settlement was in fact in the plaintiff town, there is not sufficient evidence in the case to support that conclusion. He had a derivative settlement in the town of Corinna, and he never lived in any other town five consecutive years after arriving at the age of twenty-one years, without receiving supplies as a pauper. In reply to a notice from the overseers of the plaintiff town dated February 10, 1900, representing that "Frank M. Moody and family" had fallen into distress and that their settlement was in the defendant town, a letter was returned by the overseers of Corinna under date of February 22, 1900, saying "We are satisfied that this town is not the place of the lawful settlement of the said Frank Moody 'family.' We own him." And it accordingly appears from exhibits in the case that the defendant town paid to the plaintiff five different bills for the support of Frank M. Moody during the years 1904 and 1905, and in the winter of 1906 paid another bill for his support to the town of Dexter. It is true that the defendant is not absolutely precluded from contesting the settlement by the acts of its overseers in furnishing or paying for supplies for the support of the pauper or by their admissions and declarations made in their written answers to notices received, for it is not within the scope of their authority to create or change the settlement of paupers. But such payments for support and such admissions and declarations are important evidential facts bearing upon the question of liability. *Weld* v. *Farmington*, 68 Maine, 301.

But as already noted the principal controversy between the parties arose upon the defendants' contention that Mary Jane Moody, the woman who was living with Frank M. Moody when the supplies in question were furnished and was represented in the notices to be his wife, was not in fact his lawful wife, and that the four minor children mentioned in the notices were not his legitimate children.

And it is conceded that the defendant is not estopped to deny the settlement of the alleged wife and children by reason of its failure to return a written denial to the plaintiff town within two months from the receipt of their notices, unless it appears that they were the wife and children of Frank M. Moody, and that testimony tending to negative that fact was admissible. *Holden* v. *Glenburn*, 63 Maine, 579.

Frank M. Moody, the pauper in question, was divorced from his first wife Lillie B. Moody in December, 1894, and November 26, 1896, married Mary Jane Mears, whose maiden name was Mary Jane Farrar, but she had a lawful husband living named John A. Mears, who was then serving a sentence of imprisonment in the state prison for ten years for the crime of rape, and this marriage to Moody was therefore unlawful and their children illegitimate. On the 7th of October, 1903, however, having learned presumably, that under our statutes only a life sentence in state prison would dissolve the bonds of matrimony without legal process, Mary Jane Mears obtained a decree of divorce from John A. Mears, in the Supreme Judicial Court, and on the fifteenth of the same month was lawfully joined in marriage to Frank M. Moody. The four minor children in question were born after her supposed marriage to Moody in 1896, while John A. Mears was serving his sentence in state prison, and they were the progeny of Frank M. Moody and Mary Jane Mears, afterward Mary Jane Moody. Thereupon the plaintiff invokes paragraph three, section one of chapter 27, R. S., which declares that "Illegitimate children have the settlement of their mother at the time of their birth, but when the parents of such children born after March, 24, 1864 intermarry, they are deemed legitimate and have the settlement of their father." The language of this statute is clear and unambiguous and it must be presumed to mean what it has so plainly expressed. When clear and unequivocal language is used which admits of only one meaning, it is not permissible to interpret what has no need of interpretation. Endlich on Interpretation of Statutes, section 4; *Davis* v. *Randall*, 97 Maine, 36. The justice and humanity of the statute have been illustrated in several instances which have been brought

to the attention of the court since its enactment. *Minot* v. *Bowdoin*, 75 Maine, 205; *Gardiner* v. *Manchester*, 88 Maine, 249. And there is nothing in its character and purpose or practical operation which would afford any justification for departing from the rule of literal interpretation in applying it. The obvious purpose of it was to promote the moral welfare of the people by preserving the family in its entirety and preventing the separation of innocent children from their parents in the event of their falling into distress and needing relief under the pauper laws.

But the counsel insists that this statute is not to be construed to apply to the pauper settlement of illegitimate children of parents who were living together in a state of adultery at the time of the birth of such children, and cites *Sams* v. *Sams*, 85 Kentucky, 396, in support of this contention. But the question before the Kentucky court in that case involved the rights of inheritance of illegitimate children and had no reference to their pauper settlement. The statute there construed reads as follows: "If a man having had a child by a woman, shall afterwards marry her, such child or its descendants if recognized by him before or after marriage, shall be deemed legitimate." And it was held by the court that the statute did not apply to that class of cases where a husband has violated his marriage vows and become the father of children by an adulterous intercourse with another woman during the marital relation. The reason for this conclusion is thus stated by the court: "It can scarcely be supposed that any law would have been enacted by which the children of the adulterous intercourse would be made legitimate that they might inherit with the children of the lawful wife, equal parts of the estate. Such a statute if so construed would only invite the husband to desert his wife and the woman of easy virtue to encourage the violation of his marriage vows, that she might some day become his lawful wife and her children the rightful heirs of the estate."

It is unnecessary to consider whether this court would have reached the same conclusion respecting the construction of a statute manifestly designed for the protection of innocent children who were not morally responsible for the conduct of their parents. It

is sufficient to note that the decision of the Kentucky court related solely to the right of inheritance of illegitimate children and that the same considerations of public policy are not involved in the construction of a statute regulating their pauper settlement. In this State there are distinct and separate statutes concerning illegitimate children, one relating to their pauper settlement and another relating to their rights of inheritance. See *Lyon* v. *Lyon*, 88 Maine, 395. Under the provisions of the latter statute, a parent may legitimize his illegitimate children without marrying the mother. "If the father of an illegitimate child adopts him into his family, or in writing acknowledges before a justice of the peace that he is the father, such child is the heir of his father."

But it may well be questioned whether the case at bar falls within the class represented by the Kentucky case. It is true that the marriage between Frank M. Moody and Mary Jane Mears Nov. 26, 1896, took place before the divorce was obtained from John A. Mears who was then in state prison. It appears, however, that all of the requirements of the statutes respecting the record of their intentions of marriage and its solemnization, were carefully observed. They lived together thereafter as husband and wife, and the four children in question were born after that marriage, and there is reasonable ground for the inference that they honestly believed that their first marriage was a legal one and their children legitimate at the time of their birth.

Finally the defendant denies the legality of the second marriage of October 15, 1903, on the ground that the decree of divorce obtained by Mary Jane Mears from John A. Mears in October, 1903, was invalid for the reason alleged that the libel was not signed by her. It appears that the libelant was unable to write her name and was obliged to make her mark. It is stated in the libel that her maiden name was Mary Jane Farrar, and counsel inadvertently wrote the name of Mary Jane Farrar instead of Mary Jane Mears, so that the signature appears thus: "Mary Jane $\underset{\text{mark}}{\overset{\text{her}}{\text{X}}}$ Farrar." The libelant is represented in the libel to be Mary Jane Mears and her counsel was permitted to testify that in fact it was Mary Jane Mears, the person

named in the libel, who made the cross in the signature, and in answer to a question by defendant's counsel, he testified that she made that mark for the name of Mary Jane Mears and not Mary Jane Farrar. There is no room for doubt respecting the identity of the libelant and the person who made her mark on the libel. The oral evidence did not contradict the record, but supported it by establishing the identity of the person who made the cross. It is provided in rule XX, sect. 6, chapter 1, R. S., that "when the signature of a person is required he must write it or make his mark." The signature of Mary Jane Mears was required, and being unable to write, she made her mark. The cross made by her hand was in lieu of the name of Mary Jane Mears. The decree of divorce was valid.

All of the exceptions taken to the admission of testimony have been shown to be without merit. It clearly appears that October 15, 1903, Mary Jane Mears became the lawful wife of Frank M. Moody, and although the four minor children in question were illegitimate at the time of their birth, yet by reason of the intermarriage of their parents Frank M. Moody and Mary Jane Moody, after the divorce of the latter from John A. Mears, these children are to be deemed legitimate under the pauper laws of this State and have the settlement of their father in the defendant town of Corinna.

It is the opinion of the court that the legal evidence in the case would not support a verdict in favor of the defendant, and that the entry must accordingly be,

Exceptions overruled.

ORLANDO WEEKS *vs.* FESSENDEN E. HACKETT and Trustee.

EDWIN E. MORTON *vs.* SAME.

Franklin. Opinion June 11, 1908.

Trover. Treasure-Trove. Title Thereto. Joint Finders. Rights and Duties of Joint Finders. Conversion. Tenants in Common. Revised Statutes, chapter 100, section 10, et seq.

The absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in a plaintiff at the time of the conversion is sufficient.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is a well established rule that one tenant in common cannot maintain trover against his co-tenant for the reason that the two are equally entitled to possession, but this rule does not apply to such commodities as are readily divisible by count or measure into portions absolutely alike in quality, such as grain or money.

The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many States, but the provisions of Revised Statutes, chapter 100, section 10, and those following, have no reference to the law of treasure-trove.

Treasure-trove is a name given by the early common law to any gold or silver in coin, plate or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown.

In the absence of legislation upon the subject, the title to treasure-trove belongs to the finder as against all the world except the true owner, and ordinarily the place where it is found is immaterial.

The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land.

When several persons are joint finders of treasure-trove consisting of coin, each such finder is entitled to the possession of an equal share of such coin and is charged with the duty of holding it for the true owner, if he can be ascertained, and is under obligation to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he may appear, and is therefore authorized to maintain such action as may be necessary to retain or recover possession of such share, and if one such joint finder having possession of all the coin, refuses to surrender to the other joint finders their respective shares thereof it is a conversion

of their shares as tenants in common and each such other joint finder may maintain an action of trover, for his share, against the co-tenant who having possession of all the coin, refuses to surrender such share.

In the case at bar, the plaintiffs each brought an action of trover against the defendant for the alleged conversion of their respective shares of certain silver coins contained in three metallic cans found buried in the ground. The defendant contended, among other things, that he found the coins under circumstances which made him the sole owner of them as against the plaintiffs. *Held:* That the evidence warranted the jury in finding that the discovery of the three cans should be deemed one transaction and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant.

On exceptions and motions by defendant. Overruled.

Actions of trover, one by each plaintiff, brought to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other plaintiff and with the defendant in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard.

Plea in each case, the general issue with the following brief statement in each case:

"1. Defendant claims and says he is the owner of the property sued for, and that he found it under such circumstances as makes him the owner of the same as against the plaintiff.

"2. That if the plaintiff found any part of the same, which the defendant denies, then he is a joint owner, or co-tenant with the plaintiff; and that defendant holds the money in trust for the real owner or party that deposited the same in the ground.

"3. Defendant claims by purchase of one Leonard J. Hackett, who was the owner of the land where the money was found, all the right, title and interest of the said Leonard J. Hackett, in and to the property sued for."

Tried together at the September term, 1907, Supreme Judicial Court, Franklin County. Each plaintiff recovered a verdict for $291.20. The defendant excepted to certain rulings made by the presiding Justice during the trial and also filed general motions to have the verdicts set aside.

All the material facts are stated in the opinion.

Frank W. Butler, for plaintiffs.

Joseph C. Holman, for defendant.

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

WHITEHOUSE, J. These were actions of trover brought by each of these plaintiffs to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant Fessenden E. Hackett. It is not in controversy that the coins in question of the aggregate par value of $1,284.67 were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard; and it appears in evidence that after the coins were found and prior to the commencement of these actions, the defendant Fessenden E. Hackett, purchased all the right, title and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense.

1. That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

2. That if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs as tenants in common cannot maintain trover against him for their respective shares.

3. That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding Justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury in substance that gold or silver coin deposited in the soil as this appeared to have been, became what is known in law as

treasure-trove the title to which does not pass with the soil, and that the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant consequently acquired no title by purchase from Leonard J. Hackett; that if the coin was purposely buried in the soil and forgotten or its place of concealment remained undisclosed by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared and in that sense became a trustee for the owner, but if several participated in the finding so as to become joint finders with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of $291.20, being one-third of the aggregate market value of the coins, and the cases come to the Law Court on exceptions to these instructions and on a motion to set aside the verdicts as against the law and the evidence.

1. It is the opinion of the court that the instructions given by the presiding Justice were correct and that the exceptions must be overruled.

Treasure-trove is a name given by the early common law to any gold or silver in coin, plate or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. 1 Black, 295. Cyc. Vol. 19, page 339; A. & E. of Law, Vol. 28, page 472; *Livermore* v. *White*, 74 Maine, 452; *Sovern* v. *Yoran*, 16 Or. 269, 8 Am. St. Rep. 293. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether in modern commercial life, the term treasure-trove may be

held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here; (See *Huthmacker* v. *Harris*, 38 Pa. St. 499 and *Danielson* v. *Roberts, et al.*, 44 Oreg. 108, 74 Pac. 913) for while it is not in controversy that the coins here in question clearly fall within the common law definition of treasure-trove, the general rule is established by a substantially uniform line of decisions in the American States, with respect to both lost goods, properly so termed, and treasure-trove, that in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner and that ordinarily the place where it is found is immaterial. *Lawrence* v. *Buck*, 62 Maine, 275; *Durfee* v. *Jones*, 11 R. I. 588; *Hamaker* v. *Blanchard*, 90 Pa. St. 377; *Bowen* v. *Sullivan*, 62 Ind. 281 (30 Am. Rep. 172); *Danielson* v. *Roberts*, 44 Or. 108 (74 Pac. 913); *Armory* v. *Delamarie*, 1 Strange, 504 (1 Smith's Lead. Cases. 631); *Bridges* v. *Hawkesworth*, 7 Eng. Law & Eq. 424; 21 L. J. Q. B. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. *Reg.* v. *Thomas*, Leigh & Cave Eng. Cr. cases; 28 A. & E. Enc. of Law, (2d. Ed.) 473. According to Bracton, lib. 3. cap. 3, as quoted in Viner's Abridgment, "he to whom the property is shall have treasure-trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasurer;" and according to Lord Coke (3 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or upon his omission to claim it, to the finder. 2 Kent's Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many States, but the provisions of the Maine Statutes (R. S., ch. 100, sect. 10, et seq.) have no reference to the law of treasure-trove.

In *Danielson et al.* v. *Roberts, et al.*, 44 Or., supra, in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendant's premises an old tin can containing gold coin of

the value of $7000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants, in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants to whom they had been induced to deliver the money. In a well-reasoned opinion, the court say: "Ever since the early case of *Armory* v. *Delamarie*, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. *Sovern* v. *Yoran*, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; 19 Am. & Eng. Ency. Law, (2nd Ed) 579. But it is argued that property is lost in the legal sense of that word only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safe-keeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to any one the place of deposit."

"But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or, if treasure-trove, whether it belongs to the State or the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the

finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In *Durfee* v. *Jones*, 11 R. I. 588, the plaintiff bought an old safe and soon afterwards, through his agent, left it for sale with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him, the defendant found secreted between the exterior and the lining, a roll of bank bills amounting to $165. Neither the plaintiff nor the defendant knew the money was there before it was found and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that as owner of the safe, he was entitled to the money by right of prior possession. But the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it; that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff, so as to be in the protection of the safe as *his* safe, or so as to affect him with any responsibility for it," and it was accordingly held that the plaintiff as finder of the money, was entitled to retain it as against the defendant, the owner of the safe, and as against all the world except the real owner.

In *Bowen* v. *Sullivan*, 62 Ind., supra, the plaintiff while engaged as an employee in the defendant's paper mill found two fifty dollar bank bills, in a clean unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good and upon his promise to return them. The defendant refusing to return them, the plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing among other cases, *Lawrence* v. *Buck*, 62 Maine, 275; *Durfee* v. *Jones*, 11 R. I. 588, and *Armory* v. *Delamarie*, 1 Strange, 505, supra, and stating that the place of the finding was ordinarily immaterial.

The result therefore seems unquestionable that in the case at bar, the coins sued for belonged to the finder or finders as against all

the world except the true owner, or his legal representatives, when discovered. Indeed the defendant's counsel does not seriously contend to the contrary, but as already noted, he claims under the motion that the defendant was in fact the sole finder of the coins, and further insists under the exceptions that in any event, these actions are not maintainable for the reason that an action of trover will not lie in favor of one tenant in common against his original co-tenant.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is undoubtedly a well established rule that one tenant in common cannot maintain trover against his co-tenant for the reason that the two are equally entitled to possession and the one who has it cannot be guilty of conversion by retaining it. But this rule " can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike in quality, such as grain or money." Cooley on Torts, (2 Ed.) page 533. Cessante ratione legis, cessat ipsa lex. If A and B are tenants in common of a car load of corn and B denying A's right to any part of it, refuses to surrender his half on demand, this is deemed in law a conversion, because the commodity would be capable of exact division by weight or measure, and by refusing to surrender A's half, B exercised a dominion over it inconsistent with A's rights. As observed by the court in *Pickering* v. *Moore*, 67 N. H. 533, " One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his co-tenant." See also *Fiquet* v. *Allison*, 12 Mich. 328; *Ripley* v. *Davis*, 15 Mich. 75; *Gates* v. *Bowers*, 169 N. Y. 14; *German Nat'l Bank* v. *Meadowcroft*, 95 Ill. 124.

It is also familiar law that absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in the plaintiff with the right of possession at the time of the conversion will be sufficient. It has been seen that in all the cases above cited in which it has been held that the finder of lost property is entitled to retain possession of it as against all the world until the rightful owner appears; it was also held that the finder had a special or qualified property in the thing found sufficient to enable him to maintain trover for its conversion against any one except the true owner.

Upon the assumption then that the plaintiffs and the defendant were joint finders and therefore tenants in common of the coin contained in the cans found in the case at bar, each was entitled to possession of one-third of it and charged with the duty of holding it for the true owner if he could be ascertained. He was under obligations to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he might appear, and was therefore authorized to maintain such action as might be necessary to entitle him to retain or recover possession of it. The coins were readily divisible into three parts by counting and weighing, but the defendant denied the plaintiffs' rights and refused to surrender any part of the coin. This was effectually a conversion of their respective shares as tenants in common, and an action of trover was the appropriate remedy for each plaintiff.

2. Under the motion the defendant insists that he discovered the cans under circumstances that constitute him the sole finder of the coins. But under instructions upon this point to which no exceptions were taken, the jury evidently reached the conclusion that the plaintiffs participated in the discovery so as to become joint finders with the defendant with equal rights in the property found. They awarded to each plaintiff $291.20, and this appears to have been precisely one-third of the aggregate market value of all the coin. As it satisfactorily appears that the quantity of coin in any one can was not of the same value as that in any other, the jury must have decided that there was a joint finding by all and not a

separate finding of a single can by each. And the question now is whether this conclusion of the jury was warranted by the evidence.

A mill owned by Leonard J. Hackett had been destroyed by fire including a small building fourteen feet distant from it and a covered passageway connecting it with the mill. The plaintiffs' and defendant were employed by the owner of the premises, among other things, to make an excavation about eight feet wide for a shaft-way preparatory to the erection of a new mill on the same site. At the time of the discovery of the coin, they were all engaged in digging out the gravel and small stones in the passageway connecting the old mill with the small building. It appeared in evidence that there had been some "joking" between these workmen and Mr. Sweet, a neighbor who happened to be present, with reference to a tradition that one Porter, a former owner, had buried some money on the premises; but according to the testimony in behalf of the plaintiffs, the coin was discovered under the following circumstances. The plaintiffs and defendant were working in the trench about four or five feet from each other when the defendant discovered the top of an old can, and asked Sweet, who was walking away, to come back, saying "I have found it." Thereupon the plaintiff Morton commenced to dig out the stones and gravel around the can when the defendant tried to pull it out with his hands and said "I can't lift it. I guess it is filled with sand." After further digging the plaintiff Morton took up the can when the bottom dropped out and the silver coins were seen falling from the can among the stones. The defendant exclaimed, "It is money! I wish I hadn't said anything for there will be a row over it." While digging out more stones for the purpose of picking up the coins that fell among the stones, the plaintiff Morton discovered the second can which was taken out by the defendant and Mr. Sweet. Morton continued to dig out the stones and gravel and soon uncovered the third can, the top of which, however, appears to have been first seen by the plaintiff Weeks. This can was removed by the defendant and the plaintiff Morton. The three cans were set in a triangular position about a foot equi-distant from each other, the spaces between them being filled with stones and gravel.

The money was turned into a pail and pan and carried to the house of Leonard J. Hackett by the defendant and Mr. Sweet, where it remained from Saturday afternoon until the following Monday when by arrangement between the defendant and the owner of the land, the money was deposited in a national bank.

The defendant's account of the finding is materially different. He testifies that the cans were standing in a row close to each other and that when he unearthed the first one and before it was taken out he discovered the other two through the openings in the stones and plainly saw the bright coins in the cans. He expressly admits, however, that "we all had hold of those cans," and it is the opinion of the court that there was sufficient evidence to warrant the jury in accepting the plaintiffs' version of the finding, and in drawing the inference that neither the plaintiffs nor the defendant had any knowledge or belief that silver coins had been discovered until they were seen to fall through the bottom of the first can after it was taken out by the plaintiff Morton. It may also be fairly inferred from the conduct of the parties that at the time of the discovery of the coins, neither the plaintiffs nor the defendant understood that the finder of money under such circumstances acquired any legal claim to it as against the owner of the soil where it was found.

The solution of the question thus raised respecting the rights of the several parties who participated in the discovery and removal of the cans containing the coin in dispute, is necessarily attended with some practical difficulties. Other courts have encountered similar difficulties under analogous circumstances.

In *Keron* v. *Cashman et al.*, N. J. Eq., 1896, 33 Atl. 1055, one of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, a second one of the boys snatched it or, it having been thrown by the finder, the second boy picked it up, and began striking the other boys with it. In this way it passed from one to another, and, finally, while the second boy was swinging it, it broke open, and paper money to the amount of $775 was found therein, all then examining it together. It was held that the money belonged to all the boys in common. In the opinion the

court say: "This money within the stocking was therefore the lost property, and as to this money the first intention, idea, or "state of mind," as it is called in some of the authorities, arose on this discovery. As a plaything, the stocking with its contents was in the common possession of all the boys; and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything, and in the course of the play, the money must be considered as being found by all of them in common."

"All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal "finder" of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants."

In *Cummings* v. *Stone*, 13 Mich. 70, the plaintiff's tug boat while towing a raft belonging to the defendant, slackened speed and on starting again the tow line, which was the property of the defendant, caught and drew up an anchor and chain which were secured and put on the raft by the defendant. And it was held that the plaintiff and defendant were joint finders of the property.

In these decisions the courts appear to have been governed by those practical considerations of fairness and conceptions of common right which influence just and thoughtful men in the ordinary affairs of life and which are in harmony with the principles of equity and not discountenanced by the rules of law. In reaching the conclusion that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant, the jury in the cases at bar appear to have been governed by the same equitable considerations and it is the opinion of the court that the verdicts were warranted by the evidence.

Exceptions and motions overruled.

INHABITANTS OF BRADLEY *vs.* PENOBSCOT CHEMICAL FIBRE COMPANY.

Penobscot. Opinion June 29, 1908.

Taxation. Pulp Wood. Mechanic Arts. Revised Statutes, chapter 9, section 13, paragraph I.

The plaintiff town of Bradley assessed a tax, for the year 1906, on certain pulp wood belonging to the defendant. The defendant, an Old Town corporation, on April 1, 1906, owned and operated in Old Town, on the west side of the Penobscot River, a mill for the manufacture by mechanical and chemical processes of soda pulp, from pulp wood, for sale to paper manufacturers. On the same side of the river it also had a cutting up saw mill and a piling ground. Across the river in the plaintiff town, it also had a cutting up saw mill and a piling ground. In the defendant's operations, pulp wood, out of which pulp was to be manufactured, was driven down the river in log lengths to a boom above the defendant's mill. From this boom some of the logs were let down into a boom on the Old Town side of the river, taken out and cut into four foot lengths, and used in the mill or piled on the piling ground. Other logs, for economy and convenience in operation, were let down into a boom on the Bradley side of the river, then taken out and cut into four foot lengths, and piled on the Bradley piling ground, from which it was taken across the river in the winter on the ice to the soda mill or piling ground on that side. The pulp wood which was taxed by the plaintiff town had been so cut up and piled on the Bradley ground during the season prior to April 1, 1906, and was still there on that date. It was intended for use in the soda mill in Old Town, but it had not been removed to the Old Town side during the previous winter, because the piling ground on that side was so full that it could not be received there.

Held: That the wood was not taxable, April 1, 1906, by the plaintiff town, as being "employed in the mechanical arts" in that town.

On report. Judgment for defendant.

Action of debt brought by the plaintiff town against the defendant corporation to recover a tax assessed by the plaintiff town in 1906 on six thousand cords of pulp wood belonging to the defendant corporation. Plea, the general issue. Tried at the October term, 1907, Supreme Judicial Court, Penobscot County. At the

conclusion of the testimony, it was agreed that the case should be reported to the Law Court for determination upon so much of the evidence as was competent and legally admissible.

The case appears in the opinion.

Matthew Laughlin, for plaintiffs.

J. F. Gould, for defendant.

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

SAVAGE, J. Action to recover taxes duly assessed on six thousand cords of poplar pulp wood in 1906.

It is not in dispute that the defendant is not an inhabitant of Bradley. It is an Old Town corporation. Nor is it disputed that it owned the pulp wood assessed, nor that the wood, on April 1, 1906, was in the plaintiff town. But the plaintiff claims that the wood was "employed in the mechanic arts" by the defendant in Bradley at that time, and that the defendant then occupied a saw mill, wharf and landing place in Bradley for the purpose of such employment, and, hence, that the wood was taxable to it in Bradley, in accordance with R. S., chap. 9, sect. 13, par. 1, which provides that "all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where it is so employed, on the first day of each April; provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment." The foregoing claims are denied by the defendant. The only question presented is whether, under the circumstances of the case, the wood was taxable to the defendant in Bradley.

The record discloses the following facts: The defendant owns and operates a mill for the manufacture, by mechanical and chemical processes, of soda pulp, sometimes called chemical fibre pulp. The pulp is manufactured to be sold to paper manufacturers. The mill is situated on or near the west bank of the Penobscot river in that part of Old Town called Great Works. On the same side of the river it also has a cutting up saw mill and a piling ground. On the

opposite side of the river, in Bradley, it has another cutting up saw mill and another piling ground. The saw mill in Bradley is equipped with a cutting up saw, a "nigger" and a splitting saw. A part of the pulp wood consumed by the defendant comes to it by rail on the Great Works side of the river, in four foot lengths. This is unloaded from the cars and either taken directly to the pulp mill, or hauled to the piling ground, as may be convenient. The remainder of the defendant's pulp wood comes down the Penobscot river in log lengths, to a boom above the defendant's mill. There the logs are divided, having reference to the room left vacant in each boom below, at the time, and part are let down into a boom on the Great Works side of the river, from which they are taken to the cutting up mill, cut into four foot lengths, split if necessary for convenient handling, and then taken to the pulp mill for immediate use, or piled on the piling ground in Great Works. The remainder, for economy and convenience in operation, are let down into a boom on the Bradley side of the river. They are then taken to the defendant's cutting up mill in Bradley, cut into four foot lengths, and split, if necessary, and are then piled on cars and hauled by horse power, over tracks laid for that purpose, to the piling grounds in Bradley, and piled in tiers. The cutting up mill usually runs from about the first of June to the first of November. After the river freezes in the winter, the wood on the Bradley piling ground is hauled across the river on the ice, and either used at once in the pulp mill, or piled on the Great Works piling ground, as occasion may require. The weight of the evidence is, we think, to the effect that usually all of the wood piled on the Bradley side of the river in any season, has been hauled over to the Great Works side during the ensuing winter. But this is not true of every year. Some years, either because it was impracticable to get it all across the river in a winter, or because the Great Works piling ground was so full that there was no room to receive it, some of the pulp wood was left on the Bradley piling ground after the winter was ended. Such was the case with the six thousand cords in question. It had been purchased by the defendant to be used in the manufacture of pulp in the Great Works mill. It had been taken down the river into

the Bradley boom, cut up in the Bradley mill, and piled on the Bradley piling ground, where it remained on April 1, 1906, because the Great Works piling ground had been so full that the wood could not be taken over and stored there. It may be added that the defendant had no office in Bradley. It made no sales of its product in any stage of manufacture, in Bradley. All sales of its manufactured products were made in Great Works, where its main office was, and all shipments were made from there.

Under these circumstances, can it be properly said that this pulp wood was "employed in the mechanic arts," in Bradley, at the time it was assessed? We think not.

That the manufacture of wood pulp from pulp wood is a mechanic art may be assumed. The questions then arise, was this wood employed in the mechanic arts, when assessed? and, if so, where? But for the cutting up process in Bradley, we think the principles declared in *Ellsworth* v. *Brown*, 53 Maine, 519, and *Farmingdale* v. *Berlin Mills Co.*, 93 Maine, 333, would lead us necessarily to hold that this wood, though still in transit from the forest to the mill, and not yet having arrived within the town in which was the mill where it was designed to reduce it to pulp, was nevertheless "employed," within the meaning of the statute, "in the mechanic arts," and was so employed in the town in which was the mill which was its ultimate destination, namely, Old Town. In *Ellsworth* v. *Brown*, it was held that "logs designed to be manufactured and sold in some town other than that in which their owner resides, but in which, on the first day of April he occupies a mill, store or wharf, are rightfully taxable in such town, and not in the town where the owner resides, although they may not on the first day of April, in the year for which the tax is assessed, have actually arrived within the corporate limits of such town." In *Farmingdale* v. *Berlin Mills Co.*, logs which were intended by the owner for manufacture in a mill in a town other than that in which the owner resided, and which were in transit to the mill, but which had not, on the first day of April, arrived in the town where the mill was situated, were held to be employed in the trade or business of that mill on that

day, within the meaning and purpose of the statute, and so, taxable in that town.

Upon careful consideration, the court is of opinion that the fact that these logs while in transit were taken from the river in Bradley, cut into convenient lengths for handling and use, and stored until they could be conveniently removed to the mill where they were to be converted into pulp, and so remained in Bradley until April 1, 1906, does not take them out of the rule established by the cases above cited. The wood was still in transit. No doubt the cutting up process at the mill in Bradley aided and facilitated the final reduction of the wood into pulp, and perhaps in a certain broad sense was one of the processes of the mechanic arts in which the wood was being employed. But the real process, the one to which we think the statute was intended to apply, was carried on in the mill in Great Works. It was in that mill that the wood was "employed" in the mechanic arts by reason of its being designed to be reduced to pulp there. *Farmingdale* v. *Berlin Mills Co.*, supra. All the rest was preliminary and preparatory. The statute looks to the real employment, and not to the preparations for it.

It is claimed that the result is affected by the fact, as claimed, that the two yards, one on each side of the river, were contiguous, and that each was a part of one and the same plant. We think that matters not. If it were so, it would still be true that the ultimate destination of the wood, for employment in the mechanic arts, was the Great Works soda mill in Old Town.

Hence we conclude that this wood was not taxable by the town of Bradley.

Judgment for the defendant.

STATE OF MAINE *vs.* OTHA H. JELLISON.

Hancock. Opinion July 10, 1908.

Criminal Law. Plea Autrefois Acquit. Demurrer Thereto. Effect of Demurrer. Same Act may Constitute Two or More Offenses. Unlawful Assembly and Riot. Assault and Battery. Twice Put in Jeopardy. Constitution of Maine, Article 1, section 8. Revised Statutes, 1857, chapter 77, section 28; 1903, chapter 79, section 56; chapter 124, section 2.

1. While a demurrer admits the truth of allegations of fact well pleaded, it does not admit the correctness of statements or conclusions of law made in the pleading demurred to.
2. While a demurrer to a plea of autrefois acquit may admit that the acts of the defendant were the same in both cases, it does not admit that the offenses charged were the same.
3. The same act, or group of acts, may constitute two or more distinct offenses, different in kind as well as degree.
4. While the constitutional provision that "no person for the same offense shall be twice put in jeopardy" prohibits another prosecution for the same offense when the jeopardy has been once incurred, it does not prohibit another prosecution for a different offense, though the act or group of acts, was the same.
5. The offense of unlawful assembly and riot under Revised Statutes, chapter 124, section 2, and the offense of assault and battery are distinct offenses different in kind, and a conviction or acquittal for either does not bar a prosecution for the other offense, even though based on the same acts.
6. When a plea of autrefois acquit is overruled, and the defendant excepts and stands upon his exceptions instead of pleading over, he must abide the fate of the exceptions. If they be determined against him there must be final judgment for the State. Revised Statutes, chapter 79, section 56.

On exceptions by defendant. Overruled. Judgment for the State.

Indictment against the defendant for the offense of unlawful assembly and riot, under the provisions of Revised Statutes, chapter 124, section 2, found by the grand jury at the April term, 1907, Supreme Judicial Court, Hancock County, charging that the defendant on April 5, 1907, at Eden in said county, "with certain other persons to the number of three and upwards, to wit: with

Joe Emery, Charles Conners, Frank Leighton and certain other wicked and ill-disposed persons, said certain other wicked and ill-disposed persons being to the jurors unknown, with force and arms, to wit with eggs, stones, sticks, staves and clubs as rioters, routers, and disturbers of the peace of the State, in a violent and tumultuous manner and unlawfully did assemble and gather themselves together to do an unlawful act to wit: to make an assault upon one Henry N. Pringle, and so being assembled and gathered together the day and year aforesaid at the county aforesaid, with force and arms in a violent unlawful and tumultuous manner, to the terror and disturbance of others, in and upon the said Henry N. Pringle in the peace of the State then and there being an assault did make with said eggs, stones, sticks, staves and clubs and him, the said Henry N. Pringle did then and there beat, wound and ill-treat and other wrongs to the said Henry N. Pringle then and there did to the great injury of the said Henry N. Pringle against the peace of the said State and contrary to the form of the statute in such case made and provided."

The defendant pleaded in bar an acquittal by the Bar Harbor Municipal Court upon a complaint against him for the offense of assault and battery upon the aforesaid Pringle, averring in his plea that the offense of which he was acquitted by the Bar Harbor Municipal Court and the offense for which he was indicted were one and the same offense.

To this plea the State by the County Attorney filed a general demurrer. The presiding Justice sustained the demurrer and the defendant excepted.

The case appears in the opinion.

Charles H. Wood, County Attorney, for the State.

Edward S. Clark, for defendant.

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

EMERY, C. J. The defendant was indicted for the offense of unlawful assembly and riot under R. S., ch. 124, sec. 2, viz.— for being one of three or more persons who unlawfully assembled in

a violent and tumultuous manner to commit an assault upon Henry N. Pringle; and who being so assembled did in the same manner commit the assault. He pleaded in bar an acquittal by the Bar Harbor Municipal Court upon a complaint against him for the offense of assault and battery upon the said Pringle, averring in his plea that the offense of which he was thus acquitted and that for which he is now indicted are one and the same offense. To this plea the County Attorney demurred, the court sustained the demurrer and the defendant excepted. The demurrer, of course, did not admit the correctness of any statements or conclusions of law made in the plea; hence, though it admits that the acts of the defendant were the same in both cases, it does not admit that the offenses charged are one and the same. Whether they are the same or different offenses is a question of law now to be determined by the court.

It was said by the Connecticut Court in *Hurd* v. *State*, 2 Root, 186. "If a prosecution and conviction before a justice for a simple breach of the peace be a good plea in abatement or bar of information for riot, it would be attended with the most pernicious consequences, and the most atrocious offenders would be exculpated by punishments totally inadequate to their crimes." As to that, an acquittal would be attended with as pernicious consequences, but, passing that consideration, we proceed to consider whether the offense of unlawful assembly and riot charged in the indictment is the same offense as that of assault and battery charged in the complaint which the defendant was acquitted. It is to be noted that the constitution does not prohibit a second jeopardy for the same act or group of acts, but only "for the same offense," Dec. of Rights, sec. 8. The acts and the offense they constitute are different matters. The same acts may constitute more than one offense and also different offenses, subjecting the actor to as many punishments as the offenses his acts constitute.

Thus a person by the same acts or group of acts may violate the statute against selling liquors; also the statute against being a common seller of intoxicating liquors; also that against keeping a drinking house and tippling shop; and also that against maintain-

ing a common nuisance. If he be charged and convicted, or acquitted, of the violation of one of these statutes he has been put in jeopardy only for that one offense, and not for the offense of violating any of the other statutes. *State* v. *Coombs*, 32 Maine, 529; *State* v. *Maher*, 35 Maine, 225; *State* v. *Inness*, 53 Maine, 536. In the opinion of the court in this last case are cited many instances where it was held that a person may be punished more than once for the same act where the act constitutes more than one offense. We refer the reader to that opinion for the cases.

The offense of assault and battery and the offense of unlawful assembly or riot are different offenses. Neither includes the other. A person may commit either without committing the other. Nevertheless the same acts may sometimes constitute both offenses, but when they do, the offenses are still different though the acts are the same, and the perpetrator of the acts may be punished twice, once for each offense. *State* v. *Inness*, 53 Maine, 536, at page 537; *Hurd* v. *State*, 2 Root, 186; *U. S.* v. *Peaco*, Fed. Cas. No. 16,018; *Freeland* v. *People*, 16 Ill. 380. We are aware that in some States the courts hold otherwise but we think the above is the law of this State. It follows that the exceptions must be overruled.

In the case *State* v. *Inness*, 53 Maine, 536, where the court overruled the exceptions to sustaining a demurrer to a plea of former jeopardy, final judgment was ordered for the State after full consideration of the question whether the judgment should be final or only respondeas ouster. The decision was based on R. S. of 1857, ch. 77, sec. 28, now R. S., ch. 79, sec. 56. "When a dilatory plea is overruled and exceptions taken, the court shall proceed and close the trial, and the action shall then be continued and marked 'law,'" etc. The defendant's plea of former jeopardy was a dilatory plea, since, if overruled, the judgment, but for the statute cited, would be simply respondeas ouster. He pleaded his dilatory plea alone, without obtaining leave to plead double, and his plea having been judged insufficient, he excepted, and, without obtaining leave to plead over if his exceptions should be overruled, he brought them directly to the Law Court before the trial was closed. Under the statute it must be held that by taking the course

he did, he waived whatever right he may have had to plead over, when his dilatory plea was overruled; and that having thus elected to abide by that plea he must fall with it. *State* v. *Inness*, 53 Maine, 536; *Furbush* v. *Robertson*, 67 Maine, 35, page 38; *Smith* v. *Hunt*, 91 Maine, 572.

Exceptions overruled.
Judgment for the State.

FRED MOORE AND JEREMIAH HURLEY *vs.* ALTON ARCHER.

Hancock. Opinion July 10, 1908.

Nonsuit. Exceptions. Trespass Quare Clausum. Entry upon Locus by Defendant Must be Shown. Report of Evidence. Amendment of Same. Omitted Evidence.

1. Upon exceptions to an order of nonsuit, the question is whether the report of the evidence contains evidence sufficient to prove all the propositions essential to the maintenance of the action. If any one of those propositions is not supported, by the evidence reported, the exceptions must be overruled.
2. If the report of the evidence upon exceptions to an order of nonsuit does not contain essential evidence actually introduced at the trial, it may be amended by the presiding Justice to include such evidence; but if the evidence was not thus actually introduced, the fact that it was omitted because of an understanding that the proposition to be proved by it was admitted, does not authorize the report to be amended to include such evidence, unless by consent.
3. In an action of trespass quare clausum, evidence of an entry upon the locus by the defendant is essential to the maintenance of the action, and if the plaintiff rests his case without such evidence a nonsuit is properly ordered, though the plaintiff omitted to introduce the evidence because of a justifiable understanding that the entry was omitted. If upon such order the plaintiff elects to except to the order, instead of asking leave to re-open the case and introduce the evidence, his exceptions must be overruled.

On exceptions by plaintiffs. Overruled.

Trespass quare clausum fregit brought by the plaintiff against the defendant, alleging that the defendant on February 12, 1908, with force and arms broke and entered the plaintiffs' close situate in Plantation No. 8, Hancock County, and then and there cut down and carried away certain wood and lumber then and there growing. Plea, the general issue with brief statement alleging as follows:

"1. If he was cutting or doing other acts on said premises, described in plaintiffs' writ at any time, he was so acting by authority of and under permission from Lynwood F. Giles.

"2. That said Lynwood F. Giles is vested with legal title to the premises described in the writ of plaintiffs, and was so vested at and before the time alleged, that the trespass was committed."

The action came on for trial at the April term, 1908, Supreme Judicial Court, Hancock County. At the conclusion of the plaintiff's evidence the presiding Justice, upon motion of the defendant, made the following order:

"Nonsuit for the defendant is ordered with stipulation on his part that if the Law Court overrules this order, then the defendant agrees that judgment may be entered for the plaintiffs in the sum of ten dollars and costs." To this order the plaintiffs excepted.

The case appears in the opinion.

D. E. Hurley, for plaintiffs.

L. F. Giles, for defendant.

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

EMERY, C. J. This was an action of trespass quare clausum. The plaintiffs having put in their evidence and rested, the defendant moved for a nonsuit and stipulated that if the Law Court should find that the evidence would sustain the action it might order judgment for the plaintiffs with damages assessed at ten dollars. A nonsuit was ordered and the plaintiffs brought the case to the Law Court on exceptions to that order.

At the oral argument the defendant claimed that there was no evidence that he or his servants had made any entry at all upon the land described in the writ. The plaintiffs claimed that it was the understanding at the trial that the entry was admitted and that the only question in the case was the sufficiency of the plaintiffs' title and possession to maintain the action. The defendant however would not admit that such was the understanding. While from all the circumstances it does seem probable that the entry was not understood to be in dispute yet there was no evidence of entry in the record before us. The general issue was pleaded which put the entry directly in issue. In his brief statement and in his admissions of record, the defendant carefully avoided admitting the entry as a fact. His willingness to have judgment go against him in case the plaintiffs' evidence showed a cause of action would seem to indicate that he reserved all points as to the sufficiency of the evidence.

But whatever the fact may be, or whatever the understanding was, the only question before us is whether the evidence shows that the order of nonsuit was erroneous. Inasmuch as that evidence fails to show the fact of entry, a fact essential to the maintenance of the action, the nonsuit was rightly ordered.

If, as seems probable, the plaintiffs omitted proving the entry because of their justifiable understanding that it was and would be admitted, there seems to be no way to relieve them as the case is presented. There was a ruling on the evidence. There is no suggestion that the bill of exceptions does not present the question ruled upon fairly and fully. If the exceptions be dismissed or discharged, instead of being considered and overruled, that ruling remains in force; the nonsuit stands. The plaintiffs only remedy would seem to be to bring a new action and at the trial prove what is not expressly admitted on the record.

Exceptions overruled.

STATE OF MAINE *vs.* J. P. BASS PUBLISHING COMPANY.

Penobscot. Opinion July 15, 1908.

Penal Statutes. Construction of Same. Advertisements of Intoxicating Liquors Kept for Sale Without the State. Statute Prohibits Such Advertisements. Police Power of State. U. S. Constitution, Article 1, section VIII, paragraph 3. U. S. Statute, 1901, "Wilson Act." Revised Statutes, chapter 29, sections 14, 45.

1. If a penal statute is equally susceptible of two interpretations, that should be adopted which gives the statute the effect evidently intended by the legislature.
2. The statute R. S., chapter 29, section 45, forbidding the publication of advertisements of the sale or keeping for sale of intoxicating liquors includes advertisements of intoxicating liquors sold or kept for sale without the State.
3. By the Act of Congress known as the "Wilson Act," intoxicating liquors are to a great extent withdrawn from the protection of the Commerce Clause of the United States Constitution and made subject to the police powers of the States. Since the Act, a State in the exercise of its police power may lawfully prohibit the advertising within the State of intoxicating liquors sold or kept for sale without the State.

On agreed statement. Judgment for the State.

Complaint to the Bangor Municipal Court in the City of Bangor, for an alleged violation of the provisions of Revised Statutes, chapter 29, section 45, and which said section reads as follows:

"Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs, to be recovered by complaint. One-half of said fine shall be paid to the complainant and one-half to the town in which said notice is published."

The body of the complaint is as follows: "Henry N. Pringle of Waterville in the County of Kennebec, on the seventeenth day of September, A. D. one thousand nine hundred and six in behalf of said State, on oath, complains that the J. P. Bass Publishing Co., a corporation organized under the laws of Maine and doing business

in said Bangor, in the County of Penobscot, is the owner and publisher of a certain newspaper called the Bangor Daily Commercial, printed and published in said Bangor, that Joseph P. Bass, M. Robert Harrigan, and Frederick H. Strickland all of said Bangor, are the owners of all the stock of said corporation and were the officers and directors thereof on the tenth day of August, A. D. one thousand nine hundred and six and the said Joseph P. Bass, M. Robert Harrigan and Frederick H. Strickland as such officers and directors did unlawfully and knowingly cause said newspaper to be printed and published in said Bangor, on the tenth day of August, A. D. one thousand nine hundred and six, in which said newspaper on said tenth day of said August a certain notice, or advertisement of the sale and keeping for sale of intoxicating liquors was printed and published in the words and tenor following, to wit: (Here follows a facsimile of the liquor advertisement of. Chas. Gallagher & Co., of Boston, Mass. printed in the said Bangor Daily Commercial August 10, 1906, stating, among other things, "Send us $3.00 and we will ship you in a plain sealed case, express prepaid, with no marks to show contents, four full quarts of Gilbert Club Pure Rye Whiskey. Put it to the test and if not satisfied, send it back. We will stand the expense—none whatever to you—and your money cheerfully refunded.") against the peace of said State, and contrary to the form of the Statute in such case made and provided.

"Wherefore, the said Pringle prays that the said Bass, Harrigan and Strickland may be apprehended and held to answer to this complaint, and dealt with relative to the same, as law and justice may require."

On this complaint a warrant in due form of law was issued by said Municipal Court, and the defendants were duly arraigned in said Municipal Court where they pleaded not guilty, and waived a hearing, and thereupon the Judge of said Municipal Court adjudged them guilty and imposed a fine of twenty dollars and costs on each defendant, from which judgment an appeal was taken by all the defendants to the February term, 1907, of the Supreme Judicial Court, Penobscot County.

At said February term of said Supreme Judicial Court, an agreed statement of facts was filed and the case was then reported to the Law Court with the following stipulation: "Judgment to be rendered by the Law Court as the facts and the law of the case may require."

The agreed statement of facts is as follows:

"It is agreed that at the time of said alleged offense said newspaper, the Bangor Daily Commercial, including the plant, consisting of printing presses, boiler, engine, lineotype machines, cases, type, paper and printing appliances was owned and that said newspaper was published by the 'J. P. Bass Publishing Company,' a corporation duly organized and existing under the laws of this State, and having a capital stock fully paid in of Forty Thousand Dollars ($40,000) and that said capital stock is and was all owned at the time of the commission of the alleged offense by the respondents above named, to wit: the 10th day of August A. D. 1906, and that the notice of the sale or keeping for sale of intoxicating liquors above named and as described in the complaint and warrant was published with the knowledge of and by the direction of the said Bass, Strickland and Harrigan.

"It is further agreed that Chas. Gallagher & Co. whose advertisement was alleged to have been published in the Bangor Daily Commercial, carried on business in the Commonwealth of Massachusetts and was legally authorized under the laws of said Commonwealth to sell and keep for sale intoxicating liquors.

"It is further agreed that said advertisement was published in said Bangor Daily Commercial in pursuance of a contract made and entered into in Boston aforesaid through the advertising agency of Julius Matthews between the said Gallagher & Co. and the said Julius Matthews, acting on behalf of and as agent of said J. P. Bass Publishing Company."

NOTE. April 28, 1905, proceedings were instituted against the same personal defendants as in this case, for an alleged violation of the provisions of the aforesaid section 45, and that case was also reported to the Law Court. See *State* v. *Bass* et als., 101 Maine, 481.

The case appears in the opinion.

H. H. Patten, County Attorney, for the State.

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

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

EMERY, C. J. Chap. 29 of the Revised Statutes, popularly known as the "Prohibitory Law," contains in sec. 45 the following prohibition: "Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs to be recovered by complaint."

The defendants knowingly published, Aug. 10, 1906, at Bangor in Penobscot County, a newspaper, the Bangor Daily Commercial, in which was given a notice and advertisement that intoxicating liquors were sold and kept for sale at 297 Congress St. in Boston, Massachusetts, by Chas. Gallagher & Co. who were then carrying on business in Massachusetts and were legally authorized under the laws of that Commonwealth to sell and keep for sale intoxicating liquors. Their advertisement in question was published in the Bangor Daily Commercial in pursuance of a contract made in Boston, Massachusetts, between them and an advertising agency there acting as the agent of the defendants.

The defendants claim that their act of publishing the advertisement was lawful upon two grounds; 1st that the statute is susceptible of the construction that it only prohibits notices or advertisements of liquors for sale or kept for sale within this State, and being a penal statute should therefore receive this strict construction,— 2nd that if it should be construed as prohibiting notices or advertisements of liquors for sale or kept for sale in another State where such sale and keeping for sale are lawful, as in this case, then so construed the statute is so far nullified by that clause of the Constitution of the United States, known as the commerce clause, which

confers upon Congress the power "To regulate Commerce with foreign nations and among the several States and with the Indian Tribes." U. S. Const., Art. 1, Sec. VIII, par. 3.

I. In construing the statute, penal though it be, the intent and object of the legislature in enacting it are to be ascertained and given effect if the language be fairly susceptible of such a construction. As said by the Massachusetts Court per Shaw, C. J., in a criminal case *Com.* v. *Kimball*, 24 Pick. 366, at page 370, "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute." In a criminal case *U. S.* v. *Hartwell*, 6 Wall. 385, the court, page 396, said of the penal statute there in question, "The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting words to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical one; but the words shall be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

The statute in this case is but a part of the legislation of this State upon the subject matter of the sale and keeping for sale of intoxicating liquors and is to be construed, so far as its language will fairly and reasonably allow, in harmony with what appears from that legislation to be the legislative policy and purpose. The selling and keeping for sale of intoxicating liquors are in themselves harmless acts. If the people purchasing such liquors used them only "for medicinal, mechanical and manufacturing purposes," no harm would result to the people of the State; and the sale and keeping for sale of intoxicating liquors for such purposes are provided for in sec. 14 of chap. 29. It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a

means. The end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the State. The legislation upon the subject, including the statute in question, should be construed to further that end so far as the language, without bending either way, fairly allows.

The language of the statute (sec. 45) is comprehensive. There are in it no words limiting the prohibition to notices, or advertisements of liquors kept for sale or to be sold within this State. Read in connection with the other legislation, its evident purpose is to further the ulterior purpose of all that legislation, viz., to diminish the use of intoxicating liquors as a beverage. To effect that purpose it must be construed as prohibiting notices and advertisements of liquors for sale or kept for sale without the State as well as within, and we think the language fully permits, if it does not require, such a construction, and we accordingly accept it as the true construction.

We are not unmindful of the rule that penal statutes are to be construed strictly. "But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the will of the legislature." *U. S.* v. *Lacher*, 134 U. S. 632, at page 642. In *U. S.* v. *Winn*, 3 Summer, 209, the statute provided a punishment if "any master or other officer" without justifiable cause imprisoned "any one or more of the crew" etc. The master was indicted for imprisoning the "Chief Officer." It was held that to further the purpose of the statute, the word "crew" should be held to include the "Chief Officer," though the rule of strict construction alone might exclude him. So in *U. S.* v. *Moulton*, 5 Mason, on 537, gold coin was held to be included in the term "personal goods" in a penal statute, though the rule of strict construction might exclude it. We think further illustration or authority unnecessary.

II. As to the second ground of defense it may be conceded that but for the Act of Congress known as the "Wilson Act," U. S. Comp. Stat. 1901, page 3177, the State statute as above construed would be in conflict with the commerce clause of the United States

Constitution. The Wilson Act, however, goes far to remove intoxicating liquors from the protection of that clause and to give full effect to State legislation concerning them. Decisions of United States Courts upon the subject, made prior to the passage of that Act are now inapplicable and need not be considered. Since the Wilson Act, the State may prevent the sale within its limits of intoxicating liquors in the original package, and to that end may seize them in such packages the moment they are delivered. Also, to further the welfare of its people, the State may now prohibit the solicitation within the State of orders for the purchase of liquors without the State. This seems to be settled by the recent decision of the United States Supreme Court in *Delamater* v. *South Dakota*, 205 U. S. 93. Delamater, a salesman for a firm of liquor dealers in Minnesota, carried on the business in South Dakota of soliciting orders from residents of that State for the purchase of intoxicating liquors from his firm in Minnesota. The law of South Dakota imposed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the State. The statute was admittedly a police regulation and not a revenue measure. Delamater did not offer to make sale of intoxicating liquors within the State. He merely solicited orders for liquors to be sold in Minnesota and shipped from there to the purchaser at his risk. Being prosecuted for not paying the license fee, he set up in defense the commerce clause of the U. S. Constitution. The United States Supreme Court, following the decision of the Supreme Court of South Dakota, held the State statute constitutional on the ground that the Wilson Act authorizes a State to restrain persons from soliciting within its territory orders for the purchase of intoxicating liquors in another State to be shipped to the purchaser in his State.

Under that decision neither the Boston firm of Chas. Gallagher & Co. nor any agent for them can within the territory of this State solicit orders for the purchase of intoxicating liquors in Massachusetts to be shipped to the purchaser in Maine, if our statutes forbid. Since advertising is really soliciting, it would seem to follow that they cannot lawfully advertise in this State such liquors for sale in Massachusetts and that the publishers of newspapers

within this State cannot lawfully publish such advertisement in the face of the State statute expressly forbidding it. It may be noted that in the advertisement in this case, the advertisers say to the reader, "Send us $3.00 and we will ship you in a plain sealed case prepaid, with no marks to show contents, four full quarts of Gilbert Club Pure Rye Whiskey." The advertisement was in a Maine newspaper and plainly was for orders for intoxicating liquors to be shipped to the purchaser in Maine. The case would therefore seem to be well within the rule of the decision in the case cited.

For answer to the able argument and citations of the defendants' counsel we refer them and the profession to the opinion of the court in the Delamater case above cited, 205 U. S. 93. The Supreme Court in that case did not hold, nor do we hold in this case, that an inhabitant of a State where the sale of intoxicating liquors is prohibited may not purchase intoxicating liquors in another State and bring them into his own State for any lawful use, but we understand that court to hold, and hence we hold, that a State may prohibit an inhabitant of another State making in this State a contract for, or soliciting orders for, the sale of intoxicating liquors in any State. The question is fully discussed in the opinion with illustrations drawn from some State insurance statutes. While a State cannot prevent one of its citizens from making a contract of insurance in another State, it may forbid the making, within its own borders, insurance contracts by foreign companies or their agents. *Hooper* v. *California*, 155 U. S. 648; *Commonwealth* v. *Nutting*, 175 Mass. 154, 183 U. S. 553. The court then goes on to say, "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the State in respect thereto. As we have seen, the right of the States to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson Act is absolutely applicable to liquor shipped from one State into another, after delivery, and before the sale in the original package. It follows that the authority of the States, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete

as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the States to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors, liquors which otherwise the citizen of the State would not have thought of making must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

The defendants' counsel urged upon us the language of this court in its opinion in the case *Corbin* v. *Houlehan*, 100 Maine, 246. The decision in that case, however, sustained the State statute as not in conflict with any provision of the United States Constitution. So far as the opinion discussed the question here involved it must be regarded as dicta only. The question is a federal question, the decision of which rests finally with the United States Supreme Court. In view of the decision of that court and the reasons stated therefor in the case cited *Delamater* v. *South Dakota*, 205 U. S. 93, whatever may have been said in the opinion in *Corbin* v. *Houlehan*, we must now hold that the statute in question (sec. 45) at the time of its violation by the defendants in 1906 was not in conflict with the State or United States constitution, but was valid and operative upon the defendants.

The defendants further urge that newspapers and magazines published in other States, and containing advertisements of intoxicating liquors for sale, come into this State by mail and otherwise in large quantities, and yet cannot be interfered with by the State authorities. That may be, but it does not follow that the State may not prevent such advertisements being printed in newspapers published in this State. If the State cannot wholly prevent the mischief of such advertisements by excluding from the State all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the State. It may to that extent control the conduct of printers and

publishers within its own territory. Such we understand to be the logical result of the decision and reasoning in the Delamater case by the court of last resort upon such questions.

It follows that the State must have judgment.

Judgment for the State.

In Equity.

UNION SAFE DEPOSIT AND TRUST COMPANY

vs.

FRANK W. DUDLEY et als.

Cumberland. Opinion August 6, 1908.

Wills. Construction. Trust Estate. "Issue." Revised Statutes, chapter 1, section 6, paragraph IX.

The word "issue" as used in wills is an ambiguous term. It may be restricted to children only, or include descendants generally or descendants taking by right of representation. Whether it shall be construed to have one or the other meaning depends entirely upon the intention of the testator as gathered from the context of the whole will, interpreted according to the established rules of construction.

In the construction of a will the word "issue" is to be interpreted according to its primary signification as importing descendants, unless it appears from the provisions of the will, or from extrinsic circumstances proper to be considered, that the testator used the word in its secondary or restricted meaning of children.

The words "and lawful issue, if any, of the body," as used by a testator in his will *held* to mean lineal descendants taking by right of representation, per stirpes and not per capita.

A testator by his will created a trust estate and in relation to the income of the trust estate, directed, among other things, as follows: "To pay of the net income of said trust estate, after the payment of the expenses of said trust fund, one fourth to my sister Frances Jane Dudley, if living at my decease, quarterly during her natural life; one fourth to my nephew, Augustus Palmer Dudley, son of my said sister Frances Jane Dudley, if living at my decease, quarterly during his natural life." The testator

further provided as follows: "In case my said sister Frances Jane Dudley is not living at my decease or at her decease thereafter, my trustees are to pay her share of the income of the trust fund under this will quarterly in equal shares to her said children, or the survivor of them if the others have deceased, and the lawful issue of the body of those deceased, if any, or if all of her said children are deceased leaving lawful issue of their bodies to such issue, the aforesaid issue taking only the parent's share." Frances Jane Dudley died prior to the death of the testator leaving three surviving children of whom the said Augustus Palmer Dudley was one. *Held:* That the said Augustus Palmer Dudley acquired by the death of his mother the right to receive an additional one-twelfth of the net income of the trust fund and which added to the one fourth share already given to him by the testator made his total share one-third of the net income.

The testator died April 18, 1905, and the said Augustus Pamler Dudley died July 15, 1905, three days before the first quarterly payment fell due. *Held:* (1) That the language of the will gave the said Augustus Palmer Dudley a vested interest in the net income of the trust fund. (2) That the manner and time of payment, "quarterly during his natural life," was not intended by the testator to be annexed to the legacy as a condition precedent to its vesting. (3) That the gift of the share of the income to the said Augustus Palmer Dudley was absolute, the words "quarterly during his natural life" being a direction as to manner and time of payment only. (4) That the estate of the said Augustus Palmer Dudley is entitled to his share of the net income of the trust fund from the date of the testator's death to the date of the death of the said Augustus Palmer Dudley.

In relation to the net income of the aforesaid trust estate between April 18, 1905, the date of the testator's death, and July 15, 1905, the date of the death of the said Augustus Palmer Dudley, it appeared that $3137.50 of interest coupons, attached to bonds not due at the testator's death, matured and were collected between April 18 and July 15, 1905, of which sum $1721.19 was interest which accrued on said bonds prior to the testator's death, although not due and payable until after his death; that there were other coupons on said bonds amounting to $1775 which became due and were collected after the death of the said Augustus Palmer Dudley, of which $368.28 accrued between April 18 and July 15, 1905; that $406.83 of interest on demand deposits in banks became due and was collected between April 18 and July 15, 1905, of which $106.85 accrued before the death of the testator; that there was $406.61 of other interest on said deposits collected after the death of the said Augustus Palmer Dudley of which $76.73 accrued prior to his death; that there was a dividend of $75 declared on bank stock July, 1905, which was collected after the death of the said Augustus Palmer Dudley.

Held: (1) That the income of the trust estate between the date of the testator's death and the date of the death of the said Augustus Palmer Dudley and in which the estate of the said Augustus Palmer Dudley is to share comprised the following, viz: The total amount of the coupons

which became payable subsequent to the testator's death and prior to the death of the said Augustus Palmer Dudley amounting to $3137.50; the interest on the demand deposits which accrued between the death of the testator and the death of the said Augustus Palmer Dudley, amounting to $376.71; the dividend of $75, declared July 1, 1905, and in all $3589.21. (2) That at the death of said Augustus Palmer Dudley his share of said net income was one-third part of said sum of $3589.21 and that said third part is payable to the executor of his estate.

Where a testator by his will created a trust estate with certain of the net income thereof to be paid to certain beneficiaries and one of the beneficiaries died prior to the death of the testator and another died after the death of the testator, the will was construed and it was determined to whom and in what shares the net income given to the deceased beneficiaries should be paid.

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

Bill in equity asking for the construction of the will of Llewellyn Scott Wyman, late of Portland, deceased, brought by the plaintiff corporation against divers defendants. April 25, 1907, the cause came on to be heard on bill and answers before the Justice of the first instance and "there appearing to be questions of law of sufficient importance or doubt to justify the same and the parties agreeing thereto" the cause was reported to the Law Court.

The case appears in the opinion.

Drummond & Drummond, and Henry B. Cleaves, for plaintiff.

Verrill, Hale & Booth, for Fifth Avenue Trust Company, defendant.

Charles W. Michael, for Abbie J. Malcolm et als., defendants.

Albert D. Jones, for Archie W. Dudley et als., defendants.

Wm. H. Looney, for Frank W. Dudley, defendant.

John T. Fagan, for Frances Jane Bennett et al., defendants.

Cassandra H. Dudley, for Janey Dudley et al., defendants.

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

KING, J. Bill in equity reported to this court.

Llewellyn Scott Wyman, late of Portland, died April 18, 1905, leaving a will executed June 28, 1901, proved and allowed in the Probate Court for Cumberland County, Maine, June 5, 1905.

The complainant, having been appointed executor and confirmed as trustee thereunder, brings this bill asking for a construction of certain provisions of said will, and to whom and in what portions the trustee shall pay certain of the net income of the trust estate.

By the fourth item of the will the testator devised and bequeathed one-half of the residue of his estate to the complainant in trust.

"2. To pay of the net income of said trust estate, after the payment of the expenses of said trust fund one-fourth ($\frac{1}{4}$) to my sister Frances Jane Dudley, if living at my decease, quarterly during her natural life; one fourth to my nephew, Augustus Palmer Dudley, son of my said sister Frances Jane Dudley, if living at my decease, quarterly during his natural life; one fourth ($\frac{1}{4}$) to my nephew Frank Wyman Dudley, son of my said sister Frances Jane Dudley, if living at my decease, quarterly during his natural life; and one fourth ($\frac{1}{4}$) to my niece Abbie Malcolm, daughter of my said sister Frances Jane Dudley, if living at my decease, quarterly during her natural life.

"3. In case my said sister Frances Jane Dudley is not living at my decease or at her decease thereafter, my trustees are to pay her share of the income of the trust fund under this will quarterly in equal shares to her said children, or the survivor of them if the others have deceased, and the lawful issue of the body of those deceased, if any, or if all of her said children are deceased leaving lawful issue of their bodies to such issue, the aforesaid issue taking only the parent's share, until the termination of this trust as hereinafter provided under the 7th clause of this item of my will.

"4. In case my said nephew Augustus Palmer Dudley is not living at my decease, or at his decease thereafter, my trustees are to pay his share of the income under this will quarterly in equal shares to his said mother, brother and sister, or the survivor or survivors of them if any have deceased, and the lawful issue, if any, of the body of those deceased; or if his said mother, brother and sister are deceased leaving lawful issue of their bodies, to such issue, the aforesaid issue taking only the deceased parent's share until the termination of this trust as hereinafter provided under the 7th clause of this item of my will."

Like provisions, mutatis mutandis, are made for the disposal of the shares of Frank Wyman Dudley and Abbie Malcolm in the event of their death. The trust is to terminate at the expiration of twenty years after the death of the survivor of the beneficiaries who were in being at the testator's death.

Frances Jane Dudley died prior to the death of the testator leaving Augustus Palmer Dudley, Frank Wyman Dudley, and Abbie Malcolm as her only surviving children.

The bill as amended shows that there were also nine grandchildren and three great grandchildren of Frances Jane Dudley surviving her, viz: — Archie W. Dudley, Hester Sophia Dudley and Una Gladys Dudley, children of Edwin R. Dudley, a son of Frances Jane Dudley, deceased prior to her death; Janey Dudley and Grace Gilman Dudley, children of said Augustus Palmer Dudley; Frances Jane Bennett, Sarah Percy Barnes, T. J. Jackson Malcolm, and Archibald Warren Malcolm, children of said Abbie Malcolm; William R. Bennett, child of the grandchild, Frances Jane Bennett, Rachel Dudley Barnes and Geneva Percy Barnes, children of the grandchild Sarah Percy Barnes. These surviving children (except Augustus Palmer Dudley now deceased), and all the grandchildren and great grandchildren are made parties defendant in the bill.

Augustus Palmer Dudley died July 15, 1905, leaving as his only heirs at law and lawful issue of his body his minor children above named, Janey Dudley and Grace Gilman Dudley.

The Fifth Avenue Trust Company of New York as executor of the last will and testament of Augustus Palmer Dudley is also made a party defendant in the bill.

The eighth paragraph of the bill as amended reads:

"Eighth: That upon the appointment of said Complainant as Executor aforesaid, it took possession as a part of the estate of the said testator, certain bonds upon which interest was payable, in some cases semi-annually and in some cases quarterly,—said interest being evidenced by coupons or interest warrants attached to said bonds, and none of which bonds were, at the date of the death of the testator, due and payable; that said coupons to a large amount,

to wit, to the amount of $3137.50, were payable after the date of the death of said testator but evidenced interest which had in part only accrued after said date, to wit, to the sum of $1416.31; that as said Executor, it also took possession of certain deposits in certain banks and trust companies, said deposits being payable upon demand, and upon which interest was payable after the death of said testator, to wit, in the sum of $406.83, a part only of which interest accrued on said deposits after the death of said testator, to wit, the sum of $299.98; that in addition to said above mentioned interest, there also accrued upon said estate of said testator and was collected by said complainant as executor aforesaid, other income in the sum of $75 as a dividend upon certain bank stock, which said dividend was declared and payable on the first day of July A. D. 1905, but was not actually collected by said complainant as said Executor until the seventeenth day of November A. D. 1905; that in addition to said above mentioned interest and dividend, there also accrued upon said estate of said testator and was collected by said complainant as executor aforesaid, other interest upon said above described bonds evidenced by coupons and interest warrants aforesaid, said coupons and interest warrants being payable on different dates subsequent to the fifteenth day of July 1905, the date of the death of said Augustus Palmer Dudley, to wit, in the sum of $1775 and only a part thereof having accrued prior to said date, to wit, the sum of $368.28, and other interest upon said deposits collected on different dates subsequent to said fifteenth day of July 1905, to wit, in the sum of $400.61 and only a part thereof having accrued prior to said date, to wit, the sum of $76.73."

The questions propounded by the complaint are:

"(a) Whether any portion of the net income of said trust estate accruing before the death of said testator but not payable until after said death goes to the Fifth Avenue Trust Company as the executor of the last will and testament of said Augustus Palmer Dudley, and, if so, what portion thereof.

"(b) Whether any portion of the net income of said trust estate accruing between the date of the death of said testator and the date of the death of said Augustus Palmer Dudley, goes, upon the

death of said Augustus Palmer Dudley, to said Fifth Avenue Trust Company, as executor of the last will and testament of said Augustus Palmer Dudley, and, if so, what portion thereof.

"(c) Whether any portion of the net income of said trust estate accruing before the death of the said Augustus Palmer Dudley but not payable until after said death, goes upon the death of said Augustus Palmer Dudley to the said Fifth Avenue Trust Company, as executor of the estate of the said Augustus Palmer Dudley and, if so, what portion thereof.

"(d) What portion of the share of said income given by said fourth paragraph to said Frances Jane Dudley, she having deceased prior to the death of said testator, and said Augustus Palmer Dudley having deceased subsequently to the death of both said Frances and said testator, goes to said Frank W. Dudley and said Abbie G. Malcolm.

"(e) Whether any portion of the share of said income given by said fourth paragraph to said Frances Jane Dudley, she having deceased prior to the testator, and said Augustus Palmer Dudley having deceased subsequently to the death of both said Frances and said testator, goes to said Archie W. Dudley, Hester Sophia Dudley, Una Gladys Dudley, Janey Dudley and Grace Gilman Dudley, Frances Jane Bennett, Sarah Percy Barnes, T. J. Jackson Malcolm, Archibald Warren Malcolm, William R. Bennett, Rachel Dudley Barnes and Geneva Percy Barnes, or either or any of them, and if so, to which of them, and what portions thereof and in what proportion.

"(f) Whether upon the death of said Augustus Palmer Dudley, he having died subsequently to the death of both said Frances Jane Dudley, and said testator, any portion of the share of said income given to him under item 2 of the fourth paragraph of said will goes to said Archie W. Dudley, Hester Sophia Dudley, Una Gladys Dudley, Janey Dudley, Grace Gilman Dudley, Frances Jane Bennett, Sarah Percy Barnes, T. J. Jackson Malcolm, Archibald Warren Malcolm, William R. Bennett, Rachel Dudley Barnes and Geneva Percy Barnes, or to either of them, and if so, to which of them, what portion and in what proportions."

The questions presented may be summarized as follows:

1. To whom was Frances Jane Dudley's share of the net income payable, she having predeceased the testator?

2. What fractional share of the income was Augustus Palmer Dudley entitled to at the time of his death, and to whom and in what portions is that share thereafter to be payable?

3. Is the interest which accrued on the demand deposits and the coupon bonds prior to the testator's death, or any part of it, to form a part of the principal of the trust fund, or is it to be regarded as income to be distributed to the beneficiaries?

4. Whether any portion of the net income of the trust fund is payable to the Fifth Avenue Trust Company as executor of the will of Augustus Palmer Dudley, he having deceased within the first quarterly period after the testator's death, and if so of what does that income consist?

It is contended on behalf of the respondents, Archie W. Dudley, Hester Sophia Dudley and Una Gladys Dudley, children of Edwin R. Dudley, a son of Frances Jane Dudley, deceased prior to her death, that upon the death of said Frances Jane they became entitled to a portion of her original share of the income. We think this contention not maintainable.

It appears manifest from the provisions of paragraph 3 of item fourth of the will that in case of the death of Frances Jane Dudley her share of the net income of the trust fund was to be paid in equal shares to her children, Augustus, Frank and Abbie, if they all survived her. The words "her said children," used in paragraph 3, obviously relate to her two sons and daughter previously mentioned in paragraph 2. It follows from this construction that Augustus acquired by the death of his mother, Frances, the right to receive an additional one-twelfth of the net income of the trust, and that at the time of his death his share was one-third.

It is provided by paragraph 4 of item fourth that in case of the death of Augustus "my trustees are to pay his share of the income under this will quarterly in equal shares to his said mother, brother and sister, or the survivor or survivors of them if any have deceased, and the lawful issue, if any, of the body of those deceased; or if

his said mother, brother and sister are deceased leaving lawful issue of their bodies, to such issue, the aforesaid issue taking only the deceased parent's share, until the termination of this trust as hereinafter provided under the 7th clause of this item of my will."

It is claimed by some of the respondents that the one-twelfth of the income of the trust which Augustus acquired upon the death of his mother, Frances, did not form a part of "his share of the income . . . . under this will," which was disposed of under the provisions of paragraph 4.

If those words used in paragraph 4 are limited to Augustus' original share then the one-twelfth which had fallen to him at the death of his mother was undisposed of by the will; and as similar provisions were made for the disposal of the shares of the mother, brother and sister, in the event of the death of either of them, any share falling to either of them at the prior death of any other life legatee would be undisposed of.

It was unquestionably the intention of the testator to dispose of the entire income of the trust fund for the whole period of the trust, for there is no provision under which any part of it can accumulate and become a part of the principal. Augustus acquired the additional one-twelfth, at the death of his mother, under the express provisions of the will, except for which he would not have been entitled to it. The language of paragraph 4 is broad enough to include that one-twelfth so acquired, and it should be so construed.

At Augustus' death his share ($\frac{1}{3}$) was to be paid, under the provisions of paragraph 4, one-third thereof, or one-ninth, to each of his surviving brother and sister, and the remaining one-ninth to "the lawful issue, if any, of the body of" the mother, she having previously deceased.

Who are comprehended in the expression as thus used by the testator, "and the lawful issue, if any, of the body of those deceased?"

It is not our purpose to undertake any extended discussion of the meaning of the word "issue" as used in wills, or to consider at length the vast number of cases in which that word has been variously construed. Each case is but an application of the uni-

versal doctrine that in the construction of wills the intention of the testator is to govern when it can be ascertained from the will itself and is not inconsistent with the rules of law. It has been correctly said that the word "issue" as used in wills is an ambiguous term. It may be restricted to children only, or include descendants generally, or descendants taking by right of representation; and whether it shall be construed to have the one or the other meaning depends entirely upon the intention of the testator as gathered from the context of the whole will, interpreted according to the established rules of construction.

With respect to the words "lawful issue, if any, of the body" as used by the testator, it is suggested:

First. That only children are meant, under which construction Frank and Abbie, being the only surviving children of Frances Jane, would take the remaining one-ninth.

The earlier English cases held that the primary meaning of "issue" was all descendants, and its secondary meaning children. Chancellor Kent, however, seems to have adopted a different view, saying, (4 Com. 278): "The term issue may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children." And Judge Redfield in his work on Wills, says: "It seems to us that the term 'issue' in its primary signification imports children, and that it is a secondary meaning, by which it has been held to include the issue of issue, in an indefinite descending line." 2 Redfield on Wills, 3d Ed. 37, 38, note 5.

But the great weight of authority is that the word "issue" in its general sense, unconfined by any indication or intention to restrict its meaning, imports descendants. *Leigh* v. *Norbury*, 13 Ves. 340; *Tier* v. *Pennell*, 1 Edw. Ch. 354; 2 Wash. R. P. 318; Re Corrie, 32 Beav. 426; Re Kavenaugh, 13 Jr. Ch. 120: *Drake* v. *Drake*, 134 N. Y. 220, 224; *Soper* v. *Brown*, 136 N. Y., 244-248; *Chwatal* v. *Schreiner*, 148 N. Y. 683; *Jackson* v. *Jackson*, 153 Mass. 374; *Dexter* v. *Inches*, 147 Mass. 324; Words and Phrases, Vol. 4, page 3782; Am & Eng. Ency. Law, 2d Ed. Vol. 17, page 543.

The rule deducible from the authorities is that the word "issue" is to be interpreted according to its primary signification as importing descendants, unless it appears from the provisions of the will, or extrinsic circumstances proper to be considered, that the testator used the word in its secondary or restricted meaning of children. As said in *Soper* v. *Brown*, supra: "There are many authorities on wills in which the word has been construed to mean children only. Those authorities rest upon the undisputed principle that words used by a testator in his will are to be interpreted in the sense which he attributed to them, where it appears by the context that they were not used in their strict legal sense."

In support of this construction, that "issue" means children, it is suggested that the testator used the expression "the aforesaid issue taking only the deceased parent's share," and therefore that the word "parent," being used correlatively with "issue," restricts the latter to mean children only.

There are authorities which hold that the word "issue" when used in connection with the word "parent" will be understood to mean children only. Such seems to be the English rule, as laid down in *Sibley* v. *Perry*, 7 Ves. 522, and *Pruen* v. *Osborne*, 11 Sim. 132. This rule though criticised has been followed by some American Courts.

One of the most recent cases following the rule that has come to our notice is *Coyle* v. *Coyle*, (Court of Chancery of New Jersey, Oct. 26, 1907) 68 Atl. 1, R. 224. In this case the testator provided that the residue of his estate, after the death of his wife, should be divided equally, share and share alike, between his three children, "or such of them as shall survive my said wife, but if any of my said children shall have died, leaving lawful issue, such issue shall take the share their parent would have taken if living." Leaming, V. C. reaches the result that "issue" is to be restricted to the meaning of children only, but saying:

"I do not think I should feel at liberty to adopt the view that this language discloses the intent of testator to use the word "issue" in the restricted sense referred to with sufficient clearness to warrant a court in disregarding the natural significance of the word, were

it not for the fact that eminent jurists have in the past adopted that view (citing *Sibley* v. *Perry*). . . . I think it may be fairly said that the determination of *Sibley* v. *Perry* does not appear to have been wholly free from the influence of considerations arising from other provisions of the will and circumstances surrounding it; but the case appears to have always stood as authority for the rule of construction stated, though it has not escaped severe criticism." See criticism in *Ralph* v. *Carrick*, 11 Chancery Division, P. 873.

He also states that in Massachusetts the same rule is adopted, citing only *King* v. *Savage*, 121 Mass. 303, and that *Sibley* v. *Perry* has been cited with approval in his own court. Continuing he says:

"I would add, however, that I am strongly impressed that the testator's purpose may have simply been to secure to the line of any child who should predecease the life tenant, leaving descendants, the one-third share which such child would have received if living at the termination of the life estate, or, in other words, that the share should descend according to law if lineal descendants existed. . . . . A contrary intent would seem to call for some clear and specific statement of a contrary purpose. But, as already stated, I am impelled to give to the language used the force which the adjudicated cases seem to require." We have thus quoted from this recent case to show that the Vice Chancellor construed the word "issue" to have the restricted meaning of children only because he felt impelled to do so by reason of what he regarded as controlling precedent, and not because such construction satisfied his reason and judgment. We do not feel so impelled; our court is not committed to the doctrine of *Sibley* v. *Perry*. That doctrine seems not to have been wholly satisfactory to the English judges.

In *Ralph* v. *Carrick*, 11 Chancery Division, 873, Lord Justice James said:

"It is, however, I think settled, but rather by the case of *Pruen* v. *Osborne*, than by *Sibley* v. *Perry*, that as a general rule when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut

down to mean children," and he proceeds to point out some of the hard consequences of that rule. Lord Justice Brett said, "after hearing what the effect of such a general rule may be as described by Lord Justice James, I should have no objection to be present at the funeral of *Sibley* v. *Perry*."

We do not think it quite correct to say that "In Massachusetts the same view is adopted." It is true that in *King* v. *Savage*, 121 Mass. 303, where it was provided in the will that if the child had deceased its issue should "take the share of the deceased parent," it was said in the opinion: "In such a provision the word 'issue' would be limited to children," and *Sibley* v. *Perry*, and *Pruen* v. *Osborne*, are cited

But the question there decided was whether Henry Savage was entitled to receive the entire share of his father to the exclusion of Henry's own children, and it was held that he was, a result precisely the same as would have been reached if "issue" had been construed to mean descendants taking per stirpes.

In *Jackson* v. *Jackson*, 153 Mass. 374, it is said:

"Although in England, when the word 'issue' is used as the correlative of parent, it is held that the word 'parent' means father and mother, and that the word 'issue' means children, yet there as well as here the usual meaning of the word 'issue' is all lineal descendants. This is also the popular meaning in this Commonwealth. . . . . We think, that, as a matter of verbal construction, it would be as easy and natural to say that when the words 'parents' and 'issue' are used in connection with each other, the word 'parents' means ancestors, as that the word 'issue' means children; and in the construction of any instrument it is always necessary to look beyond the literal meaning of words.

"The English decisions are collected in 2 Jarm Wills (Bigelow's Ed.) 101-107. They do not seem to be wholly satisfactory to the English judges, and in *Hills* v. *Barnard*, (152 Mass. 67) we refused to follow the decision in *Martin* v. *Holgate*, in a case closely resembling that, and reached a conclusion analogous to that of the Court of Appeals in *Ralph* v. *Carrick*. The tendency of our decisions has

been more and more to construe 'issue' where its meaning is unrestricted by the context, as including all lineal descendants and importing representation."

Notwithstanding the doctrine of *Sibley* v. *Perry*, we are of opinion that there is nothing in the context of this will which necessarily or reasonably shows that the testator intended to confine and restrict the meaning of 'issue' to children only. He used the words "the aforesaid issue taking only the deceased parent's share" only to show his intention that the issue were to take by right of representation, and not to show that he used the word "issue" as synonymous with "children." He evidently meant the same and no more than if he had said "the aforesaid issue taking only by right of representation."

Further, it is to be noted that if "issue" as used by the testator is confined to children then there is the possibility and perhaps probability, that before the termination of the trust some part, or the whole, of the income of the trust would be undisposed of by reason of the death of some or all of the children of the life beneficiaries, a condition entirely inconsistent with the testator's scheme for the disposition of his estate. It seems reasonable then that the word "issue" was used by the testator in its primary meaning of descendants. Such construction is in accord with R. S., ch. 1, sec. 6, par. IX.: "The word 'issue' applied to the descent of estates, includes all lawful lineal descendants of the ancestor." Second, it is contended that if "issue" is intended to mean descendants then all lineal descendants are included taking per capita, under which construction all the defendants in the bill, except the Fifth Avenue Trust Company, would be comprehended in the lawful issue of Frances Jane Dudley. We think such is not the correct construction. The words "the aforesaid issue taking only the deceased parent's share" discloses the testator's intention that the issue should take by right of representation.

It is claimed, however, that these limiting words do not qualify the word "issue" as first used in the paragraph because separated from that by the semi-colon which appears between the words "deceased" and "or". There would be merit, perhaps, in this claim

if it was apparent that the punctuation so appearing was intentionally placed there. But on the contrary, we think it evident that the presence of the semi-colon was unintentional and probably a typographical error, for in no other of the paragraphs of the will, disposing of the shares of the nephews and nieces, where, as previously mentioned, the same phraseology is used, does a semi-colon appear in this place; and no reason can be gathered from the will, or attending circumstances, why the testator should intend that the language used in this paragraph should have any different meaning than it does as used in the others. It follows as a necessary conclusion that the true interpretation of the words "the lawful issue, if any, of the body" as used in this will means lineal descendants taking by right of representation, per stirpes and not per capita. Judicial precedent is not wanting for such construction. *Hall* v. *Hall*, 140, Mass. 267; *Dexter* v. *Inches*, 147 Mass. 324; *Hills* v. *Barnard*, 152 Mass. 67; *Jackson* v. *Jackson*, 153 Mass. 374; *Gardiner* v. *Savage*, 182 Mass. 521; *Coates* v. *Burton*, 191 Mass. 180.

It is therefore, the opinion of the court that at the death of Augustus his share (1-3) of the income of the trust, provided for in the "Fourth" item of the will, thereafter became payable as follows: 1-3 thereof, or 1-9 of the income, to Frank Wyman Dudley, 1-9 to Abbie Malcolm, and 1-9 to the lineal descendants of Frances Jane Dudley, taking by right of representation, which last 1-9 would go as follows, 1-4 thereof or 1-36 to Frank Wyman, 1-36 to Abbie, 1-36 to the issue of Edward R. Dudley, and 1-36 to the issue of Augustus.

How much of the net income of the trust, if any, goes to the Fifth Avenue Trust Company as executor of the last will and testament of Augustus Palmer Dudley?

The language in which a share of the income of the trust is given to Augustus is: "To pay of the net income of said trust estate, after paying the expenses of said trust fund . . . one-fourth to my nephew, Augustus Palmer Dudley . . . if living at my decease, quarterly during his natural life." The testator died April 18, 1905, and Augustus died July 15, 1905, three days

before the first quarterly payment fell due. The language of the will gives Augustus a vested interest in the net income of the trust fund. The manner and time of payment, "quarterly during his natural life," was not intended by the testator to be annexed to the legacy as a condition precedent to its vesting.

The gift of the share of the income to the life beneficiary was absolute, the words "quarterly during his natural life" being a direction as to manner and time of payment only.

"Courts of Equity, in the construction of wills relating to personal estate, follow the rules of the Civil Law. By that law, when a legacy is given absolutely, and the payment is postponed to a future definite period, the court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as debitum in presenti, solvendum in futuro." Redfield on Wills, 618.

It can hardly be said, however, that the testator here even postponed the time of payment. He made, rather, a provision making the times of payment definite and frequent for the manifest benefit of the beneficiaries.

The will speaks from the date of the death of the testator, and the beneficiaries are entitled to the income from that date. *Weld* v. *Putnam*, 70 Maine, 209.

We are of opinion, therefore, that Augustus' estate is entitled to his share of the net income of the trust fund from the testator's death to Augustus' death.

It remains then to determine what the net income of the trust fund was between April 18, and July 15, 1905. The eighth paragraph of the bill as amended shows, that $3137.50 of interest coupons, attached to bonds, which were not due at the testator's death, matured and were collected between April 18, and July 15, 1905, of which sum, however, $1721.19 was interest which accrued on said bonds prior to the testator's death, although not due and payable till after his death; that there were other coupons on said bonds amounting to $1775 which became due and were collected after Augustus' death, of which $368.28 accrued between April 18 and July 15, 1905; that $406.83 of interest on demand deposits in banks became due and was collected between April 18 and

July 15, 1905, of which $106.85 accrued before the testator's death; that there was $400.61 of other interest on said deposits collected after Augustus' death of which $76.73 accrued prior to his death; and that there was a dividend of $75 declared on bank stock July 1, 1905, which was collected after Augustus' death.

Is any of the interest which accrued on the bonds and bank deposits prior to the testator's death to form a part of the capital of the trust, or is it all income?

It is a well settled general rule that an apportionment of interest on an ordinary debt is allowable, for the reason that it accrues from day to day for the creditor's forbearance to call in the principal to which he is entitled. 22 Cyc. 1484, and cases cited. The interest on the demand deposits must be governed by this rule. Those deposits were due and payable; the interest accrued thereon from day to day as compensation for the delay in withdrawing them.

This rule, however, does not apply to the interest on the bonds. They were not due. Each coupon evidenced an independent obligation to pay a sum of interest at a specified time. When detached from the bonds the coupons were separately negotiable, and enforceable at their maturity by the holder although he might not be the owner of the bond. At the time of the testator's death he had no right to demand and receive the accrued interest on the bonds because the coupons were not then due.

In the absence of express statute or agreement no apportionment of the interest upon coupon bonds can be allowed during the intervening periods fixed for the maturity of said coupons. Such interest is to be regarded as income at the time of the maturity of the coupons. So also are dividends declared on stocks to be regarded as income at the time when they are so declared.

We need only cite as authority the case of *Dexter* v. *Phillips*, 121 Mass. 178, in which the question was directly before the court, and so decided after an exhaustive review of the authorities.

It follows that the net income of the trust fund between the time of the testator's death and Augustus' death and in which the estate of Augustus is to share, comprises the following:

(1) The total amount of the coupons which became payable subsequent to the testator's death and prior to Augustus' death, amounting to $3137.50. (2) the interest on the demand deposits which accrued between the testator's death and Augustus' death, amounting to $376.71. (3) the dividend of $75, declared July 1, 1905, and in all $3589.21.

It is unnecessary to answer seriatim the several questions proposed in the bill, but the result is: That at Augustus' death his share of the net income of the trust fund in question was one-third; that his executor, the Fifth Avenue Trust Company, is entitled to that one-third of the net income of the trust fund which accrued after the testator's death and prior to Augustus' death, as above determined; and that from and after Augustus' death, and until some further change in the beneficiaries results, the net income of the said trust fund is to be paid, seventeen thirty-sixths (17-36) to Frank Wyman Dudley, seventeen thirty-sixths (17-36) to Abbie Malcolm, one thirty-sixth (1-36) to the issue of Edwin R. Dudley by right of representation, and one thirty-sixth (1-36) to the issue of Augustus' Palmer Dudley by right of representation.

We think it proper that out of the total of the income of said trust, in which the Fifth Avenue Trust Company is entitled to share as herein specified, the costs, and reasonable counsel fees of the parties, should be paid the amount thereof to be determined by the court below.

Decree in accordance with this opinion.

JOSEPH B. PEAKS AND SYLVESTER J. WALTON

vs.

CLYDE H. SMITH.

Somerset. Opinion September 5, 1908.

Chattel Mortgages. Same not Recorded. No Possession of Mortgaged Property by the Mortgagees. Attaching Creditors. Statute (Mass.) 1832, chapter 157, section 1. Statute 1839, chapter 390, section 1; 1850, chapter 180; 1853, chapter 103; 1897, chapter 301; chapter 331; 1907, chapter 103; Revised Statutes, chapter 93, section 1; chapter 113, section 6.

When a mortgage of personal property has been given by a mortgagor residing in an unorganized place, and no town or organized plantation adjoins such unorganized place, and therefore there is no place designated by the statute, R. S., chapter 93, section 1, where the mortgage can be lawfully recorded, the mortgagee must take and keep possession of the mortgaged property in order to preserve his rights as against attaching creditors.

That part of Revised Statutes, chapter 93, section 1, relating to possession of mortgaged personal property by the mortgagee is simply declaratory of the common law, while that part relating to record provides an equivalent for possession not previously authorized. The mortgagee is given his option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties, and the mortgagee must employ one method or the other to preserve his rights as against third parties, and it matters not in what section of the State the mortgagor may reside.

The plaintiffs brought an action of trover against the defendant, who was sheriff of Somerset County, to recover the value of certain personal property attached on a writ by one of the defendant's deputies. The plaintiffs claimed the attached property under a chattel mortgage given to them, previous to the attachment, by a mortgagor who resided in an unorganized place in Somerset County when the mortgage was given. The mortgage was not recorded as there is no town or organized plantation adjoining the place in which the mortgagor resided and therefore no place where the mortgage could have been legally recorded. Neither did the plaintiffs ever take possession of the mortgaged property but permitted the mortgagor to remain in possession of the same. Previous to bringing the action, the plaintiffs gave the defendant written notice of their claim and the true amount thereof as required by R. S., chapter 83, section 45. *Held:* That the action cannot be maintained.

On report. Judgment for defendant.

Action of trover brought by the plaintiffs against the defendant, Sheriff of Somerset County, to recover the value of certain personal property attached December 18, 1906, by a deputy of the defendant on a writ of attachment in favor of one Margaret J. Armstrong and against one Martin J. A. Munster. The record does not disclose the plea, but presumably it was the general issue.

The plaintiffs claimed title to the attached property under a chattel mortgage given to them by said Munster, September 6, 1906. The mortgage was not recorded for the reason that Munster, at the time the mortgage was given, resided in Askwith, an unorganized place in Somerset County, and which is surrounded by other unorganized places, no town or organized plantation adjoining it, so that the statute requirement as to record could not have been complied with. Neither did the plaintiffs ever take possession of the mortgaged property but allowed Munster to have and retain the possession of the same. After the aforesaid attachment and "at least forty-eight hours" before bringing their action against the defendant, the plaintiffs gave to the defendant written notice of their "claim and the true amount thereof" as required by Revised Statutes, chapter 83, section 45.

Tried at the December term, 1907, Supreme Judicial Court, Somerset County. At the conclusion of the testimony, the case was reported to the Law Court upon so much of the evidence as was legally admissible, with the stipulation that "if the action cannot be maintained, judgment to be rendered for the defendant; if the action can be maintained, the case to be remanded to nisi prius for assessment of damages."

The case appears in the opinion.

J. B. & F. C. Peaks, and Walton & Walton, for plaintiffs.

Merrill & Merrill, for defendant.

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

CORNISH, J. This is an action of trover against an officer to recover the value of personal property attached December 18, 1906, and is before the Law Court on report.

The plaintiffs claim title under a mortgage given to them by the debtor, September 6, 1906. The validity of this mortgage, as against the attaching creditor is attacked by the defendant on the ground that neither had the property been taken into possession and kept by the mortgagees, nor had the mortgage itself been recorded. The plaintiffs admit these facts but reply that there was no place where the mortgage could have been legally recorded and therefore the action is maintainable.

R. S., ch. 93, sec. 1, provides as follows: "No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides, when the mortgage is given. . . . If any mortgagor resides in an unorganized place, the mortgage shall be recorded in the oldest adjoining town or plantation organized as aforesaid, in the county."

The mortgagor resided, at the time the mortgage was given, in Askwith, which is an unorganized place in Somerset County, and is surrounded by other unorganized places. No town or organized plantation adjoins it so that the statute requirement as to record could not have been complied with. Did this fact relieve the mortgagees from the other requirement, the taking and keeping possession of the mortgaged property? We think not.

At common law, as a general rule, to make a transfer of personal property, whether absolute or conditional, valid as against third parties, delivery was required and, in general also, a retention of the property by the vendee. *Lanfear* v. *Sumner*, 17 Mass. 109; *Goodenow* v. *Dunn*, 21 Maine, 86. The legislature of Massachusetts by P. L. of 1832, ch. 157, sec. 1, provided for the first time for the registration of personal mortgages and the court in *Bullock* v. *Williams*, 16 Pick, 33, (1834) construed this registration, when made, to be a substitute for the taking and keeping of possession. "The plain implication of the Statute is, that if possession is delivered to and retained by the mortgagee, or if the mortgage is recorded

pursuant to the directions of the statute, it shall be valid against other persons," says Chief Justice Shaw in that case.

The legislature of Maine in chap. 390, sec. 1, P. L. 1839, reenacted the Massachusetts Statute in these terms:

"No mortgage of personal property hereafter made . . . . shall be valid against any other person than the parties thereto unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the city, town or plantation where the mortgagor resides." Our court has followed the construction placed upon the same statute by the court of Massachusetts. *Smith* v. *Smith*, 24 Maine, 555; *Morrill* v. *Sanford*, 49 Maine, 566; *Hamlin* v. *Jerrard*, 72 Maine, 62.

The clause of the statute relating to possession is simply declaratory of the common law, while that relating to record provides an equivalent therefor not previously authorized. The mortgagee is given his option either to take and keep possession, or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties. Impossibility of recording does not abrogate the necessity of possession any more than the impossibility of possession would annul the necessity of record. The purpose of registration was to give notice to creditors and subsequent purchasers, notice which before the statute was left to be inferred from delivery and possession, *Sawyer* v. *Pennell*, 19 Maine, 167, and the mortgagee must employ one method or the other, it matters not in what section of the State the mortgagor may reside.

Plaintiffs rely upon *Wade* v. *Bessey*, 76 Maine, 413, where the court held that the then existing statute requiring an assignment of wages to be recorded "in the town or plantation organized for any purpose, in which the assignor is commorant while earning such wages" did not apply to an assignor earning wages in an unorganized township. We hold the same here. If the facts do not meet the statute, the statute does not apply. But the statute throws upon the mortgagee in such cases another duty, the common law duty that existed before the statute was passed, while in the case of the assignor, no other burden is imposed. More in point is *Grant*

v. *Albee*, 89 Maine, 299. The rule as to the attachment of personal property is similar to that governing mortgages. At common law in order to perfect and preserve an attachment of chattels, it was necessary to take and retain possession and control of the property or to have the power to take immediate control. *Laughlin* v. *Reed*, 89 Maine, 226. A statute, originally passed in 1840, authorized the recording of attachments of bulky personal property and with some amendments is still in force. In 1896 the then existing statute provided that "when the attachment is made in an unincorporated place" the copy of the officer's return of attachment "shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county." In *Grant* v. *Albee*, supra, personal property was sought to be attached in an unincorporated place with no town adjoining, and the officer recorded his attachment in the oldest and nearest town, but failed to keep possession of the property. The court held that the record was not authorized and the attachment was void. If the plaintiffs' reasoning in the case at bar is correct the impossibility of the record rendered unnecessary the taking of possession.

It is interesting to note that the statute as to recording assignments has been amended to cover the omission existing at the time of *Wade* v. *Bessey*, 76 Maine, 413; (1884) See P. L. 1897, ch. 301, R. S., ch. 113, sec. 6, P. L. 1907, ch. 103. And the statute relating to recording attachments of personal property, existing at the time of *Grant* v. *Albee*, 89 Maine, 299, (1896) has been similarly amended. See P. L. 1897, ch. 331, R. S., ch. 83, sec. 27. Moreover by P. L. 1850, ch. 180, recording of a personal mortgage was authorized in the nearest incorporated town in case the mortgagor resided in an unorganized place, which would have met the conditions in the case at bar; but by P. L. 1853, c. 103, this was changed "to the oldest adjoining town in the county." To change it back and make it harmonious with the statute governing assignments and attachments is for the legislature and not for the court.

The burden is on the plaintiffs to prove their right of possession of the goods attached. This they could do by proving that "possession" of the goods had been "delivered to and retained by" them

as mortgagees, or that the mortgage had been duly recorded, *Citizens National Bank* v. *Oldham*, 142 Mass. 379. The latter could not be done, the former was not done, and the entry must therefore be,

Judgment for defendant.

In Equity.

THE WEBBER HOSPITAL ASSOCIATION et als.

vs.

STELLA R. MCKENZIE, Executrix and Trustee.

STELLA R. MCKENZIE, Trustee.

vs.

CHARLOTTE MUCHMORE et als.

York. Opinion September 5, 1908.

Wills. Construction. Trust. Free Hospital. Revised Statutes, chapter 47; chapter 57; chapter 79, section 6, paragraph VIII.

Although no trustee is named in a will, yet a valid trust once created is never allowed to fail for want of a trustee. The executor may be held to act as trustee or the court may appoint one.

Allegations as to the misconduct of an executor and trustee cannot be considered by the Supreme Judicial Court sitting in equity upon the construction of a will. Such allegations are within the exclusive jurisdiction of the Probate Court in the first instance and of the Supreme Judicial Court sitting as the Supreme Court of Probate, on appeal, in the last instance.

A testator's will contained the following residuary clause:

"The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned to constitute a fund which when it shall have amounted to seventy-five thousand dollars the income from which to be and for the maintenance of a Free Hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment.

"If a Hospital shall not have been built when the above Hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for its maintenance.

"The above fund to be a memorial to my beloved wife, Eliza P. Webber."

Stella F. Ripley was named as one of the executors in the will without bond "leaving the other executor to the discretion of the Judge of Probate." The said Stella F. Ripley duly qualified as executrix under the will but no co-executor was appointed, and the said Stella F. Ripley settled the estate as sole executrix. No trustee being named in the will, the said Stella F. Ripley upon her own petition was then appointed trustee by the Probate Court, and afterwards having married one McKenzie she surrendered her former letters of trusteeship and was appointed trustee anew under the name of Stella R. McKenzie. Two Biddeford corporations, the Trull Hospital and the Webber Hospital Association were claimants for the benefit of the alleged trust fund created by the aforesaid residuary clause. These corporations were not in existence at the time of the execution of the will or at the death of the testator.

HELD:

1. That a valid trust was created by the will and although no trustee was named in the will yet a trustee has already been appointed by the Probate Court.
2. That the word "free" in the residuary clause is used in the sense of thrown open or made accessible to all, open for the public use. It does not prohibit receiving compensation from those able to pay, and at the same time, no charge is to be made against those unable to pay.
3. That the Trull Hospital is not entitled to the benefit of the trust fund. It is a private enterprise organized with a capital stock under Revised Statutes, chapter 47, governing business corporations, all of the stock being held by the physician in charge and three other members of his family. It is neither a public nor a charitable institution and does not meet the requirements of the will. Such an institution is not a public charity even if indirectly it serves charitable ends.
4. That the Webber Hospital Association is entitled to the benefit of the trust fund. It was organized under Revised Statutes, chapter 57, governing charitable and benevolent organizations for the admitted purpose of carrying out the provisions of this will. It has a membership of about three hundred and fifty. It is treating patients gratuitously. It comes within the letter and spirit of a charitable corporation whose distinctive feature is that it has no capital stock and no provisions for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution.
5. That when the principal of the trust estate amounts with its accumulations to $75,000, the trustee is authorized and directed to pay over semi-annually

to the treasurer of the Webber Hospital Association for its use, the income of the trust fund. When that time arrives the Association may have already built a hospital. If not the trustee may use $25,000 of the principal for that purpose, if a sufficient sum is guaranteed by other parties, so that with the income from the remaining $50,000 its maintenance is assured. If in the future the principal can be properly paid to the Association, to be held in trust, appropriate proceedings can be had therefor.

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

Two bills in equity asking for the construction of the will of Moses W. Webber, late of Biddeford, deceased, and the mode of executing the trust if one was created by the will.

The bill in the first named case was filed September 5, 1905, and was brought by the Webber Hospital Association, a corporation located at Biddeford, and Charlotte Muchmore, Phœbe Goodwin and Johanna Murray, heirs at law of the said Moses W. Webber, against the defendant, Stella R. McKenzie, in her capacity as executrix of the aforesaid will "and also in her capacity as trustee of a fund created by and under the provisions of said last will and testament of said Webber, for a hospital in said Biddeford, 'where the unfortunate may receive good care and skilful treatment.'" March 15, 1906, the Trull Hospital, a corporation located at Biddeford, was made a party plaintiff by agreement of all the parties. At the following September term, of the Supreme Judicial Court, all the plaintiffs, except the Webber Hospital Association and the Trull Hospital, withdrew by consent of the defendant. To this bill the defendant filed a demurrer and answer.

The bill in the last named case was filed January 2, 1906, and was brought by the said Stella R. McKenzie "in her official capacity as trustee by and under the last will" of the aforesaid Moses W. Webber, against the aforesaid Charlotte Muchmore, Phœbe Goodwin and Johanna Murray, "and against any and all unknown pretended supplicants or pretended claimants in any way relating to the last will and estate of said Webber, being all the parties interested, or claiming to be interested in the subject matter of this bill." The aforesaid Charlotte Muchmore, Phœbe Goodwin, Johanna Murray, the Webber Hospital Association and the Trull Hospital appeared in defense and filed answers to the bill.

Both cases were heard together on bills, demurrer, answers and evidence, before the Justice of the first instance. At the conclusion of the hearing and by agreement of the parties the cases were reported to the Law Court for determination.

All the material facts appear in the opinion.

Appearances in first named cause:

Foster & Foster, Edwin Stone, George F. and Leroy Haley, and Cleaves, Waterhouse & Emery, for plaintiffs.

James O. Bradbury, for defendant.

Appearances in last named cause:

James O. Bradbury, for plaintiff.

Foster & Foster, Edwin Stone, George F. & Leroy Haley, Cleaves, Waterhouse & Emery, for defendants.

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

CORNISH, J. Construction of the will of Moses W. Webber formerly of Biddeford, who died June 9, 1899, is asked in two bills in equity, brought under R. S., ch. 79, sec. 6, par. VIII. The first bill was filed September 5, 1905, in the name of The Webber Hospital Association and of the heirs at law, against the executrix and trustee. On March 15, 1906, the Trull Hospital was admitted as party plaintiff and at the September term 1906, the heirs withdrew by consent of the defendant. To this bill the defendant filed a demurrer and answer interposing the objection that neither the Webber Hospital Association nor the Trull Hospital has sufficient interest to enable it to maintain the bill. On January 2, 1906, a bill was filed in the name of Stella R. McKenzie, trustee, against the heirs at law and all parties claiming an interest under the will, asking for a construction thereof and instructions upon the execution of the trust. The heirs at law, the Webber Hospital Association and the Trull Hospital appeared in defense and filed answers. Both cases are now before this court on report, the evidence taken being applicable to both. Under these circumstances it is unnecessary to determine the technical question raised by the demurrer as to whether

the first bill should be entertained. All parties in interest are before the court, and are asking for the construction of the same will and the mode of executing the trust if one was created. The result in no way depends upon whether the first or the second bill is entertained or both. This is a privileged suit "to which the ear of the court should be open" to relieve parties from tedious and expensive litigation. *Richardson* v. *Richardson*, 80 Maine, 585. Therefore, without discussing this technicality we pass to the merits of the case.

The portion of the will which is said to be of doubtful construction is as follows:

"The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned, to constitute a fund which, when it shall have amounted to seventy-five thousand dollars, the income from which to be used for the maintenance of a free hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment.

If a hospital shall not have been built when the above hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for its maintenance.

The above to be a memorial to my beloved wife, Eliza P. Webber."

The questions involved are,

First, whether a valid trust was created by this residuary clause or whether the residuary clause being void, the heirs at law of the testator are entitled to the residuum as intestate estate.

Second, if a valid trust was created, how shall it be administered.

1. The intention of the testator is clear. The will was made July 9, 1898, about one year before his death and as he was childless he desired to dispose of the bulk of his estate for charitable purposes and at the same time as a memorial to his deceased wife. He makes a bequest of five thousand dollars to his niece Stella F. Ripley, who is also named as executrix, together with all his household goods, books, pictures, etc., and the use of his house in Old Orchard for life, with one hundred dollars a year from the income of his prop-

erty for the maintenance of the same. Seven hundred and fifty dollars are given for a monument to be erected on the burial lot of his father. All other bequests create trust funds the income only to be used. Three of these are in small amounts for the care of family burial lots, a fourth is of $15,000 "as a fund, the income from which to be given said Stella F. Ripley during her lifetime," and the fifth is of "one thousand dollars as a fund, the income from which to be donated to the aid of unfortunate women, to enable them to enter the Wardwell Home, so called, at Saco Maine, the fund to be known as the Eliza P. Webber fund." Then follows the clause already quoted bequeathing the balance of his estate "to constitute a fund which when it shall have amounted to seventy-five thousand dollars, the income from which to be used for the maintenance of a free hospital," etc., also as a memorial to his beloved wife.

A purpose so benevolent and an intention so clear ought to be upheld by this court unless prevented by positive and firmly established rules of law.

2. Counsel for the heirs contend that this residuary clause is void, that the legacy lapsed because the intention is incapable of being carried into effect, and the court in equity is not authorized to frame a new intention for the testator; that his purpose was to establish a hospital absolutely and entirely free, not a hospital some branch of which might be free, or which might provide a certain number of free beds to charity patients; that neither the Webber Hospital Association nor the Trull Hospital is or claims to be a free hospital in this sense; that if twenty-five thousand dollars of the principal are taken to build such a free hospital, the income of the remaining fifty thousand will be entirely inadequate to maintain it; that a guaranty of at least two hundred thousand dollars from outside parties would be needed and as it is impossible for the court to say that such a sum will be guaranteed, the entire provision is impossible of fulfilment and therefore void. This contention invokes the commonly accepted rule that if it appears that the gift was for a particular purpose only and that there was no general charitable intention, the court cannot by construction apply it cy pres the original purpose, *Doyle* v. *Whalen*, 87 Maine, 414; and

if the gift cannot vest in the first instance in the donees for the reason that such donees cannot be found, as in *Brooks* v. *Belfast*, 90 Maine, 318, or if the gift is conditional upon a future and uncertain event, and the condition is never fulfilled so that the estate never arises, as in Re Whites Trusts, 33 Ch., Div. 449, cited by the learned counsel for the heirs, the court cannot appoint other donees cy pres, and the legacy lapses.

But in the case at bar the facts do not warrant the application of these rules. No condition whatever is attached to the bequest; the expenditure of twenty-five thousand dollars in erecting such a hospital is not mandatory but discretionary. "Twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for its maintenance" are the words of the will. The trustee is to decide whether a sufficient sum has at any time been guaranteed and even then he may expend twenty-five thousand of the principal or not, as his good judgment may determine.

Nor is the word "free" used in the sense of without compensation from any one receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free. The word is used in its equally well known meaning as defined by Webster, "thrown open or made accessible to all." This is also a well recognized definition of the word in law: "Open to all — public," 14 Am. & Eng. Ency. of Law, page 527, Anderson Law Dictionary, "Open for the public use, "20 Cyc. 841, Black's Law Dictionary, *Dugan* v. *Baltimore*, 5 Gill & J. 357–375. It was therefore a public hospital "where the unfortunate may receive good care and skilful treatment" that the testator had in mind. No charge should be made to those unable to pay, but this would not prohibit receiving compensation from those who are able. It was to be open to all. The rich should not be turned away because of their wealth nor the poor because of their poverty. It should be free in the broadest sense.

The will, while providing that the income of this fund shall be used for the maintenance of a hospital, does not prohibit aid from other sources, but on the contrary, suggests such assistance.

Patients may contribute from their means; the State may make generous appropriations, benevolent friends may unite in guaranteeing an endowment. All these things may be done and they will promote rather than thwart the testator's intent. Without their aid the work of the hospital may be limited, with it, it may be largely extended.

This bequest therefore, fairly interpreted, is by no means impossible of fulfilment and the contention of the heirs on this point fails.

3. We think a valid trust was created. The bequest under consideration clearly comes within the scope of a public charity. "Public, or as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals in which the cestuis que trustent may be a portion or class of a public community." 2 Pom. Eq. Sec. 987; *Bangor* v. *Masonic Lodge*, 73 Maine, 428; *Doyle* v. *Whalen*, 87 Maine, 414; *Brooks* v. *Belfast*, 90 Maine, 318; *Jackson* v. *Phillips*, 14 Allen, 539. The following are examples: "to the suffering poor of the town of Auburn," *Howard* v. *Am. Peace Soc.*, 49 Maine, 288; "to the town of Skowhegan for the worthy and unfortunate poor," *Dascomb* v. *Marston*, 80 Maine, 223; "for the benefit of the inhabitants of E. and vicinity for educational purposes," *Sears* v. *Chapman*, 158 Mass. 400. It is unnecessary to multiply authorities sustaining the point that the founding and maintenance of public hospitals form a favored branch of charitable trusts. *Ould* v. *Washington Hospital*, 95 U. S. 303; *Home for Incurables* v. *Noble*, 172 U. S. 386.

No trustee is named in the will but a valid trust once created is never allowed to fail for want of a trustee. The executor may be held to act as trustee or the court may appoint one. *Washburn* v. *Sewall*, 9 Met. 280; *Brown* v. *Kelsey*, 2 Cush. 243; *Sears* v. *Chapman*, 158 Mass. 400; *Tappan* v. *Deblois*, 45 Maine, 122; *Howard* v. *Am. Peace Soc.*, 49 Maine, 288; *Wentworth* v. *Fernald*, 92 Maine, 282.

In the case at bar that step has already been taken. In the Probate Court and upon her own petition, Stella F. Ripley on March 4,

1902, was appointed trustee and after her marriage and the surrender of her former letters of trusteeship, was appointed trustee anew on June 2, 1903, under the name of Stella R. McKenzie, gave bond in the sum of $75,000 and has settled two probate accounts in that capacity.

We therefore hold that a valid trust was created by the residuary clause of the will.

4. The next question is the mode of executing said trust; to whom shall the principal or the income be paid? There are two claimants, the Trull Hospital and the Webber Hospital Association, both now of Biddeford, but neither in existence at the time of the execution of the will nor at the death of the testator.

The Trull Hospital is a corporation, organized December 11, 1902, under R. S., ch. 47, governing business corporations, with a capital stock of $25,000 all of which has been since the incorporation, and still is owned by Dr. Trull and three other members of his family. It owns and maintains a private hospital. It is distinctly a private enterprise, originated by Dr. Trull in 1900 and then incorporated two years later as he says for two principal reasons, one because he had organized a training school for nurses, and it gave them a better recommendation to graduate from an incorporated institution, and second because, if incorporated, he would be relieved from paying duty on certain drugs and on alcohol. No mention of charity work is made in the purposes of incorporation or in the by-laws. Some patients have failed to pay their bills but regular charges are made against all. The management is in the hands of the directors who may receive or reject applicants as they see fit.

It is neither a public nor a charitable institution. No patient has a right to claim its benefits unless he pays for them. It is true that this claimant now declares its readiness to devote the income of the Webber fund, if received, to charity work, but that does not change the character of the institution itself. Such an enterprise is not a public charity even if indirectly it serves charitable ends. *Stratton* v. *Physio-Medical College*, 149 Mass. 505.

Our conclusion is that the Trull Hospital is not such an institution as meets the requirements of the will and that it is not entitled to any portion of the income.

The Webber Hospital Association was incorporated on November 23, 1899, under R. S., chap. 57, governing charitable and benevolent organizations, for the admitted purpose of carrying out the provisions of this will and with the knowledge and approval of the executrix who was at first made a member of the Board of Directors. Its purposes are thus stated in its papers of organization; "for the purpose of taking and holding by purchase, gift, devise or bequest, personal and real estate, for the support and maintenance of a hospital in Biddeford where the unfortunate may receive medical and surgical treatment and nursing." It has a membership of about three hundred and fifty and its officers are among the substantial and public spirited citizens of Biddeford. It received an appropriation of ten thousand dollars from the State in 1907. Pledges have been made by certain individuals and corporations for its assistance. It occupies a leased house and is doing the work of a public hospital where the poor and unfortunate are treated gratuitously, limited only by the amount of its resources. It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital stock and no provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution. 6 Cyc. 974; *McDonald* v. *Mass. Gen. Hospital*, 120 Mass. 432; *Farrington* v. *Putnam*, 90 Maine, 405.

We therefore are of the opinion that the Webber Hospital Association meets the requirements of the will and should be the recipient of its bounty.

When the principal of this trust estate amounts with its accumulations to $75,000, the trustee thereof is authorized and directed to pay over semi-annually, to the treasurer of that Association for its use the income of the trust fund. When that time arrives the Association may have already built a hospital. If not, the trustee may use twenty-five thousand dollars of the principal for that purpose, if a sufficient sum is guaranteed by other parties, so that with

the income from the remaining $50,000 its maintenance is assured. That decision will call for the sound judgment of the trustees. If in the future this Association is in such condition that the principal can properly be paid to it, to be held in trust, appropriate proceedings can be had therefor.

5. The bill filed by the Webber Hospital Association contains many allegations of misconduct on the part of Stella R. McKenzie both as executrix and as trustee, and claims that had the estate been legally administered the balance available for this trust would now amount to at least $75,000. The record contains a large amount of evidence bearing on these points. But these allegations and this evidence cannot be considered by this court sitting in equity upon the construction of a will. They are within the exclusive jurisdiction of the Probate Court in the first instance and of this court sitting as the Supreme Court of Probate on appeal in the last instance. The acts of the executrix and trustee have been passed upon by the Probate Court and whether correctly or incorrectly cannot be made a matter of inquiry in this proceeding. *Harlow* v. *Harlow*, 65 Maine, 448; *Piper* v. *Moulton*, 72 Maine, 155; *Lebroke* v. *Damon*, 89 Maine, 113; *Graffam* v. *Ray*, 91 Maine, 234; *Hawes* v. *Williams*, 92 Maine, 483. Sitting as the Supreme Court of Probate this court will not exercise equity power in construing a will, *Hanscom* v. *Marston*; 82 Maine, 288, and the converse is equally true. Whatever rights and remedies an interested party has must be sought and enforced in the Probate Court.

We deem it, however, our duty in this case to observe that the administration of this estate seems to have been left too much in the hands of one person and she a party with conflicting interests. Stella F. Ripley now Stella R. McKenzie, was named as one of the executors in the will without bond "leaving the other executor to the discretion of the Judge of Probate," showing a purpose on the testator's part to have a co-executor appointed who should give bond. It seems, however, that no action was taken by her, looking to the appointment of a co-executor and she settled the estate as sole executrix without bonds, notwithstanding she was a legatee to the amount of $5000, and apparently made her own selection of

securities with which to satisfy that sum. She was then, upon her own petition, appointed trustee of the $15,000 fund of which she was the beneficiary, and to meet which she made another selection from the securities. In her petition she states that such was the wish of the testator. If so he could have easily expressed it by naming her as trustee in the will. By the same letters of trusteeship, she was made trustee of the residue of the estate, the income of which was to be for the benefit of a hospital. She claims that the balance has not yet reached the required sum. Her attitude toward the Webber Hospital Association, as disclosed by the record, is far from friendly and her interests in these various capacities are clearly antagonistic.

The court would suggest the propriety of the trustee resigning from the trusts, and having a disinterested person or corporation appointed, that would administer the $15,000 trust, paying the income thereof to Mrs. McKenzie during life; and also a disinterested person or corporation to administer the Hospital Trust in accordance with the construction herein given. The law does not look with favor upon such a concentration of conflicting interests and the rights of all parties will be better protected if these suggestions are carried into effect.

The Webber Hospital Association, the Trull Hospital and the trustees are each entitled to recover one bill of costs to be paid out of the estate, and also the three heirs at law who are to be treated as one party.

Decree accordingly.

EMMA J. CONEY, Admx. *vs.* HENRIETTA M. MALING.

Sagadahoc. Opinion September 10, 1908.

Taxation of Costs. Appeal. Practice.

An appeal from the taxation of costs by a clerk of courts in vacation must be in writing.

On exceptions by plaintiff. Overruled.

An alleged appeal by the plaintiff from the taxation of costs in vacation by the Clerk of Courts, Sagadahoc County.

The case appears in the opinion.

Wm. T. Hall, Jr., for plaintiff.

Staples & Glidden, for defendant.

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

SAVAGE, J. At the trial of this case at the December term, 1907 in Sagadahoc County, the verdict was for the defendant. The plaintiff's attorney did not request to be heard in costs during the term. After adjournment, the clerk taxed the costs, whereupon the plaintiff's attorney orally notified the clerk that he desired to appeal, but he filed no appeal in writing. He made no effort to have the matter heard by the Justice who presided at the December term, or by any other Justice in vacation. He presented the matter to the Justice who presided, at the following April term, who ruled that he had no jurisdiction to entertain the appeal, that it was not properly taken, and ordered it dismissed. To this ruling the plaintiff excepted.

We think the ruling was right. The plaintiff took no appeal. Giving the clerk in vacation oral notice of his desire to appeal was not sufficient. An appeal from the taxation of costs is a part of a judicial proceeding, and becomes a part of the record. From the very nature of the thing it must necessarily be evidenced by a writ-

ing. Otherwisé, no record of it can be made. Nor can the Justice to whom an appeal in vacation is made act judicially except upon a written appeal signed by the party or his attorney. Such a procedure is not permissible.

Exceptions overruled.

MARY SEAVEY FAIRBANKS, Appellant from Decree of Judge of Probate in the Estate of LYDIA H. RUGGLES.

Penobscot. Opinion September 10, 1908.

Wills. Residuary Clause. Construction. Heirs. Next of Kin. Rules of Descent. Revised Statutes, chapter 77, section 1, rule VI.

When a testamentary gift is made to a class of persons, to take effect in possession immediately, only those take who constitute the class at the death of the testator, when the will becomes operative, unless a different intention appears from the will, or from circumstances proper to be considered.

The will of a testatrix contained the following residuary clause: "All the rest, residue and remainder of my estate I give devise and bequeath to my heirs and the heirs of my late husband, Hiram Ruggles, those standing in the same degree of relationship either to myself *of* said Hiram to share alike according to the laws of descent in this State."

Held: That the manifest intent of the testatrix was to divide the residue of her estate into two equal parts, one part to go to her heirs and the other part to go to her husband's heirs, and that the persons who are to take as such heirs, and the proportions which they are to take, are to be determined "according to the law of descent in this State."

The said Hiram Ruggles died testate, leaving neither issue, father, mother, brother nor sister, but the descendants of six deceased brothers and sisters. *Held:* That the persons entitled to the one-half of the residue devised to his heirs "according to the laws of descent in this State" are determined by Revised Statutes, chapter 77, section 1, rule VI, under which "it descends to his next of kin in equal degree."

At the death of the testatrix there were living eleven nieces and nephews and eight grandnieces and grandnephews of the said Hiram Ruggles. *Held:* That his "next of kin in equal degree" are his eleven nieces and nephews living at the death of the testatrix and that they are to take the one-half of the residue devised to his heirs, per capita and not per stirpes.

On report. Decree of Judge of Probate affirmed.

Appeal from the decree of the Judge of Probate, Penobscot County, ordering distribution of the residue of the estate of Lydia H. Ruggles, deceased testate, as follows: one-eighth thereof to each of the two sisters of the testatrix; one twenty-fourth thereof to each of her six nieces and nephews; one twenty-second thereof to each of the eleven nieces and nephews of Hiram Ruggles, the deceased husband of the testatrix. The case came on for hearing at the April term 1908, Supreme Judicial Court, Penobscot County, at which time and by agreement of the parties it was reported to the Law Court, that court "to render such judgment as the law and the evidence require."

The case appears in the opinion.

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

Matthew Laughlin, for heirs of Lydia H. Ruggles.

SITTING: SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

KING, J. Lydia H. Ruggles devised and bequeathed the residue of her estate in the following language:

"All the rest, residue and remainder of my estate I give, devise and bequeath to my heirs and the heirs of my late husband, Hiram Ruggles, those standing in the same degree of relationship either to myself *of* said Hiram to share alike according to the laws of descent in this State."

The testatrix died in November 1905 leaving surviving her two sisters, also a niece and two nephews, children of a deceased brother, and three other nieces, children of another deceased brother. Hiram Ruggles died in May 1889, testate, leaving neither issue, father, mother, brother nor sister, but the descendants of six deceased brothers and sisters. At the time of the death of testatrix there were living eleven nieces and nephews, and eight grandnieces and grandnephews, whose parents were deceased, of Hiram Ruggles.

Upon petition for order of distribution of the residue of the estate the Judge of Probate decreed 1-8 thereof to each of the two sisters of testatrix, 1-24 to each of her said six nieces and nephews; and 1-22 to each of the eleven nieces and nephews of Hiram Ruggles.

From this decree Mary Seavey Fairbanks, a grandniece of Hiram Ruggles, appealed, assigning as reasons therefor: (1) That the residue of the estate should not be divided equally between the heirs of the testatrix and the heirs of Hiram; (2) that the heirs of Hiram should not be determined as of the date of the death of the testatrix but of the date of his death; (3) that the heirs of Hiram were not his nephews and nieces to the exclusion of his grand-nephews and grand-nieces whose parents were deceased; (4) that the heirs of Hiram should not take per capita but per stirpes.

The case is reported to this court for determination.

The chief question presented is, whether the testatrix in the residuary clause of her will made a devise to her heirs and the heirs of her husband as individuals to take per capita, or a devise in equal parts to her heirs and to his heirs as two classes.

In *Daggett* v. *Slack*, 8 Met. 450, Shaw, C. J., states the rule thus: "A devise to heirs, whether it be to one's own heirs, or to the heirs of a third person, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be, that they shall take as heirs would take by the rules of descent." In *Lord* v. *Bourne*, 63 Maine, 368, it is held that a devise or bequest to the "heirs" of an individual without addition or explanation vests the property in the persons who would take it in case of intestacy under the laws of descent and distribution. See also *Talcott* v. *Talcott*, 39 Conn. 186; *Woodward* v. *James*, 115 N. Y. 359; *Richards* v. *Miller*, 62 Ill. 417; *Holbrook* v. *Harrington*, 16 Gray, 102; *Bassett* v. *Granger*, 100 Mass. 348; *Townsend* v. *Townsend*, 156 Mass. 454; *Allen* v. *Boardman*, 193 Mass. 284.

In the residuary clause of her will the testatrix devised the residue of her estate "to my heirs and the heirs of my late husband, Hiram Ruggles." Those words, without addition or explanation, would be construed, according to the well recognized rules of testamentary construction, and the authorities, as a devise in equal parts to two classes, the persons who are to take and the manner and proportions in which they are to take under each class to be determined by the

rules of descent. Do the added words "those standing in the same degree of relationship either to myself *of* (or) said Hiram to share alike according to the laws of descent in this state" indicate a different intention of the testatrix? We think not. On the contrary those words make it manifest that the testatrix did not intend for her heirs and the heirs of her husband to take equally as individuals, because she expressly provides that they are to share "according to the laws of descent in this state," a provision that cannot be complied with if they are to share equally, per capita.

But granting that the laws of descent are not to be disregarded, it is suggested that the words "those standing in the same degree of relationship either to myself *of* said Hiram to share alike" indicate an intention of the testatrix to dispose of the residue of her estate to her heirs and Hiram's heirs as if they were all her heirs but "according to the laws of descent in this State."

Giving that interpretation to the language it will be found that the result suggested by the literal meaning of the words "to share alike" can in no sense be realized, for in such case the nieces and nephews of Hiram, representing different branches of his family, would take shares differing widely in amount. Under one branch of Hiram's family a niece would take one-sixtieth, while under another branch a niece would take one-tenth, being the same share that a sister of the testatrix would take under that interpretation.

No reason appears why the testatrix should prefer her husband's relatives, so that one of his nieces or nephews should receive as large a share as her own sister. Such a disposition of property is unnatural and not in accord with family ties and affections. We do not think the testatrix so intended. The language used does not require such construction.

A careful examination of the whole residuary clause of the will satisfies us that the manifest intent of the testatrix was to divide the residue of her estate into two equal parts, one to go to her heirs and the other to her husband's heirs, and that she used the words "those standing in the same degree of relationship either to myself *of* said Hiram to share alike according to the laws of descent in this State" to make plain her intent that no one of her heirs was pre-

ferred over another standing in the same degree of relationship to her, and likewise that no one of Hiram's heirs was preferred over another standing in the same degree of relationship to him, but that all of her heirs on the one side and Hiram's heirs on the other were regarded by her impartially and were "to share alike," without distinction or discrimination, "according to the laws of descent in this State."

It is a well settled general rule that when a testamentary gift is made to a class of persons, to take effect in possession immediately, only those take who constitute the class at the death of the testator, when the will becomes operative, unless a different intention appears from the will, or from circumstances proper to be considered. *Howland* v. *Slade*, 155 Mass. 415; *Smith* v. *Smith*, 186 Mass. 138; *Worcester* v. *Worcester*, 101 Mass. 128, 132; *Campbell* v. *Rawdon*, 18 N. Y. 412; 1 Jarman on Wills, 286, 287. This rule must be applied in the case at bar. No question is raised as to the persons entitled to share as the heirs of the testatrix.

Hiram Ruggles left neither issue, father, mother, brother or sister, consequently the persons entitled to the one-half of the residue devised to his heirs "according to the laws of descent in this State" are determined by R. S., c. 77, sec. 1, rule VI, under which "it descends to his next of kin in equal degree."

At the death of the testatrix there were living eleven nieces and nephews, and eight grandnieces and grandnephews, of Hiram Ruggles. But his grandnieces and grandnephews, not being related to him in equal degree with his nieces and nephews, are not entitled to share under rule VI. Accordingly his "next of kin in equal degree" are his eleven nieces and nephews living at the death of testatrix, and they are to take the one-half of the residue devised to his heirs, per capita and not per stirpes. *Davis* v. *Stinson*, 53 Maine, 493.

The decree of distribution appealed from conforms in all respects with the construction of the residuary clause of the will as herein determined, and the entry must be,

The decree of the Judge of Probate affirmed with costs.

VICTORIA ACETYLENE COMPANY *vs.* ANDRE R. CUSHING.

Androscoggin. Opinion September 10, 1908.

Verdict. Same Sustained.

The plaintiff, by defendant's order set up an acetylene gas light machine in the defendant's mill on thirty days' trial. If the machine was satisfactory to the defendant, he agreed to pay $325 for it. The plaintiff brought an action to recover the price. At the trial of the action the defendant contended that he rejected the machine as being unsatisfactory and gave notice thereof within the thirty days to one Waldron who was both the selling and the collecting agent of the plaintiff. The verdict was for the defendant, and the plaintiff filed a general motion for a new trial. *Held:* That the issue presented to the jury was one of fact only, and the verdict is their determination of that issue, reached after deliberation over conflicting testimony and varying inferences arising from the circumstances and conduct of the parties, and that no sufficient reason appears for disturbing the verdict.

On motion by plaintiff. Overruled.

Action of assumpsit, upon a special contract, to recover the sum of $325 as the purchase price of an acetylene gas light machine which by the defendant's order, had been set up in his lumber mill, on 30 days' trial. Plea the general issue. The verdict was for the defendant. The plaintiff then filed a general motion for a new trial.

The case appears in the opinion.

Oakes, Pulsifer and Ludden, for plaintiff.

Newell & Skelton, for defendant.

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

KING, J. The plaintiff set up an acetylene gas light machine in defendant's lumber mill upon the following order:

"You may set up one of your 100 light machines on thirty days' trial. For which if it is satisfactory to me the price will be $325.00 to be paid by a long time note at 6 per cent. The Victoria

Acetylene Co. to pay freight to Island Falls." This is a re-trial of an action to recover the price. Each trial has resulted in a verdict for the defendant. The first verdict was set aside on a motion for a new trial on the ground of newly discovered evidence. The case is now before the court on plaintiff's general motion to set aside the second verdict.

From an examination of the record we think the evidence reasonably establishes, that the machine was set up and started August 11, 1903; that the lights at first flickered and globes were obtained and adjusted August 21 or 22, which practically remedied that objection; that when the machine was re-charged, as required every few days, the lights would run low for sometime, and also varied in brilliancy at other times, so that they were not sufficiently even and steady for the safe and convenient operation of the mill; that the defendant was notified that his insurance would be cancelled because the machine had been installed at the mill, and one policy, at least, was cancelled and not continued; that the defendant was not satisfied with the machine and disconnected it, and at some time so notified Mr. Waldron, who was both the selling and collecting agent of the plaintiff.

The crux of the issue, however, was whether the defendant seasonably notified Waldron of his dissatisfaction. Upon this point the evidence was much in conflict. The defendant contended that he so notified him "September 3rd or 4th," but Waldron testified that he was not notified until sometime in December "near Christmas." Each party introduced other evidence tending to support his position. It is not deemed necessary to point out here any detailed analysis of the record, and we suggest the following observations only to indicate how conflicting was the testimony offered, on the one side and the other, in support of this vital point in the case, and the inferences that might be drawn therefrom.

Defendant testified in substance that on the 26th of August Mr. Holyoke, the insurance agent, met him in Houlton and notified him that the insurance must be cancelled; that he returned to the mill and disconnected the machine on the 28th of August, after which time it was not used; that he saw Mr. Waldron at Fort Kent

on Sept. 3rd or 4th and told him that the insurance was ordered cancelled, that the machine had been disconnected, and he should not keep it.

As tending to corroborate the defendant on this point Mr. Holyoke testified, that he did find the defendant at Houlton on August 26, and notified him that all of the insurance must and would be cancelled, and requested the return of the policies, which was delayed, but "at a later date, after being informed that the machine had been disconnected, two of the policies were continued and allowed to go in force again at the beginning."

William D. Frazer, defendant's foreman, testified that the machine was disconnected "about the latter part of August or the very first days of September" and was not used after that. Mr. Theriault, of Fort Kent, testified that Mr. Waldron was in Fort Kent between the 1st and 5th of September.

Against this evidence the plaintiff presented.

1. The testimony of Waldron, in substance that the first time he saw the defendant after the machine was installed was on October 15, at the defendant's mill; that the machine was then in operation and the defendant expressed no objections to it but was satisfied with it and said as soon as he got his insurance adjusted he would settle for it; that he next saw him in November at Fort Kent when defendant said he preferred to give a check rather than the note and would send check the next week; and that the last time he saw defendant was in December "near Christmas," on the train, when he told him for the first time that he should not keep the machine.

2. The circumstance that on August 14 defendant sent an order for one-half ton of carbide (a material used in the machine) which order was returned unfilled because no check accompanied it, and that between October 12 and 17 defendant sent a check for $70 with an order for one ton of carbide which was shipped to and received by him at the place of his mill.

The fact and circumstances of the purchase of this ton of carbide constitute the newly discovered evidence upon which the motion to set aside the first verdict was based.

In its brief the plaintiff says: "We claim that the evidence in regard to the running of the machine after the time of the thirty days trial had elapsed, especially in view of the order for the carbide in October, is so overwhelmingly in favor of the plaintiff that the decision ought to be set aside." Therein the pith of the plaintiff's motion is stated. The purchase of the ton of carbide does appear to be an unusual transaction, viewed even from the standpoint of the defendant's position, and a natural inference to be drawn from it is, perhaps, that the defendant was influenced by some additional motive other than the necessity to repay Theriault the 200 pounds borrowed of him, as explained by defendant; but the weight and effect of this transaction as tending to prove or disprove the question whether the machine was disconnected as the defendant claimed, or was run until at least October 15, was for the jury. They have passed upon it, and apparently decided that notwithstanding that transaction the machine was not run as Waldron claimed it was.

There are also other important portions of the evidence which present sufficient reasons why the verdict should not be disturbed. The testimony fairly discloses that the machine would consume from 12 to 15 pounds of carbide per day. The defendant had borrowed of Theriault 200 pounds which would last from August 11 to 28, the period during which the defendant says the machine was used, but not much longer. No more carbide was bought, and no more was borrowed.

Where then did the additional 500 to 700 pounds of carbide come from if the machine was run until at least October 15? This question is not answerable from the record. But the plaintiff states that its theory "is that the defendant must have received more carbide from Theriault than he testified to." But the testimony as to the quantity borrowed is not equivocal but direct and uncontradicted, being given not only by the defendant, but also by his foreman, Frazer, and by Theriault, of whom it was borrowed.

Unless the jury disregarded that testimony as false, and assumed an opposite fact without evidence, they could not have reasonably decided that the machine was operated by the defendant as the plaintiff claimed.

The issue presented to the jury was one of fact only, and the verdict is their determination of that issue, reached after deliberation over conflicting testimony and varying inferences arising from the circumstances and conduct of the parties. It is the opinion of the court, from a careful examination of the record, that no sufficient reason appears for disturbing that verdict. Accordingly the entry must be,

Motion overruled.

NORTHPORT WESLEYAN GROVE CAMPMEETING ASSOCIATION

vs.

HENRY H. ANDREWS.

Waldo. Opinion September 10, 1908.

Public Park. Dedication. Trespass. Revised Statutes, chapter 4, section 93, paragraph VI.

Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of dedication of streets and highways.

The word "park" written upon a block on a map of real estate indicates a public use; and when the owner of such real estate makes conveyances of portions thereof by express reference to such map, such acts on the part of the owner if unexplained operate as a dedication to the public use of the block so marked.

A park may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, amusement and enjoyment. The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation can afford is also included in the uses and purposes of a public park.

The plaintiff, in 1876, purchased a tract of land for an addition to its campground at Northport and caused the same to be laid out into lots for lease or sale with an open space of about one acre for a park. A plan of the tract and the laying out was made on which the lots were designated by numbers and the open space or park marked "Bay View Park." Lots were at first leased "in perpetuam" and later others conveyed in fee, by express reference to said plan. The defendant is the owner of four and one-half lots adjoining said "Bay View Park." The defendant cut certain grass standing and growing in said "Bay View Park," contending that this was done by him as one of the public, and an adjoining lot owner, for the purpose only of beautifying and improving the said park. The plaintiff then brought an action of trespass quare clausum against the defendant. On the facts, which are stated in the opinion, *Held:* (1) That there was a dedication of the locus by the plaintiff to the use of the public and the adjoining lot owners as a park. (2) That by its dedication of the locus as a park the plaintiff gave up and surrendered its right to exercise any acts of control or possession of it that would hinder the public in the full enjoyment of it as a place of rest, of recreation, of amusement and enjoyment, or that would prevent the public from increasing those enjoyments by its adornment and ornamentation. (3) That the defendant as one of the public, and an adjoining lot owner, had a right to cut the grass as he did, for the sole purpose of improving the park, and that he was not a trespasser in so doing.

On report. Judgment for defendant.

Trespass quare clausum to recover damages for cutting and trampling down grass on a lot of land in Northport, known as "Bay View Park." Plea, the general issue, with brief statement as follows:

"That the land described in plaintiff's writ, on which it is alleged that the trespass was committed by the defendant, was dedicated to the use of the public and the adjoining lot owners by the plaintiff as a park long before the date of the alleged trespass and had been improved, graded, fertilized and sown to grass by the adjoining lot owners; and that the defendant, as one of the adjoining lot owners, had a legal right to enter upon said land and cut the grass thereon for the purpose of improving and beautifying said park and keep-

ing it in proper condition for use for the purposes for which it was designed and had been dedicated; and that the defendant, in the exercise of his legal right and by request of other adjoining lot owners, entered upon said land at the time alleged in the writ, and mowed the grass thereon, for the purpose only of benefiting and improving said park, and did not injure said park or damage the plaintiff."

Tried at the April term, 1908, 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 for determination upon the legally admissible evidence.

The case appears in the opinion.

William P. Thompson, for plaintiff.

Dunton & Morse, for defendant.

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

KING, J. On report. Action of trespass quare clausum to recover damages for cutting and trampling down the grass on a lot of land in Northport, Maine. The defendant justifies under a claim that the locus had been dedicated by the plaintiff to the use of the public and the adjoining lot owners as a park, and that the acts complained of were done by him as one of the public, and an adjoining lot owner, and at the request of other adjoining lot owners, for the purpose only of beautifying and improving said park and rendering it more suitable for the use for which it was dedicated.

In 1876, the plaintiff purchased a tract of land for an addition to its campground at Northport and caused the same to be laid out into lots for lease or sale with an open space of about one acre for a park.

A plan of the tract and the laying out was made on which the lots were designated by numbers and the open space or park marked "Bay View Park." Lots were at first leased "in perpetuam," and later others conveyed in fee, by express reference to said plan. The defendant is the owner of four and one-half lots adjoining said "Bay View Park." The only instrument put in evidence, showing title of

any of the lots in defendant, is dated May 18, 1881, wherein the plaintiff leases to the defendant "in perpetuam . . . . A certain lot on their campground numbered according to the plan made by R. B. Miller of said lots, and bounded as follows: Beginning on the easterly side of "Bay View Park" at the northerly corner of lot No. 314; thence southerly by said Lot and on "Bay View Park" twenty-five feet to a vacant Lot; thence easterly on said vacant Lot fifty feet to a stake & stones; thence northerly by lot 314 twenty-five feet to a vacant lot; thence westerly on said vacant Lot fifty feet to the place of beginning. Intending hereby to convey to said Andrews Lot No. 314 as per said plan."

There is no material conflict of testimony as to the original laying out of the space for a park and its subsequent use as such by the lot owners and the public generally, from which testimony it satisfactorily appears: That at the time of the conveyance of lot 314 to defendant the treasurer of the plaintiff, Mr. Ruggles, who was authorized to make the conveyance, exhibited to him said plan and promised that the park designated thereon was to be graded and kept open as a park; that after several years, nothing material having been done to improve the park, the defendant raised among the lot owners one hundred dollars or more, to which the plaintiff added twenty-five dollars, and this money was expended by the defendant in grading, fertilizing and seeding to grass the park; that the lot owners, and the public generally, have used the park since it was laid out for crossing and recrossing it, and as they pleased. The circumstances leading up to the alleged acts of trespass, and explanatory of those acts, are thus stated by defendant: "I seeded it down and kept seeding it down, as I say, on the clay, and putting on year after year a good deal of fertilizer. But Mr. Dickey (the superintendent at time of acts complained of) claimed the grass. He didn't put anything on as I say for several years but claimed the grass and I was away from home a good deal and when I would get home the first of July, sometimes away along into July, perhaps the 8th or 10th, that grass wouldn't be cut. And when it was cut, growing so stout, especially on that clay, it left it nothing but stubble, and it would take me all the season to mow it

and trim it and work on it to bring it in to make a decent grass plot of it. I worked upon it the rest of the season every year to try to make it look decent, but I urged him, and the others in authority, to have it cut early, but I couldn't get that cut. They did come over on Ruggles' part earlier, but our part it was almost impossible to get it cut before July, and as I say before, it always looked rough and coarse. He kept cutting it and I urged him or tried to reason with him to let us have it to beautify and fertilize at our own expense and cut frequently, and the rest of the lot owners went to the Association — went to the officers and urged them to let us have it to care for at our own expense. But he was determined not to give it up to us, and I couldn't do anything with him. At last I made up my mind that I would cut it and see what they could do with me."

Mr. Dickey testified that he had made an arrangement with the Association whereby he was to have the hay on the park in consideration for certain work he did on the rest of the grounds and trucking, and that there was an understanding that it should be cut twice each year.

The defendant cut the grass on the 18th day of June 1907, and notified Mr. Dickey that he had done so. "And I told him that I didn't care for the grass, that was not what I was after and that he might take it off, and that if he didn't take it off I would." This action was immediately commenced.

Was there a dedication by the plaintiff of the locus to the use of the public and the lot owners as a park? We think there was.

Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest, either by his words or facts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

Judicial decisions explanatory of the principles upon which the doctrine of dedication rests have so multiplied, and are so uniform in reasoning, that but few citations need here be made.

Prof. Dillon says: (Dill. Mu. Corp. 4th Ed. 630) "the subject may be advantageously presented by referring to the leading case of the *City of Cincinnati* v. *White*, 6 Pet. 431, 10 U. S. 179, decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recognized as a sound exposition of the peculiar doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public under the doctrine of dedication. . . . . In its opinion in the case just mentioned, the Supreme Court assert or assent to the following principles: 1. That it is not essential to a dedication that the legal title should pass from the owner. 2. Nor is it essential that there should be any grantee of the use or easement in esse to take the fee, such cases being exceptions to the general rule requiring a grantee. 3. Nor is a deed or writing necessary to constitute a valid dedication; it may be by parol. 4. No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment."

In that case, *Cincinnati* v. *White*, the question discussed was the dedication of a public park. It is said: "And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

The following are a few of the cases in which the same principles have been clearly announced:

Hunter v. *Trustees of Sandy Hill*, 6 Hill, 411; *Village of Mankato* v. *Willard*, 13 Minn. 1, s. c. 97, Am. Dec. 208; *People*

v. *Marin County*, 103 Cal. 223; *Bates* v. *City of Beloit*, 103 Wis. 90; *Palen* v. *Ocean City*, 64 N. J. Law 669; *Wood* v. *Hurd*, 34 N. J. Law (5 Vroom) 87, 88; *Abbott* v. *Cottage City*, 143 Mass. 521; *Attorney General* v. *Abbott*, 154 Mass. 323, 328; 2 Dill. Mu. Corp. (4th Ed.) 630, et seq; Cyc. Vol. 13, pages 448, 453, 455; *Bartlett* v. *Bangor*, 67 Maine, 460; *Heselton* v. *Harmon*, 80 Maine, 326; *City of Indianapolis* v. *Kingsbury*, 101 Ind. 200.

The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of streets and highways. Dill. Mu. Corp. (4th Ed.) 644, and notes; *Rhodes* v. *Town of Brightwood*, 145 Ind. 21; *Abbott* v. *Cottage City*, 143 Mass. 521, 523, and cases there collected.

"Where the word 'public square' are used on a plat, that is an unrestricted dedication to public use." Dill. Mu. Corp. (4th Ed.) 645. And the same author adds: "The word 'park' written upon a block on a map of city property, indicates a public use; and conveyances made by the owners of the platted land by reference to such map operate conclusively as a dedication of the block."

In *Abbott* v. *Mills*, 3 Vt. 526, it is said; "Whenever a public square or common is marked out or set apart by the owner, and individuals are induced to purchase lots of land bordering thereon, in the expectation held out by the proprietors that it should so remain, or even if there are no marks upon the ground, but a map or plan is made, and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart, and appropriating them to any other use."

Our own court has adopted and applied the same principles. In *Bartlett* v. *Bangor*, 67 Maine, 460, 464, WALTON, J., delivering the opinion of the court said: "When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots, by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can afterwards interrupt or destroy."

Applying these principles in the case now under consideration we find all the essential elements of a complete dedication of the locus by the plaintiff to the use of the public and the adjoining lot owners for a park established by the evidence. Here was a dividing of a tract of land bordering on the seashore into small lots for sale, the setting apart of a portion of the tract for a park, the representation of the platting by a plan showing the lots by numbers and the locus as "Bay View Park," the exhibition of the plan to purchasers, the selling of lots by express reference to the plan, the promise that the park should be graded and kept open as such, and its use by the lot owners and the public generally at their pleasure continuously for a long period of years during which they have improved and beautified it at their own expense.

An intention on the part of the plaintiff to dedicate the locus to the public use as a park was thus clearly manifested by its acts and statements explanatory of those acts. Upon that intention so expressed the public and individual citizens had a right to act, and did act, purchasing lots with the assurance that they were to have the full benefit and enjoyment of the locus as a public park, and entering upon and using the same for such purpose. The conclusion therefore must be that a complete dedication has resulted.

We think such dedication affords the defendant a justification of his acts complained of.

It is true that the fee of the soil remains in the plaintiff, for a common law dedication does not pass the fee; but by the dedication the plaintiff is estopped from exercising any use and control of the locus inconsistent with the full use, benefit and enjoyment of it by the public as a park. The plaintiff's limitations as to its use and control of the locus must therefore be considered and determined with reference to the use for which it was dedicated — a park. In order to carry into effect such intended use a more enlarged right of control in the public may be required, with a consequently diminished right in the plaintiff, than in the case of some other public uses, such as highways and streets.

A park may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure,

amusement and enjoyment. See cases collected under "Words and Phrases," vol. 6, page 5176, title "Park." The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation may afford is also included in the uses and purposes of a public park.

Accordingly by its dedication of the locus as a park the plaintiff gave up and surrendered its rights to exercise any acts of control or possession of it that would hinder the public in the full enjoyment of it as a place of rest, of recreation, of amusement and enjoyment, or that would prevent the public from increasing those enjoyments by its adornment and ornamentation.

To maintain this action of trespass quare clausum the plaintiff must show that notwithstanding the dedication it still retained the possession and control of the locus sufficiently to have the grass growing thereon remain uncut until it ripened into hay, or at least until it saw fit to cut it. If such possession and control by the plaintiff would interfere with the full enjoyment by the public of the use of the locus as a park then it follows that the plaintiff had not such right of possession and control. Whether or not the grass growing upon this park, if left uncut until it ripened into hay, or late in the season, would lessen the benefits and enjoyments which the public could derive from the park is a question of fact. We think it would; and that the park would be made more suitable for use, and afford more pleasure and enjoyment to those entitled to its use, if the grass were cut earlier and oftener. It must afford less pleasure to travel through tall grass, especially when wet by dews and fogs, than to walk over a closely cut surface; so, too, the coarse and seared stubble of a late cutting is less attractive to the eye than the green of a well kept lawn.

The municipal authorities might have exercised control over the park and improved it, but they did not. The individual citizens interested in it and entitled to its enjoyment had the right to do that which was reasonably necessary to improve the park and render it more suitable for the uses for which it was intended. *Attorney Gen-*

eral v. *Abbott*, 154 Mass., page 327, 328; *Heselton* v. *Harmon*, 80 Maine, 326.

The acts of defendant in cutting the grass were done only for the purpose of improving the park, and in the opinion of the court so resulted.

It would hardly be contended that defendant could be held in trespass for raking dangerous rocks from footpaths over the park, or removing unsightly underbrush, or even cutting and destroying weeds and thistles growing thereon. Wherein is there a distinction in principle between such cases and the one at bar? We think the defendant, as one of the public, and an adjoining lot owner, had a right to cut the grass as he did, for the sole purpose of improving the park, and that he was not a trespasser in so doing.

It is suggested that inconveniences may result by reason of some possible conflict in the ideas of those interested in the park as to what acts would improve and benefit it. That is possible, but not probable. As before mentioned the municipal authorities may take charge of it under authority to make by-laws and ordinances "for the proper protection and care of public parks and squares." R. S., c. 4, § 93, par. VI. If any one does that which will render the locus less suitable or useful as a park, or unlawfully interrupts the rightful enjoyment of it by others, he may be restrained; and it is not probable that rivalry for its improvement in fact will exist to the extent of inconvenience.

It follows that this action is not maintained, and the entry will be,

Judgment for defendant.

LIZZIE M. SPRAGUE

vs.

INHABITANTS OF THE COUNTY OF ANDROSCOGGIN.

Androscoggin. Opinion September 12, 1908.

Criminal Law. Right of Appeal. Jury Trial. Private and Special Laws, 1891, chapter 132, section 12; Statute 1905, chapter 123, section 6; 1907, chapter 42. Revised Statutes, chapter 133, sections 2, 3, 4, 5, 6, 17.

1. Chapter 42 of the Laws of 1907, providing that a husband who, without lawful excuse deserts his wife, or neglects to support her when in need may be fined and imprisoned, and that the proceeds of his labor while in jail estimated as the statute provides, shall be paid to his wife, is not unconstitutional on the ground that the respondent is deprived of a jury trial.
2. The proceeding being a criminal one, the accused convicted by a municipal court has necessarily the same right of appeal under the general statute, R. S., chapter 133, section 17, that he would have if convicted of any other offense; and having the right to appeal, he is not deprived of a trial by jury in the appellate court.
3. Inasmuch as this case comes up on report, and the only question argued is that of the constitutionality of the statute, the court does not consider the question whether the form of remedy adopted is appropriate, or could be sustained, if objected to.

On report. Judgment for plaintiff.

Action to recover money alleged to be due the plaintiff by virtue of the provisions of chapter 42, Public Laws of 1907. Plea, the general issue.

When this action came on for trial, an agreed statement of facts was filed and the case was then reported to the Law Court for determination, with the stipulation "that if judgment is for the plaintiff the defendant is to be defaulted in the sum of twelve dollars with full costs."

The case appears in the opinion.

Harry Manser, for plaintiff.

McGillicuddy & Morey, for defendants.

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

SAVAGE, J. Action to recover money alleged to be due the plaintiff by virtue of the provisions of chapter 42 of the Public Laws of 1907. The case comes up upon an agreed statement of facts, and the defendant makes no objection to the present form of proceeding. Hence we do not consider whether it is the proper form or not. The only question raised in argument is the constitutionality of the statute above referred to, and that question we will decide.

The statute provides in substance that if a husband, without lawful excuse, deserts his wife in destitute or necessitous circumstances, or if, being able by means of his property or labor to provide for her necessary support, he wilfully neglects or refuses so to do when she is in destitute or necessitous circumstances, he shall be deemed guilty of a misdemeanor, and may be fined or imprisoned, or both; that the court may direct that a fine imposed shall be paid wholly or in part to the wife; that, in lieu of punishment, or in addition thereto, the court may order the payment of weekly sums to the wife for one year, and release the husband from custody on his entering into a recognizance conditioned for his personal appearance whenever ordered to do so within the year, and for his compliance with the order of payment; that when the husband is sentenced to hard labor and is actually employed in such labor in the county jail, the jailer shall each week certify to the county commissioners the number of days the prisoner has been thus employed, and that the county commissioners shall thereupon draw their order for a sum equal to fifty cents for each day's labor, and the county treasurer shall pay the same to the wife. It is further provided that the fines and penalties named in the act may be recovered and enforced by complaint or indictment. Municipal courts are given jurisdiction of such complaints.

In this case the complaint originated in the Auburn Municipal Court. The husband was convicted and sentenced to hard labor in the jail in Androscoggin County and labored twenty-four days. All the necessary statutory steps to establish the plaintiff's right to the money sued for have been taken or waived.

The principal if not the only ground upon which the constitutionality of the act is questioned by counsel is that the husband complained against is deprived of the right of a trial by jury because he has no right of appeal. *Cotton* v. *Cotton*, 103 Maine, 210, is cited as authority for this position. That case arose under chapter 123, section 6, of the Public Laws of 1905, under the provisions of which, a husband of sufficient ability who wilfully and without reasonable cause neglects or refuses to support his wife, may, by a civil proceeding, be compelled to contribute to her support. In such cases, the Supreme Judicial Court, the Superior Courts, the Probate Courts, and Municipal Courts, have concurrent jurisdiction. In *Cotton* v. *Cotton*, it was held, for reasons not necessary to be repeated, that such a proceeding commenced in a municipal court is not appealable.

That, however, is not this case. The statute under which these proceedings arose is a criminal statute. It creates an offense. It provides for a criminal proceeding. It is not a substitute for the statute under which *Cotton* v. *Cotton* arose, but is additional to it. It provides another and sharper method of enforcing the duties of husbands to necessitous wives.

The proceeding being a criminal one, the accused convicted by a municipal court has necessarily the same right of appeal under the general statute, R. S., chap. 133, sect. 17, that he would have if convicted of any other offense. Within the meaning of this section relating to appeals, the term "magistrate" includes judges of municipal courts as well as trial justices. See same chapter, sections 2, 3, 4, 5 and 6. See also the act creating the Auburn Municipal Court, respecting the right of appeal. Private and Special Laws of 1891, chap. 132, sect. 12. The right of appeal appertains to all criminal proceedings within the jurisdiction of municipal courts.

It is too well settled to require discussion, that one put on trial in a municipal court for an offense within its jurisdiction is not unconstitutionally deprived of his right to a trial by jury, when he is freely allowed an appeal to a court where a jury trial can be had. *Johnson's Case*, 1 Maine, 230; *State* v. *Gurney*, 37 Maine, 156; *State* v. *Craig*, 80 Maine, 85.

The counsel for the defendant also discusses the policy of the statute, but with that we have nothing to do.

To enact that a husband who, without lawful excuse, deserts his wife or neglects to support her when in need, may be fined and imprisoned, and that the proceeds of his labor while in jail, estimated as provided in this statute, shall be paid to his wife, does not transcend in any respect our conception of constitutional legislative power.

Judgment for the plaintiff for twelve dollars.

FLORA E. PATTERSON

vs.

SUPREME COMMANDERY UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD.

Knox. Opinion September 12, 1908.

Contracts. Insurance Application. Approval of Same a Condition Precedent. Defendant Not Estopped.

The by-laws of the defendant fraternal beneficiary organization prescribe the following steps to be taken by one desiring to become a member of the society. He makes a written application. His application is balloted upon. If the applicant is "elected to receive the degrees," he is then examined in respect to his physical condition by the subordinate commandery medical examiner. If the result of this examination is favorable, he is initiated into the commandery with ritualistic ceremonies having first paid certain fees and dues, including one assessment to the Benefit Fund. The application and medical examination are then forwarded to the Supreme Medical Director of the organization, for his approval or disapproval. If he approves, the application is returned to the subordinate commandery by him, and is sent by the proper officer to the Supreme Keeper of Records, and the initial assessment for the Benefit Fund, paid by the applicant before initiation, together with assessments, paid by members generally, on the first day of the following month, is forwarded

to the Supreme Treasurer on or before the tenth day of the month. But the by-laws provide that no rights of membership in the order shall accrue by initiation, nor shall the applicant or his beneficiary possess any claim on the Benefit Fund, nor shall a benefit certificate be issued to the applicant, until said application has been approved by the Supreme Medical Director, and shall have been sent by the Keeper of Records of the subordinate commandery to the Supreme Keeper of Records. All the requirements hereinbefore mentioned having been performed and complied with, the applicant shall be received into membership in the order."

The plaintiff was the intended beneficiary of one Patterson, who made application for membership in a subordinate commandery and pursued the several steps above mentioned, and on Sept. 27, 1906, was duly initiated. His application and medical examination were forwarded to the Supreme Medical Examiner, who on the next day, Sept. 28, approved the same. But earlier in the same day, Patterson was accidently killed.

Held: (1) That the approval of the application by the Supreme Medical Director was a condition precedent to beneficial membership, and as such approval was not had in the lifetime of the applicant, he never became a beneficial member and his beneficiary has no claim on the Benefit Fund.

(2) That the failure of the subordinate commandery to return or tender back the assessment advanced by Patterson does not estop the defendant from making this defense. Since Patterson never was a beneficial member, it did not lie in the power of any of the defendant's officers, by acts or omissions to make him a member in effect.

On report. Judgment for defendant.

Action of assumpsit by the plaintiff to recover the sum of $500, the same being the amount of certain life insurance for which Hollis L. Patterson, a son of the plaintiff, had made application in the defendant Order, the plaintiff being the beneficiary named in the application. The said Hollis L. Patterson was accidentally killed before his medical examination had been approved by the Supreme Medical Director, and before any certificate of insurance had been issued to him. Plea, the general issue.

When the action came on for trial, an agreed statement of facts was filed and the case was then reported to the Law Court to determine, upon the agreed statement, "the legal rights of the parties and all questions of law arising therefrom, and to render final judgment in accordance therewith."

The case fully appears in the opinion.

Rodney I. Thompson, for plaintiff.

Frank B. Miller, for defendant.

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

SAVAGE, J. The defendant corporation is a fraternal beneficiary organization, having a lodge system with ritualistic ceremonies of initiation of members, and carried on for the sole benefit of members and their beneficiaries, and not for profit. It is the supreme body, having under it grand commanderies and subordinate commanderies. It provides under its charter and laws, by assessments on members, a Benefit Fund, out of which death benefits are paid to the designated beneficiaries of deceased members. The assessments are collected and forwarded to the supreme treasury by means of the machinery of the subordinate commanderies. Membership is acquired by making application to a subordinate commandery and pursuing the steps prescribed by the laws of the society. These steps, so far as material to this case, are as follows: The application is balloted upon. If the applicant is "elected to receive the degree," he is then examined in respect to his physical condition by the subordinate commandery medical examiner. If the result of this examination is favorable, he is initiated into the commandery with ritualistic ceremonies, having first paid certain fees and dues, including one assessment to the Benefit Fund. The application and medical examination are then forwarded to the supreme medical director of the organization for his approval or disapproval. If he approves, the application is returned to the subordinate commandery by him, and is sent by the proper officer to the Supreme Keeper of Records, as the supreme secretary is styled, and the initial assessment for the Benefit Fund paid by the applicant before initiation together with assessments paid by members generally on the first day of the following month is forwarded to the supreme treasurer on or before the tenth day of that month.

The laws of the organization expressly provide, however, that "no rights of membership in the Order shall accrue thereby," that is, by initiation, "nor shall the applicant or his beneficiary possess any claim on the Benefit Fund, nor shall a benefit certificate be issued to the applicant until said application has been approved by

the Supreme Medical Director, and shall have been sent by the Noble Keeper of Records" (of the subordinate commandery) "to the Supreme Keeper of Records. All the requirements hereinbefore mentioned having been performed and complied with, the applicant shall be received into membership in the Order."

One Hollis L. Patterson on September 26, 1906, made application for membership in Ivanhoe Commandery, one of the defendant's subordinate commanderies, located at Rockland, and named his mother, the plaintiff in this action, as the beneficiary of his death benefit. He was elected. He successfully passed the required medical examination by the local medical examiner. He paid the regular monthly assessment of forty-one cents, and commandery dues amounting to seventy-five cents, and on September 27 was duly initiated in Ivanhoe Commandery. His application and medical examination were forwarded to the Supreme Medical Director who on the next day, September 28, approved the same. But earlier in the same day Patterson was accidentally killed. Nothing further seems to have been done by anyone. Patterson was not reported to the Supreme officers as having been admitted or initiated. No benefit certificate was ever issued. The assessment of forty-one cents which Patterson paid was not, as we infer from the agreed statement, reported or forwarded to the supreme treasurer, but remained in the hands of the subordinate commandery. It has never been returned or tendered.

This action is brought to recover five hundred dollars, the amount of death benefit for which application was made. It is resisted on the ground that Patterson never became a beneficial member of the Order, that the terms and conditions of membership which were necessary to be performed before he would be a beneficial member were not all performed in his lifetime, and that at the time of his death there was no contractual liability on the part of the defendant.

We think this contention must be sustained. The defendant, if liable at all must be liable as upon a contract,—a contract of insurance. The terms and conditions of the contracts of this defendant with its members are to be found, in part at least, in its constitution and laws. It had a right to impose terms and conditions upon those

who sought membership. All applications must be held to have been made subject to those terms and conditions. In this case one of those terms and conditions was that the approval of the application by the Supreme Medical Director should be a condition precedent to beneficial membership, and that until such approval neither the applicant nor his beneficiary should have any claim on the Benefit Fund. This was the sine qua non. The election was not sufficient, nor was a satisfactory medical examination by the local examiner. The initiation was not enough. It was a step, but it was only a step. It gave the applicant a certain status, as, if his medical examination was finally disapproved, the laws of the Order gave him the option of remaining as a social member. Approval of the application by the Supreme Medical Director was made essential. It was probably a wise requirement, but whether it was or not, it was one which the defendant had a right to make.

Patterson died before his application was so approved. The intended contract was not completed in his lifetime. At the time he died the defendant was under no liability to his beneficiary. Cases in point are *Matkin* v. *Sup. Lodge K. of H.*, 82 Tex. 301; 27 Am. St. Rep. 886; *Bruner* v. *Brotherhood of American Yeomen* (Iowa), 111 N. W. 977; *Sup. Lodge Knights and Ladies of Honor* v. *Johnson* (Ark.), 99 S. W. 834.

But the plaintiff contends that the right to make this defense has been waived or lost on account of the failure to return or tender back the forty-one cents which was paid as an assessment for the Benefit Fund. We do not think so. There are many cases which hold that when a forfeiture has arisen by reason of the failure of the member to pay an assessment within the prescribed time, the receipt and retention of the assessment afterwards, by the proper officer, is a waiver of the forfeiture. But here there was no forfeiture by a member. Patterson had no beneficial interest or right to be forfeited. He never was a beneficial member. And after his death, we do not think it lay in the power of any of the defendant's officers by any acts to make him a member in effect. *Swett* v. *Citizens' Mut. Rel. Soc.*, 78 Maine, 541. If not, how could that result be effected by failure to act? Certainly it could not. As

none of the elements of an estoppel exist, it is unnecessary to inquire whether the defendant could be estopped under any circumstances. Nor is it necessary to inquire whether the forty-one cents, conditionally paid by Patterson, but never in the Supreme treasury, should be returned to Patterson's estate by those who hold it.

Judgment for the defendant.

STATE OF MAINE

vs.

FREDERICK C. YATES, F. C. GOODWIN, C. E. GOODWIN AND W. M. DAVIS.

York. Opinion September 12, 1908.

Way. Terminus at High Water Mark When Laid Out. High Water Mark Extended Seaward by Accretions. Terminus Follows Changed High Water Mark. Public Easement. Land Made by Accretion. Fee of Same. Constitution of Maine, Article 1, section 21.

The terminus of a street laid out at Old Orchard in 1871 was "high water mark." Since 1871 high water mark at this point in Old Orchard has been moved by accretions about eighty-eight feet seaward.

Held: (1) That when high water mark changed, and the land above high water mark gradually extended seaward by accretion, the public easement which was attached to it originally at high water mark, went with it, and the street had ended at all times at high water mark, wherever it has been.

(2) That although the fee of the land made by accretion belongs to the defendants, they are not deprived of their property in it, and of a just compensation, by this extension of the street. The original compensation awarded is presumed to have been full and just. It covered all damages to the defendants' estate, and for all time, including such damages as might be occasioned later than the taking, by an extension of the easement by operation of law.

On report. Judgment for the State.

Indictment for creating a nuisance, by obstructing a way, at Old Orchard, York County. The indictment contains two counts. The first count charges that the defendants "on the first day of October in the year of our Lord one thousand nine hundred seven at Old Orchard in said County of York, did unlawfully and injuriously erect, maintain and continue a nuisance, to wit, a certain platform attached to the Old Orchard pier which obstructed a certain public highway known as Old Orchard Street in said Old Orchard." The second count charges that the defendants "on the first day of October, A. D. 1907, did unlawfully and injuriously erect and build and cause to be erected and built in and upon the lower easterly side of said Old Orchard Street a certain wooden structure, to wit, a platform, thereby obstructing said highway and endangering travel thereon, and thereby erecting, maintaining and continuing a nuisance against the peace of said State, and contrary to the form of the statute in such case made and provided." The defendants pleaded not guilty. An agreed statement of facts was then filed and by agreement the case was reported to the Law Court for decision.

The material facts are stated in the opinion.

Frederick A. Hobbs, County Attorney, for the State.

George F. & Leroy Haley, for defendants.

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

SAVAGE, J. The defendants stand indicted for creating a nuisance by obstructing a way. The case comes up on report. It appears that in 1871, a way, known as Old Orchard Street, was laid out in Old Orchard, beginning "at the north corner of Ebenezer C. Staples' field, thence running south 41 degrees 15 minutes east 76 rods or to high water mark." The street was built and has since been constantly used by the public. At the time the street was laid out it was exactly seventy-six rods from the point of beginning to high water mark on Old Orchard beach. This street was connected

with the sea, which is a great natural highway. But since 1871, high water mark at this point in Old Orchard has been moved by accretions about eighty-eight feet seaward. The defendants own a lot of land on the shore bounded westerly by Old Orchard Street. They claim to own the fee to the center of the street, and we assume that they do own it. The obstruction complained of is on the eighty-eight foot strip of land made by accretion since 1871, and is in front of that half of the way as originally laid out, of which the defendants claim the fee.

It is settled law that the owner of land, bordering on a stream, a lake or the sea, which is added to by accretion, that is, by the gradual and imperceptible accumulation or deposit of land by natural causes, becomes thereby the owner also of the new made land. It follows that the defendants, owning to the center of the street as originally described, have gained title by accretion to so much of the added land as lies in front of their half of the street, and that the obstruction is on land of which they own the fee. *Banks* v. *Ogden*, 2 Wall. 57. So far there is no controversy.

But the State contends that as far and as fast as the ground in front of high water mark as it was in 1871 has been added to by accretion, so far and so fast has the public easement extended seaward by operation of law, that the definite terminus of the street in 1871 was "high water mark," and that it continued to be and is now at "high water mark," wherever that may be. In short, it is contended that the end of the street has kept pace with the receding high water mark, and hence that the locus of the obstruction is within the street. We think that this contention must be sustained.

The cases involving this precise question are very few, if there are any, but the trend of judicial thought appears in many decided cases, some of which we cite. In *People* v. *Lambier*, 5 Denio, 9, the court said that, in case of accretions from natural causes, while the alluvial additions would become the property of the owner of the land against which the deposit is made, "it would hardly admit of a question that in such a case a public street leading to navigable waters would keep even pace with the extension of the land so as to preserve an unbroken union between the easement on

land and that on such navigable waters." This expression was doubtless a dictum when used, but it was restated and approved by the same court in *Mark* v. *Village of West Troy*, 151 N. Y. 453. In the last named case, the court stated specifically that the rule held good "whether the change in the land be due to natural causes, or to the voluntary act of the owner of the land." In *Newark Lime and Cement Mfg. Co.* v. *Mayor and City Council of Newark*, 15 N. J. Eq. 64, where a highway had been laid out to a river, as determined at the trial by a survey, the court said: "The survey carries the highway to the river, and wherever the river is found, there the highway extends. If the shore is extended into the water by alluvial deposits, or is filled in by the proprietor of the soil, the public easement is, by operation of law, extended from its former terminus over the new made land to the water." In *Hoboken Land and Improvement Co.* v. *Mayor, Etc., of Hoboken*, 36 N. J. Law, 540, the same doctrine was restated with approval. In *Dana* v. *Craddock*, 66 N. H. 593, it was held that a highway laid out to "a spike on the margin of the lake" goes to the lake in all stages of the water. The court said, "The road extends to the changeable margin of the water, whether that line is moved by natural causes by the construction of a wharf." See also *Re. Riverside Park Extension*, 58 N. Y. Supp. 963; 1 Farnham on Waters, 326.

There are in the books many cases of ways by dedication bordering on water ways. While ways by dedication are not strictly analogous to ways by statutory location, since the construction to be given to dedication depends upon the intent of the person dedicating, as a question of fact, and the construction of a statutory laying out is a question of law, still the cases touching dedicated ways are useful as illustrations of the reasons which underlie the legal rule in statutory cases. It is said that when a highway to a water way is acquired by dedication, the presumption is that the intent was that the way should reach the water so as to enable the public to enjoy the navigation of the stream. The result is that if the adjoining land is gradually extended into the stream, the highway will follow the extension and continue to reach the water.

And it will extend over natural accretions ipso facto. 1 Farnham on Waters, 673; *Saulot* v. *Shepherd*, 4 Wall. 502; *Cook* v. *Burlington*, 30 Iowa, 94; 6 Am. Rep. 649; *Freedom* v. *Norris*, 128 Ind. 377; *Lockwood* v. *N. Y. & N. H. R. R. Co.*, 37 Conn. 387; *Mayor of Jersey City* v. *Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Godfrey* v. *Alton*, 12 Ill. 29.

The principles declared in the cases we have cited seem to be consonant with reason. Here is the case of a street laid out to connect with the sea, a continuous way on land and water. The apparent purpose of extending the street to high water mark was to make such a continuous way, and yet unless it be true that the terminus of the street followed "high water mark" as it might be removed seaward by accretion, we have this curious result. In order to afford the public continuous access to the water way, it would have been necessary for the authorities to lay out new additions to the street at least as often as the imperceptible accretion by accumulation became perceptible. Such a conclusion is not reasonable.

On the other hand, in the light of judicial reason and expression, we hold that when high water mark changed and the defendants' land above high water mark was gradually extended seaward by accretion, the public easement which was attached to it originally at high water mark went with it, pari passu. The street ended at all times at "high water mark," which was declared in the laying out to be the terminus.

The defendants contend, however, that this conclusion is in violation of Article I, section 21, of the constitution, which declares that "private property shall not be taken for public uses without just compensation." They say they have received no compensation, and that none has been awarded to them, on account of the way which we have said extends over their new made land by virtue of the laying out in 1871. We think this ground is not tenable. When the street was originally laid out, if any damage was sustained, compensation was awarded to and received by the defendants or their predecessors in title, or was waived. The law conclusively presumes that the compensation was full and just. It covered all damages to

the defendants' estate and for all time. It was made once for all. It covered the damages which were incident to the taking to the limit of the easement as first used. It also covered such damages as might be occasioned later by an extension of the easement by operation of law. These are all presumed to have been estimated in the first place. *Joy* v. *Grindstone Neck Water Co.*, 85 Maine, 109; *Taylor* v. *P. K. & Y. St. Ry.*, 91 Maine, 193. In fact, when the defendants gained their soil by accretion, they gained it subject to the public easement. They have never owned it free from the easement. So that in no event are they entitled to claim damages for the extension of the street over their newly made land by operation of law.

It follows that the entry must be,

Judgment for the State.

E. A. STROUT COMPANY *vs.* LESLIE HUBBARD.

Kennebec. Opinion September 12, 1908.

Real Estate Brokers. Contracts. Customers. Sale by Owner of Land. Liability for Commissions. Evidence. Instructions.

The defendant placed his farm in the plaintiff's agency, for sale, and agreed that if it was sold to any party through the plaintiff's influence, by an advertisement or otherwise, he would pay a commission of all that was obtained in excess of eighteen hundred dollars. He further agreed that in case he should sell the property to the plaintiff's customer for less than two thousand dollars, he would pay a commission of two hundred dollars. In case the defendant withdrew the farm from plaintiff's agency before sale, the defendant agreed to pay twenty dollars, and if the farm should be sold, either before or after withdrawal, to a customer to whom the plaintiff recommended it, or who had learned that it was for sale, directly or indirectly, through the plaintiff, he would pay a commission of two hundred dollars. The defendant withdrew his farm from the plaintiff's agency, and afterwards sold it.

Held: (1) That it would have been competent for the jury to find from the evidence that the purchaser was the plaintiff's customer, and that the farm was sold to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, indirectly at least, through the plaintiff's advertisements.

(2) That a requested instruction to the effect that "if the listed place was sold, either before or after withdrawal, to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of two hundred dollars, whether such sale was effected in whole or in part by reason of such recommendation or not" was correct and should have been given.

(3) That an instruction to the jury to the effect that it was for the plaintiff to satisfy them that the same was by reason of the plaintiff's influence in some way and in some degree, and without which it would not have been sold to the purchaser, injected into the contract an element which the parties did not put into it. It was not necessary for the plaintiff to show that the purchaser was influenced by the plaintiff or its agents in making the purchase, if in fact he was the plaintiff's customer.

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

Action of assumpsit brought by the plaintiff in the Superior Court, Kennebec County, to recover the sum of $200 as commission on the sale of a farm under a written contract between the plaintiff and the defendant. Plea, the general issue. Verdict for plaintiff for $36.00. The plaintiff excepted to certain rulings made by the presiding Justice during the trial, and after verdict filed a general motion for a new trial.

The case appears in the opinion.

Williamson & Burleigh, for plaintiff.

H. H. Patten, for defendant.

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

SAVAGE, J. Action to recover commissions on the sale of a farm. The plaintiff claimed two hundred dollars. The verdict was for the plaintiff for thirty-six dollars. The case comes up on the plaintiff's exceptions and a motion for a new trial. The evidence is made a part of the bill of exceptions, and in order properly to inquire into the merits of the exceptions it is necessary to ascertain the facts to which they relate, or rather such facts, favorable to the plaintiff, as the jury would have been warranted in finding from the evidence.

It is admitted that on November 30, 1906, the defendant made and signed a written contract with the plaintiff of the following tenor, so far as material to this case:

"THE E. A. STROUT FARM AGENCY. BOSTON-NEW YORK.

I hereby place the property, real and personal, of which a description has been given, in your hands for sale. If the same is sold to any party through your influence by advertisement or otherwise, I will pay to you or your order a commission of all you get in excess of $1800, clear to me. In case I should sell the property to your customer for less than $2,000, I will pay to you or your order a commission of two hundred dollars; or if the sale exceeds $2000, ten per cent on the full amount of the sale. The commission to be due and payable the day the sale is effected.

Should I withdraw the said estate from your hands before you

have effected a sale, I will, in consideration of your having listed the property, pay you forthwith $20.00, or two per cent of the asking price, if above $1000.

Should the estate be sold either before or after withdrawal to a customer to whom you or your agents have recommended it, or who has learned that it was for sale, directly or indirectly, through you, your agents or your advertisements, I will pay your commission as agreed."

The plaintiff in two counts has declared on the clauses in the contract whereby the defendant agreed to pay a commission, in case he sold a farm to a customer of the plaintiff, or in case he should sell the farm before or after withdrawal to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, directly or indirectly, through the plaintiff or its agents or advertisements. The plaintiff did not sue for the $36 for which the verdict was returned.

At the same time the defendant signed and delivered to the plaintiff's agent a written description of the estate. Thereupon, the plaintiff "listed" the defendant's farm. That is to say, it included a condensed description of the farm in a list or catalogue of estates which it had for sale, which it published and sent to its agents in Bangor and Newport in the early part of 1907. It also sent pictures of the buildings, from a photograph furnished by the defendant. Afterwards, by a letter dated April 8, 1907, the defendant withdrew his farm from the plaintiff's hands, and, a week later, sold and conveyed it to one Blanchard for $1820.

It was admitted that the plaintiff recommended the farm to Blanchard, obtained an offer of $1700 from Blanchard and brought him to the defendant's house on April 3, 1907. There was testimony that the plaintiff's agent then communicated Blanchard's offer to the defendant, who declined to accept it.

It was also admitted that Blanchard knew that the farm was for sale previous to its being recommended by the plaintiff. The defendant testified that Blanchard asked him in February, 1907, what he would take for the farm, if he would take $1500, and that he declined to sell for that price. Blanchard testified that

previous to this conversation he knew the farm was "listed," that is, in the plaintiff's agency, as we interpret the testimony. It also appears that Blanchard had lived only a mile or two away, and knew the farm well.

Further than this, the jury would have been warranted by the evidence in finding that about April 1, 1907, Blanchard called on the plaintiff's agent in Bangor with a view to the purchase of a farm somewhere; that the agent showed him among others the description and picture of the defendant's place; that this agent recommended it and advised him to see the plaintiff's agent in Newport, who would show him the defendant's farm and another one of which he had heard, and to which he was inclined; that he went to Newport and saw the agent there; that that agent showed him the description of the Hubbard farm, and recommended it; that he then offered $1700 for it; that the agent took him to the defendant's house to see if a trade could be made; that while there he and the defendant tried to negotiate a trade, but disagreed upon the price, and that the defendant, five days afterwards, disregarding the plaintiff's agents in Bangor and Newport, whom he knew, and with whom thus far he had been in communication, sent his letter of withdrawal direct to the plaintiff's New York office.

From these facts, we think it would have been competent for the jury under proper instructions to find that Blanchard was the plaintiff's "customer," and that the farm was sold to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, indirectly, at least, through the plaintiff's advertisements. In either case, we are left to inquire whether any right to commissions accrued to the plaintiff by reason of the sale by defendant to Blanchard after the letter of withdrawal. And the answer will depend upon a construction of the contract which the defendant made, and not upon the rights which arise by implication when one leaves his property in the hands of a broker for sale, without mention of specific conditions, as between owner and broker.

The contract was a comprehensive one. It fully protected the rights of the plaintiff in every contingency. It may seem a hard

and uneven contract, but it was one which the parties had a right to make, and it must be enforced according to its terms. The first clause in the contract relating to commissions seems to contemplate a sale directly through the plaintiff, by its bringing a customer ready and willing to pay a price of $1800 or more, in which case the plaintiff was to have all in excess of $1800. The next clause contemplates that the defendant might himself sell the farm for any price he pleased to a customer of the plaintiff, that is, one whom the plaintiff had interested in the farm, to whom it had recommended it, and whom it had produced to the defendant as a purchaser at some price. Such a person would fairly be the plaintiff's "customer." In that case, the plaintiff was to be entitled to a commission of $200, whatever the selling price might be.

There was another contingency, and one which may have happened in this case. After the plaintiff had thus produced a customer, after it had directed his attention to this farm, and perhaps specifically away from others, after it recommended the farm and advised its purchase, after the customer had begun to nibble at the hook, the defendant might withdraw the farm from the plaintiff's agency, as provided in another clause in the contract, and thus deprive the plaintiff of the $200 commissions.

This contingency was provided for in the other clause which we have referred to, which was to the effect that if the farm should be sold by the defendant after withdrawal to a customer to whom the plaintiff had recommended it, or who had learned that it was for sale, directly or indirectly through the plaintiff, the defendant should pay a commission of $200. And under this clause the plaintiff now bases its right to recover.

We have already defined what is meant by "customer" of the plaintiff, as applied to this case. It will be noticed that the defendant agreed in the last named contingency to pay a commission in case of sale to a customer to whom it had recommended the farm, or who had learned that it was for sale through the plaintiff. The agreement was not limited to a sale to a customer whom the plaintiff had influenced to purchase. These are distinct propositions:

Now with the case in this situation, and under this contract, which we have construed, the plaintiff asked the court to give the following instruction to the jury :—"If the listed place was sold either before or after withdrawal to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of $200, whether such sale was effected in whole or in part by reason of such recommendation or not." The Judge declined to give this instruction, but instead instructed the jury as follows: "Was Mr. Blanchard influenced in any way, by any act, conversation, without which he would not have purchased that place, to purchase it of Mr. Hubbard? He may have looked at the place before, but had he without the influence of the Strout Company or its agents made up his mind to purchase it, or did he without their influence, and without what was said by them finally purchase this place? And that is the nub of this case, in my opinion for your determination. . . . . It is for the plaintiffs to satisfy you that it was by reason of their influence, in some way and in some degree, and without which it would not have been sold to Mr. Blanchard, before they are entitled to a verdict for more than the $36 which I have already alluded to," The instruction given injected into the contract an element, which as we have seen, the parties did not put into it, and an element onerous and prejudicial to the contract rights of the plaintiff. By the contract it was sufficient to show that the plaintiff sowed seed, and the defendant reaped his harvest, where the seed had been sown. It was not incumbent on the plaintiff to trace the development of the seed and the growth of the plant. It was not necessary to show even that the harvest came from the plaintiff's seed. For such was not the contract.

The requested instruction, we think, correctly stated the proper rule under this contract, and it should have been given. As the plaintiff's exception to the instructions given and to the refusal to instruct as requested must be sustained, it is unnecessary to consider the motion for a new trial.

Exceptions sustained.

ELMER H. DUNTON

vs.

THE WESTCHESTER FIRE INSURANCE COMPANY.

Somerset. Opinion September 15, 1908.

Fire Insurance. Maine Standard Policy. Arbitration Clause. Referees. Contracts of Insurance. Jurisdiction. Revised Statutes, chapter 49, section 4, paragraph VII.

The stipulation in the Maine Standard fire insurance policy providing that in case the parties fail to agree, the amount of loss shall be determined by three referees as a condition precedent to any right of action on the policy, is not to be construed to authorize the referees to take jurisdiction of and determine the question of the plaintiff's title to the property insured, but such stipulation contemplates only an appraisal by the referees of the value of the property described in the policy and an estimate of the damage done by fire to that property, leaving the question of the plaintiff's title and the general question of the defendant's liability to be judicially determined in the courts of law.

A policy of fire insurance in the standard form prescribed by Revised Statutes, chapter 49, section 4, paragraph VII, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract which like any other contract derives its force and efficacy from the consent of the parties.

The fact that the legislature put forward the Maine standard policy as a form for a contract to be executed by the parties, affords no reason for giving the arbitration clause therein contained any different construction from that heretofore given by the courts to all similar contracts made without legislative sanction.

In the judicial treatment of stipulations for arbitration in policies of insurance not prescribed by the legislature, every allusion to a submission to ascertain the "amount of loss or damage" has uniformly been understood to signify a proceeding to appraise and estimate the damage to the property described, but not to embrace the question of ownership or any other matter which goes to the root of the cause of action; and when a policy in the standard form prescribed by the statute has been issued there is no reason to suppose that it was in the contemplation of the parties, or of the legislature that any other or different effect should be given to such words.

A general stipulation in a contract of insurance or similar contract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damages, will not be sanctioned or enforced so as to divest the courts of their established jurisdiction.

While parties may impose, as a condition precedent to application to the courts, that they shall have first settled the amount to be recovered by an agreed mode, yet they cannot entirely close access to the courts of law.

If parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and if it appears from the express terms of the contract or from necessary implication that such was the intention, it will be upheld by the courts and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract or made all reasonable effort to fulfill it. The effect of such an agreement is not to refer a cause of action but to provide that a cause of action shall arise as soon as the amount to be paid has been determined and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss and leaves the general question of liability to be determined by the judicial courts.

On exceptions by defendant. Overruled.

Action on two fire insurance policies issued by the defendant in the standard form prescribed by Revised Statutes, chapter 49, section 4, paragraph VII. The record does not disclose the defendant's plea. Tried at the March term, 1908, Supreme Judicial Court, Somerset County. At the conclusion of the testimony, the presiding Justice ordered a verdict for the plaintiff for $1246.71. To this order the defendant excepted and also excepted to certain other rulings made during the trial.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Butler & Butler, and Frederick W. Brown, for defendant.

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

WHITEHOUSE, J. This is an action on two fire insurance policies issued by the defendant corporation in the standard form prescribed by the Revised Statutes of Maine, chapter 49, section 4, par. VII.

Among the provisions contained in this form of policy are the following stipulations respecting the loss or damage and the method of ascertaining and estimating such damage by arbitration, viz:

"The amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens but not to include loss or damage caused by explosions, etc.

"In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be within a reasonable time rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, etc.

"In case of any loss or damage, the company within sixty days after the assured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind or goodness, etc.

"If there shall be any other insurance on the property, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon.

"In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss and damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

It is admitted by the defendant that three referees were seasonably chosen in all respects in accordance with these stipulations in the policy and the statutes of the State providing for "a reference of the question of amount to three disinterested men" "in case of a

failure of the parties to agree as to the amount of loss." Thereupon the defendant contended before the board of referees, thus legally constituted, that at the time of the fire the plaintiff had no title to the property insured, and offered evidence to prove that prior to that time the plaintiff had sold the property to a third party. The referees excluded this evidence and ruled that they had no jurisdiction of the question of the plaintiff's title or insurable interest, and that the only question submitted to them was the amount of damage done by the fire.

The referees accordingly proceeded to take evidence upon the question of the amount of damage done by fire to the property described in the policies, and made their award determining the amount of damage on the merchandise insured to be $6280, and on the tools and machinery $350. The defendant declined to recognize this award as a compliance with the requirements of the policy and denied its validity on the ground that the referees had refused to hear evidence upon and determine the question of the plaintiff's title to the property insured. The plaintiff thereupon commenced this action upon the policies and at the trial, the court received evidence, subject to the defendant's objection, to prove title in the plaintiff to the property insured, and also admitted the award of the referees as to the amount of damage done to the property by the fire.

The defendant requested the court to rule that upon this evidence the plaintiff was not entitled to recover. The court refused to rule as requested and ordered a verdict for the plaintiff for $1246.71. The case comes to the Law Court on exceptions to these rulings of the presiding Justice.

The only question thus raised by the exceptions and argued by counsel, is whether the stipulation in the Maine Standard policy in regard to arbitration authorizes and requires the referees to take jurisdiction of one of the principal questions involved in the plaintiff's right to recover, and determine his title to the property insured, as well as the amount of the damage done to the property, or whether it contemplates only an appraisal by the referees of the value of the property described in the policy and an estimate of the damage done

by the fire to that property leaving the question of the plaintiff's title and the general question of the defendant's liability to be judicially determined in the courts of law.

When this question is examined in the light of the uniform current of judicial opinion respecting such stipulations for arbitration in contracts of insurance made prior to the adoption of the Maine Standard policy and considered with reference to the provisions of the standard policy itself specially involved in the inquiry, and the practical operation of the rule contended for by the defendant, the conclusion is irresistible that the ruling of the presiding Justice was correct and that the exceptions must be overruled.

It has been long established by authority both in this country and in England that if parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and if it appears from the express terms of the contract or from necessary implication that such was the intention, it will be upheld by the courts and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract or made all reasonable effort to fulfill it. The effect of such an agreement is not to refer a cause of action but to provide that a cause of action shall arise as soon as the amount to be paid has been determined and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss and leaves the general question of liability to be determined by the judicial courts. *Scott* v. *Avery*, 8 Exch. 497, (5 H. L. Cas. 811); *Elliott* v. *Assurance Co.*, 2 L. R. Exch. 237; *Hamilton* v. *Liverpool Ins. Co.*, 136 U. S. 242; *Wolff* v. *Insurance Co.*, 50 N. J. L. 453.

It is equally well settled that if an agreement to arbitrate is confined to an appraisal of value or an assessment of the amount of damages and is at the same time only an independent stipulation and not made by the policy a condition precedent to the right of

action, the plaintiff may still have his action and establish his claim by other evidence without procuring an award from the arbitrators. *Reed* v. *Insurance Co.*, 138 Mass. 572. In such a case the agreement to refer is not an essential term of the covenant but a power which may be revoked at any time before it is fully executed. It is simply a collateral agreement to refer to arbitration and not an agreement that only the adjusted loss shall be paid.

But there is a third proposition of paramount importance which has undoubtedly been regarded as settled by judicial authority ever since the days of Lord Coke and that is that a general stipulation in such a contract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damage will not be sanctioned or enforced so as to divest the courts of their established jurisdiction. *Stephenson* v. *Insurance Co.*, 54 Maine, 55, and authorities cited. In this case the distinction between a valid and invalid agreement for arbitration in such a contract is thus stated by the court:

"While the parties may impose as a condition precedent to application to the courts, that they shall have first settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." See also *Wood* v. *Humphrey*, 114 Mass. 185; *White* v. *Railroad Co.*, 135 Mass. 216; *Fisher* v. *Insurance Co.*, 95 Maine, 486.

It does not appear from any of the decisions cited in support of the familiar proposition above stated, or from any other case to which the attention of the court has been called, that such a stipulation for the settlement of the question of damages by arbitration has ever been construed to require or authorize the referees to determine the question of the plaintiff's title to the property insured, as a condition precedent to the plaintiff's right of action on the policy. It has not been perceived that any judicial decision exists in which it has been held competent for the parties to stipulate that the determination of the question of the ownership of the property by arbitration should be a condition precedent to the plaintiff's right of action. No such doctrine has ever been suggested respecting stipulations for arbitration in policies of insurance not prescribed by legis-

lative action, for the obvious reason that the question of the ownership of the property is not involved in the appraisal of the value of the property destroyed, or the estimate of the damages done to the property insured, but goes directly and solely to the plaintiff's cause of action and the defendant's liability.

But the Maine Standard policy, though its form is prescribed by statute, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract which like any other contract derives its force and efficacy from the consent of the parties. As stated by the court in *Reed* v. *Washington Ins. Co.*, 138 Mass., supra, with reference to the standard policy then prescribed by their statute: "It is their contract; as such, it does not deprive the plaintiff of his action and his trial by jury; it is not to be presumed that the Legislature intended, by prescribing the form of contract, and prohibiting any other, to give it effect in depriving a party of rights which, as a contract, it would not have."

The fact therefore that the legislature put forward the Maine Standard policy as a form for a contract to be executed by the parties, affords no reason for giving to the arbitration clause any different construction from that heretofore given by the courts to all similar contracts made without legislative sanction. It has been seen that unlike the form considered in *Reed* v. *Washington Ins. Co.*, supra, the arbitration clause in the Maine policy contains an express provision that the award of the referees "shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action . . . . to recover for such loss."

It will be noticed that in the judicial treatment of this subject in all the cases cited and to be found relating to it, every allusion to a submission to ascertain the "amount of loss or damage" has uniformly been understood to signify a proceeding to appraise and estimate the damage to the property described, but not to embrace the question of ownership or any other matter which goes to the root of the cause of action. *Stephenson* v. *Insurance Co.*, 54 Maine, supra; *Bangor Savings Bank* v. *Insurance Co.*, 85 Maine,

68. There is no reason to suppose that it was in the contemplation of the parties, or of the legislature that any other or different effect was to be given to those words in the Maine policy. All of the other terms of the policy and of the statutes relating to the subject are entirely consistent with this construction of the language of the arbitration clause in each of the policies in suit. There is nothing in any of the provisions of the policy prescribed or of any of the statutes relating to it, which indicates in the slightest degree any purpose or desire to change the established doctrine of the courts in regard to the distinction above stated between valid and invalid agreements for arbitration in this class of contracts.

The case of *Cassidy* v. *Royal Exchange Assurance Co.*, 99 Maine, 399, differs toto cœlo from the case at bar, and is not an authority for the defendant's contention. The matter which was there deemed to be within the jurisdiction of the referees, did not go to the cause of action but to the amount of damages, and the only question of fact for the determination of the referees was whether certain piles of lumber were within one hundred feet of each other.

Furthermore, the rule claimed by the defendant would not be a wise or beneficent one in its practical operation. The settlement of questions of title to real and personal property, often involves the duty of examining a complex state of facts and important and difficult questions of law, a duty which those not educated to the law would be wholly incompetent to perform; and yet it is a matter of common knowledge that in a great majority of references under the arbitration clause of insurance policies, the referees are not selected from the legal profession, for the reason that they are required to perform the functions of simple appraisers and not of general arbitrators. Under the terms of the Maine policy neither of the three persons named for referees by each of the parties is required to be learned in the law.

Exceptions overruled.

DAVID LEBRECQUE *vs.* HILL MANUFACTURING COMPANY.

Androscoggin. Opinion October 8, 1908.

Negligence. Master and Servant. Defective Leather Belt.

When a person is employed in a mill to tend and operate a machine and the relation of master and servant exists between him and his employer, it is the primary duty of the master to use all ordinary care to provide a reasonably safe place in which the servant is required to work, and to provide and maintain reasonably safe and suitable machinery for the servant to operate, so that by the exercise of ordinary care on his part the servant can perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents.

The plaintiff was employed as an operative in the picker room of the defendant's cotton mill, and while so engaged he received a severe personal injury causing a fracture of his right arm at three different points and resulting in the amputation of the arm near the shoulder. The plaintiff contended that the injury was caused by the breaking of a defective leather belt connecting two of the pulleys of the machine called an "opener" which he was employed to tend and operate, and that there was a failure of duty on the part of the defendant towards him in allowing a defective belt to be used and thus exposing him to unnecessary peril while he was himself in the exercise of ordinary care and without knowledge of the unsuitable condition of the belt. The plaintiff recovered a verdict for $3083.81. Under the facts and circumstances, which are stated in the opinion, *Held:* That the verdict cannot be deemed unmistakably wrong and that the court would not be warranted in setting it aside.

It is an axiom in mechanics that the fact that a belt breaks at a particular point is sufficient evidence that such point is the weakest place in the belt.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while employed as an operative in the picker room of the defendant's cotton mill, and caused by the alleged negligence of the defendant. Plea, the general issue. The plaintiff recovered a verdict for $3,083.81. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

WHITEHOUSE, J. On the fourth day of September, 1906, the plaintiff was employed as an operative in the picker room of the defendant's cotton mill, and while so engaged he received a severe personal injury causing a fracture of his right arm at three different points and resulting in the amputation of the arm near the shoulder. In a suit brought against the company to recover damages for the injury, the plaintiff contended that it was caused by the breaking of a defective leather belt connecting two of the pulleys of the machine called an "opener" which he was employed to tend and operate, and that there was a failure of duty on the part of the company towards him in allowing a defective belt to be used and thus exposing him to unnecessary peril while he was himself in the exercise of ordinary care and without knowledge of the unsuitable condition of the belt. The jury returned a verdict in favor of the plaintiff for $3,083.81, and the case comes to the Law Court on a motion to set aside this verdict as against the evidence.

In the picker room where the plaintiff worked, the preparatory processes of manufacturing appear to be carried on. There the bales of cotton are opened and the cotton torn apart and subjected to some degree of manipulation. It is then run through the machine called the "opener," for the purpose of lightening and cleansing it. The entire machinery of the "opener" comprises a hopper where the cotton is introduced, the feed compartment with two aprons, a "chopper" or comb and a fan, and a beater with a wooden tunnel or hood attached through which a draft is forced for the purpose of drawing the cotton into another machine in the room above. The beater is driven by power communicated by means of a belt from a large pulley overhead, and makes about 1350 revolutions a minute. On the end of the beater shaft is a small pulley four inches in diameter, and the aprons, comb and fan in the feed compartment are all operated by power transmitted from the small pulley on the beater shaft by means of the belt in question, two inches in width, which is alleged to have been defective, to a pulley

eighteen inches in diameter with spokes in it revolving on an axle three or four feet distant from the beater shaft. This feed pulley, eighteen inches in diameter makes 292 revolutions a minute.

It is not in controversy that even with the exercise of ordinary care and skill in the operation of this machinery, the cotton running through the "opener" will occasionally become clogged either in the beater or in the tunnel through which the cotton passes from the beater. In such a contingency it may become necessary and proper either to stop all of the machinery constituting the "opener" or to stop only the feed pulley. In the former case a shipper is provided for the purpose of disconnecting the beater from the power overhead. This is known as the "big shipper," and it is equipped with a long wooden handle pendent within the reach of the operative when he is standing on the floor by the side of the machine. By thus "shipping the overhead belt" all parts of the machine may be stopped in about 22 seconds. The small shipper on the lower floor with the two iron prongs between which the belt in question passes in running over the feed pulley, is operated automatically by a wire rope from the room above, and was not designed to be used to take the belt off of the feed pulley by the operative on the lower floor. Whenever it is deemed advisable to stop the feed pulley without stopping the beater, the operative removes the belt from the feed pulley with his hand while the machine is in motion. By this method the motion of the pulley is stopped in about four seconds. It is not in controversy that when the plaintiff was employed fourteen months before the accident, he was instructed by Beauchene, the boss of the picker room, both by precept and example, to stop the feed pulley by removing the belt with his hand while the machine was in motion; and it is not in dispute that this had been the practical method of stopping the feed pulley for the entire fifteen years during which this machine had been used in the picker room. Overseer Mitchell, testifying for the defense, admits that Beauchene, the boss and belt fixer in that room was authorized to instruct the operators to stop the feed portion of the machine in that way, and Beauchene himself admits that he told the plaintiff that that was the way to do it, and gave him an illustration of his manner of doing it by taking

off the belt with his own hand while the machine was running at full speed. It is suggested, however, that Beauchene employed both hands to do it, using his left hand to steady the small automatic shipper and his right hand to take off the belt; but Beauchene expressly admits that if the belt breaks when the operative is in the act of removing it from the pulley "it will fly just the same whether he is taking it off with one hand or two." Although during the time the plaintiff was running the machine, the belt had broken several times prior to the day of the accident and had been repaired by Beauchene, there is no evidence that it had ever broken before while the operative was in the act of removing it; and during the entire fourteen months of the plaintiff's service in operating the machine whenever it became necessary to stop the feed pulley, the belt was removed by him in essentially the same manner as when he attempted to remove it at the time of the accident, and in every instance without injury to himself or the belt.

In the declaration in the plaintiff's writ, it is alleged that at the time of the accident the machine became clogged and that he attempted to stop it by removing the belt in question from the pulleys with his hand and took hold of the belt with his hand for that purpose; but while the machine and its pulleys were revolving with great speed, the belt in question "by reason of its worn, weak, defective and unsuitable condition," suddenly broke and with great force and violence came in contact with the plaintiff's right hand and arm and pulled his right hand and arm into the revolving pulleys and other parts of the machine and thereby broke, wounded and lacerated the arm, so that it became necessary to amputate it between the elbow and shoulder joint.

The plaintiff's account of the accident as given in his testimony, reduced to a narrative form, is as follows: "I was doing my work on the machine. I noticed the cotton was coming up bad in the tunnel. It was going up rolling and coming down, and I stopped the machine to get it out of the tunnel and see what the matter was. I did the same as usual, as was taught me. I stopped the big strap by the big shipper. Then I did as usual and went to take off the small one with my hand. While I was pulling it, it

broke. When I pulled the strap like this, it broke and threw my arm this way. I had my left hand on the belt trying to take it off. I was standing a step from the big pulley, where I generally stood. I was right close to it. I took hold of the belt with my left hand. My right hand was right side of me. The belt broke and I didn't know much of anything afterwards. I heard some noise and it went altogether,—the noise and myself who had the accident. It went as rapidly as lightning. I heard something crack, but at the same time I received everything. The machine was running at that time. It was moderating. I couldn't say how many turns. I heard the strap break and that is all I saw.

Q. Did it strike your hand? Did the belt strike or wind around your hand?

A. That is it. I thought it put me into the pulley. I couldn't see how it put me into the pulley. It went too fast. It put my right arm into the big pulley with spokes in it and broke my arm in three places.

In taking the belt off, I did nothing to break it. I always took it off the same way. It was the way they told me to take it off.

As I put my hand on the belt it broke and then it twirled and caught my right arm and pulled me into the pulley.

I could have stopped the machine when it was clogged by taking hold of the handle of the big shipper, but I couldn't wait; it had to be done immediately. It would have retarded the work. My reason for not waiting was to do the work faster; because we were ordered to do it that way. I took hold of the handle of the shipper because I didn't know (whether the cotton was clogged) in the tunnel or down in the beater.

The belt broke four or five days before I got hurt, before the last time. I was a little way off. We found it broken. That part of the machine was stopped. The belt had broken before, but a strap may break and be repaired so it will be just as strong as it was before. I didn't bother with the straps because it wasn't my business. I didn't doubt the strap. I thought it was good."

When the plaintiff was injured he was working on the machine alone. No other person witnessed the occurrence. But it was not

in question that immediately after the accident the plaintiff was found lying on the floor near the machine at which he had been at work, apparently unconscious with his right arm broken in three places, and a cut on his forehead, which was bleeding. The broken belt was lying on the floor near the pulleys, and "seemed to be twisted up in a circle." There was blood on the floor near the belt.

The principles of law applicable to this state of facts are well settled and familiar. They have been so repeatedly stated and critically distinguished and applied in the recent decisions of this court, that no elaborate discussion of them is here required. The relation of master and servant existed between the plaintiff and the defendant. It was the primary duty of the defendant to use all ordinary care to provide a reasonably safe place in which the plaintiff was required to work, and to provide and maintain reasonably safe and suitable machinery for him to operate, so that by the exercise of ordinary care on his own part, the plaintiff could perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents.

In *Caven* v. *Granite Company*, 99 Maine, 278, the plaintiff's death was caused by the breaking of a defective eye in a wire cable into which the tackle had been hooked designed to support a movable stage. It was contended in behalf of the defense that the plaintiff was charged with the duty of the master to see that that part of the guy was sufficient for the purpose. But it appearing that this was a part of a completed structure furnished by the defendant for the use of its servants, and that the plaintiff was not expressly charged by the superintendent with any duty respecting it except to select good tackle and secure the guy to its anchorage, it was held that he assumed no risk and was guilty of no negligence. The question is thus treated in the opinion of the court: "If the appliances are of such a character as to be likely to become weak or worn or out of order by time or use, reasonable care requires the master to make examinations or inspections at reasonable intervals, in order that defects may be discovered and remedied. And the servant has a right, so far, to rely upon the presumption that the master has done its duty in all these respects. The servant on his

part is bound to use reasonable care. He is conclusively held to have assumed the risks of dangers which are known to him, and as well, those which are incident to his work and which are obvious and apparent to one of his intelligence and experience. Though he may have the benefit of the presumption that his master has performed its duties, yet he is bound to use his eyes and his mind, and to see the things before him which are obvious. He is chargeable with knowledge of the things and conditions which he sees or ought, by the exercise of reasonable care, to see. And the master has a right to presume that he will see and guard against obvious dangers. If the servant fails in this respect, he is negligent. But he is not ordinarily bound to examine or inspect appliances, or to discover dangers not obvious. He is not bound to do so, unless charged with that duty by the master, or by the character of his work. He may rely upon the presumption that the master has inspected."

That the belt in question in the case at bar was in fact defective and of insufficient strength to transmit the power and maintain the velocity required of the feed pulley in the machine operated by the plaintiff, satisfactorily appears from the testimony in the case considered in connection with the appearance of the belt itself which is exhibited in evidence. The jury so found, and there is a clear preponderance of evidence in support of their finding upon that proposition.

The jury also found that the defendant failed to exercise due care and vigilance in regard to the inspection of this belt, and neglected to provide the machine with a reasonably safe and suitable belt, and it is the opinion of the court that this conclusion cannot justly be declared manifestly wrong. The testimony of Beauchene himself, who was charged with the duty of the master to make the necessary inspection and repair of the belts in the plaintiff's room, discloses an unexplained neglect of duty on his part to make proper inspection, and a manifest failure to appreciate the nature and extent of the responsibility imposed upon him. He expressly admits in his testimony that he made no inspection to discover

defects. He say: "I leave the belt to run all he can run. I find out if he break I fix him up. If my man find out he want fix, he tell me to fix it.

Q. Let it go as long as it would until it broke and then you would fix it? That is right isn't it Mr. Beauchene?

A. Yes.

Q. You didn't take the trouble to go around and look at the belt and see how it was?

A. No.

Q. Now if you saw a crack in a belt like that, wouldn't you cut that out too?

A. If I see him, I fix the belt.

Q. If you saw it you wouldn't let the belt run that way, would you?

A. No.

Q. And that was just the way this belt was running when this belt broke, wasn't it? That is true, isn't it?

A. Well it is supposed to be run that way."

This man had worked in a picker room twenty-two years, and had served in the plaintiff's room the last time for four consecutive years immediately preceding the accident. According to the plaintiff's testimony the belt broke and was repaired by Beauchene only four or five days before the last break. This is not denied by Beauchene. He only states that he doesn't remember when he last repaired it. Beauchene then knew that the belt was in use when he took charge of the room four years before but did not know how much longer it had been there. If he had then given the belt such a careful examination as his duty required him to give it, and compared the patent defects in the other portions of it with the condition of the broken ends, he would doubtless have condemned the belt as no longer safe and suitable for use. The plaintiff had only been there fourteen months, and had no knowledge of the age of the belt. He had never been charged with any responsibility in the inspection of belts and never had any experience in testing or specially observing the tensile strength of leather which had become cracked and weakened by time and use. The surface cracks were

obvious, but they were not necessarily serious defects. The plaintiff was not sufficiently expert to distinguish at a glance harmless surface cracks from the destructive rents caused by great age and hard usage. He was justified in assuming that the decision of the belt fixer, Beauchene, to continue this belt in use after the repairs made by him four or five days before the accident was a sufficient guaranty of its strength and fitness. He could properly rely upon the presumption that the duty of the master had been performed. He says he "did not doubt the belt;" he "thought it was good." Under these circumstances the conclusion of the jury that the plaintiff assumed no risk and was guilty of no negligence in removing the belt as he had been instructed to do and as he had safely done for fourteen months prior to that time, cannot be deemed manifestly wrong.

But it is earnestly contended in behalf of the defendant that the plaintiff's account of the manner in which his injuries were received is so improbable and so discredited by the evidence, that it ought to be rejected as incredible and essentially untrue. It is argued that the belt did not break in a defective or the weakest place, and that the breaking of the belt did not cause the accident. It is suggested as a more probable theory of the plaintiff's injury that in his haste to remedy the difficulty caused by the apparent clogging of the cotton in the tunnel, he slipped and plunged his right arm into the feed pulley or under the belt, and that the breaking of the belt was the effect and not the cause of his accident.

There is unquestioned plausibility in the theory thus suggested but it appears to be founded wholly upon conjecture and not upon evidence. It will be remembered that the feed pulley 18 inches in diameter, was capable of 292 revolutions a minute, and allowing for some reduction of speed after disengaging the power overhead, it was doubtless making more than 200 revolutions a minute at the moment of the accident. The plaintiff says, "I did as usual and went to take off the small strap with my hand. While I was pulling it it broke, and I didn't know much of anything afterwards. . . . It went as rapidly as lightning. . . . . The belt broke and then it twirled and caught my right arm and

pulled me into the pulley. I couldn't see how it put me into the pulley. It went too fast." This is a succinct account of an exciting occurrence which inflicted upon the plaintiff a grevious injury and rendered him unconscious. All the incidents involved in it were comprised within a single instant of time; and it is difficult to conceive how a more definite or precise statement of the manner in which his arm was drawn into the pulley, or a more detailed account of the occurrence could truthfully be given by the victim. This version of the accident given by the plaintiff is not contradicted by any direct evidence in the case, and does not appear to be essentially discredited by circumstances or improbabilities.

With respect to the suggestion that the belt did not break in the weakest place, it is only necessary to observe that the diagonal course of the rupture across the leather and the appearance of the broken ends of the belt are wholly inconclusive evidence both of the cause of the breaking and of the strength of the belt at that point in comparison with other obviously weak places in it. There is no controlling circumstance to show that all parts of the tense side of the belt which was carrying the load at the moment of the accident were not subjected to an equal strain and if so it is an axiom in mechanics that the fact that the belt broke at a particular point is sufficient evidence that that point was the weakest place in it.

The further suggestion that the plaintiff may have put his hand between the belt and revolving pulley, and thus caused the belt to break utterly fails to account for the fact that the arm was broken and twisted in three different places, extending from the wrist to a point near the shoulder, for the reason that the arm would in that event be on the outside of the pulley and not between the spokes. The condition of the arm when the plaintiff was found by the side of the machine after the accident, tends to corroborate the plaintiff's account of his injuries.

It is finally contended that it is impossible that the plaintiff's right arm could have been drawn between the spokes of the pulley by the twirling of the end of a broken belt, according to the plaintiff's theory. But in answer to an inquiry, the defendant's witness Buchanan, a second hand with twenty years' experience having jurisdiction of the picker rooms thus testifies:

Q. Is there any telling what direction a belt will go when there is an accident on the machine and it breaks?

A. I could hardly tell which way a belt will go.

Q. If it is around the shaft and in any way it gets caught in the spokes of a pulley, wouldn't that be likely to carry it around with the pulley and twirl it?

A. If it is caught in the spokes it would be apt to. I don't see how it could do any other way.

It has been noticed that the plaintiff has not assumed to know or to state precisely how his arm was drawn into the pulley, but it affirmatively appears from his account of the accident that he was in the exercise of ordinary care and that in some way the breaking of the belt was the proximate cause of his injuries. The jury saw him and judged him. They decided that his description of the occurrence was a truthful statement and not a fraudulent invention. They found that his account of it was not so inherently unreasonable and improbable and not so overborne by established facts and circumstances that they could not accept it as the basis of their verdict. They rendered their verdict in accordance with it, and the question now presented to the court is "whether this conclusion could be arrived at by fair minded men by any reasonable inference from the evidence, even though other and contrary inferences might seem to us more reasonable." "To set aside the verdict of a jury is to say that the inference drawn by the jury is indisputably wrong,—that no such inference can fairly be drawn by any fair minded men,—that the contrary inference is not only the more reasonable inference, but is the only reasonable inference." *York* v. *Me. Cen. Railroad Co.*, 84 Maine, 117. The verdict of the jury in this case cannot be deemed unmistakably wrong and the court is not warranted in setting it aside.

Motion overruled.

STATE OF MAINE *vs.* WILLIAM A. HOLLAND.

Cumberland. Opinion November 3, 1908.

Intoxicating Liquors. Complaint and Warrant. Alleged Duplicity. Motion in Arrest of Judgment. Same not Sustained. "Impossible Date." Revised Statutes, chapter 29, sections 48, 49.

1. A complaint for keeping and depositing intoxicating liquors intended for unlawful sale, in which it is alleged that they had been first seized by the complainant without a warrant, and in which there is the further averment respecting the complainant, "being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor issued in conformity with the provisions of law" is not bad for duplicity, or uncertainty. This language is not descriptive of the offense. It is merely the necessary averment of the officer's authority to seize without a warrant.
2. A motion for arrest of judgment on the ground that the alleged date, namely, the year, of the commission of the offense is an impossible date, will not be sustained, when upon an examination of the certified copies furnished to the Law Court it appears that the date should be read either as "1908" or "1980," but it is not made to appear which is correct, as when some of the copies may properly be read "1908" and others "1980." It is incumbent upon the defendant to make it appear to the court that the date was "1980," and not "1908," which he has failed to do.

On exceptions by defendant. Overruled.

Complaint against the defendant for keeping and depositing intoxicating liquors intended for unlawful sale, and on which a warrant was issued by the Portland Municipal Court. The defendant was adjudged guilty by the said Municipal Court and thereupon he appealed to the Superior Court, Cumberland County. On trial in the Superior Court he was found guilty by the jury. He then filed a motion in arrest of judgment which motion was overruled by the presiding Justice. To this ruling the defendant excepted.

The case is stated in the opinion.

J. E. F. Connolly, County Attorney, for the State.

Dennis A. Meaher, for defendant.

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

SAVAGE, J. Motion in arrest of judgment. The defendant was convicted upon a complaint for keeping and depositing intoxicating liquors intended for unlawful sale in this State. He then filed this motion, which was overruled, and he excepted. The motion sets out two grounds for arrest.

I. It is contended that the complaint is double, ambiguous and indefinite, in that it is based upon two inconsistent situations, and upon two differing statutes. The defendant claims that the complaint contains the necessary allegations for obtaining a warrant for a search and seizure of intoxicating liquors, under R. S., chap. 29, sec. 49, and likewise the allegations necessary for obtaining a warrant for the seizure of liquors already taken without a warrant, under section 48 of the same chapter. As to this ground it is only necessary to say that the defendant has misinterpreted the language in the complaint. R. S., chap. 29, sect. 48 provides that "in all cases where an officer may seize intoxicating liquors, or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant." This is sometimes called, perhaps not with strict accuracy, a "seizure" warrant, in distinction from a "search and seizure" warrant. Such was the warrant in this case. In order to obtain such a warrant, it was necessary for the officer after seizing the liquors without a warrant, to make complaint setting out that he had already seized and was holding the liquors, and also in apt terms that he was, when he seized the liquors, an officer authorized by law to seize, upon a warrant, liquors intended for unlawful sale. Such an officer only can obtain a "seizure" warrant, and his authority must be alleged. The language which the defendant now complains of as one of two inconsistent descriptions of the offense is in these words, namely, "being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue

of a warrant therefor issued in conformity with the provisions of law." This is not descriptive of the offense. It is merely the averment of the officer's authority. Having alleged his authority, the complainant then proceeded to allege that he had found and seized the liquors, and he prayed for a warrant. So far the complaint appears to be in proper form.

II. The other alleged ground for arresting judgment is that the allegation of the time of the seizure is an impossible date, or to use the language of the motion, "that the officer says he seized the liquors by virtue of a warrant therefor on the fourth day of January A. D. 198." This is not an accurate statement. There is no allegation that the liquors were seized "by virtue of a warrant." But passing that, it is not correct to say that the complaint alleges the seizure to have been "on the fourth day of January, A. D. 198." What the actual date written was the court, of course, must determine, if it can, by inspection. We have inspected the certified copies which were evidently intended to be fac simile copies of the original, but we find that they are not alike. The complaint made January 6, 1908, sets out that the defendant unlawfully kept and deposited the liquors "on the fourth day of January in said year." And the time of the seizure is alleged as "on the fourth day of January A. D." Then the year appears in four figures, first 19 and then an 8 written upon and partly above an 0, or an 0 written upon and partly beneath an 8. But the 0 and the 8 are not in the same perpendicular line. In some of the copies the 8 appears to be a little to the left of the center line of the 0, and in others a little to the right.

Though the complaint in this respect was bunglingly made, we think it would be putting too fine a point upon it to say that we cannot tell by inspection that this was written and should be read not as 198, but either as 1908 or as 1980, according to the relative positions of the 8 and 0. But which? If 1908, the complaint was good. If 1980, it was bad. It is doubtless true that the writer intended to write "1908." But that does not help the case. We cannot rewrite it. We must take it as written. And that is uncertain. The defendant has not clearly shown to us how it was written,

or at any rate, that it was written "1980." For the purposes of this case we do not place any stress upon the fact that the defendant in his motion described the date as 198 instead of 1980. But we think that it was incumbent upon him, in support of his exceptions, to show that the date was 1980 instead of 1908, and that he has failed to do. It therefore has not been shown that the date was impossible as alleged.

Exceptions overruled.
Judgment for the State.

STATE OF MAINE *vs.* THOMAS L. LAMBERT.

Cumberland. Opinion November 4, 1908.

Criminal Law. Evidence. Reputation. Expression of Opinion by Presiding Justice. Revised Statutes, chapter 84, section 97.

The fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name and related conduct, are admissible as evidence of consciousness of guilt and thus of guilt itself. But it is for the jury to determine what weight and value should be given to such evidence.

The defendant was indicted for larceny and at the trial the arresting officer testified that the defendant had a loaded revolver in his overcoat pocket when arrested. *Held:* That the evidence was admissible.

The defendant when on trial for larceny, called as a witness a resident of Portland, who testified that he had known the defendant for five years and that he had seen him quite frequently and had numerous business dealings with him. There was no evidence that the defendant had ever resided in Portland, nor that the witness had ever resided in a community where the defendant had resided. The defendant's counsel asked the witness if he knew the defendant's "reputation for honesty in that community." The question was excluded. The witness further testified, however, that in his dealings with the defendant he had found him "honest and reliable" but that he had never heard his reputation discussed or referred to.

Held: (1) That it was not indispensable that the witness to the defendant's reputation should have resided in the same community with the defendant.

(2) That the defendant's reputation for honesty was not regularly provable by personal knowledge of the witness derived from specific instances in his dealings with the defendant.

(3) That the ruling allowing the witness to state that he "found him honest and reliable" was more favorable to the defendant than he was entitled to.

(4) That the defendant was not aggrieved by the ruling excluding the question relating to the defendant's "reputation for honesty in that community."

The defendant excepted to an alleged expression of opinion by the presiding Justice upon issues of fact in contravention of Revised Statutes, chapter 84, section 97. *Held:* That a careful examination of all the defendant's exceptions relating to the comments of the presiding Justice upon the testimony and the conduct and appearance of witnesses and the language in which the instructions were given in the charge to the jury, fails to disclose any exceptionable infringement of the statute.

On exceptions by defendant. Overruled.

The defendant was indicted for the larceny of "one horse of the value of two hundred dollars, one wagon of the value of one hundred dollars and one harness of the value of ten dollars."

Tried at the January term, 1908, Superior Court, Cumberland County. The jury found the defendant guilty. The defendant excepted to several rulings made by the presiding Justice during the trial and also excepted to an alleged expression of opinion by the presiding Justice. It appears from the bill of exceptions that "the notes of the official stenographer taken at the trial of this indictment were lost in the fire which destroyed City Hall (Portland) on January 24, 1908, so that it is impossible to make exact quotations either from the evidence or the charge."

The case is stated in the opinion.

Joseph E. F. Connolly, County Attorney, for the State.

John B. Kehoe, for defendant.

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

WHITEHOUSE, J. At the January term, 1908 of the Superior Court of Cumberland County, the defendant was found guilty by the jury of the larceny of a horse, wagon and harness, the property of George

A. Lufkin, on the evening of Sunday, September 15, 1907. The case comes to the Law Court on exceptions to the rulings of the presiding Judge admitting and excluding certain evidence during the progress of the trial, and to the alleged expression of opinion by the presiding Judge upon issues of fact in contravention of section 97 of chapter 84 of the Revised Statutes.

Eugene Groves, who was indicted at the same term as an accomplice and pleaded guilty to the charge, appeared as a witness for the State and testified that the defendant came to his house with a team Saturday evening September 14, and remained there over night; that the next evening, at the defendant's request, he rode with him to Walnut Hill church and saw the defendant Lambert drive away from the horse sheds back of the church with the Lufkin team; that thereupon they drove along the road some distance, Lambert driving the Lufkin team and Groves driving the other; that Lambert then stopped and gave him two dollars and a pint of whiskey and told him to go home and that Lambert then drove off with the Lufkin team.

Other witnesses testified for the State that they met these two men riding together in the same team that day towards Falmouth corner. One witness testified that he met them riding in separate teams on the road from Walnut Hill church; that he identified the Lufkin horse on the road that day and recognized Lambert as the driver of it.

The defendant testified inter alia that his residence at that time was in Tyngsboro, Mass., and that his business was buying and selling goods including horses. He admitted that he was with Groves on the day of the larceny and that in the afternoon they drove in a "round-about way" to the electric cars at Falmouth Foreside where they separated, and that he, the defendant, then went on to Portland by the electric cars and left for Boston on the steam cars arriving there between nine and ten o'clock. No part of the Lufkin team was afterwards found.

1. At the trial, deputy sheriff Foley, testified that he arrested the defendant on an electric car coming from Yarmouth to Portland October 3, 1907. The County Attorney inquired if the defendant

was armed at the time of the arrest. The defendant's counsel objected to the question, but before the court could rule upon it, the witness promptly answered that the defendant was armed with a revolver. The court denied the request of the defendant's attorney to have the testimony striken out, and the witness testified further as to the details of the arrest, and stated the defendant had the revolver in his right hand overcoat pocket and that it was loaded.

The defendant admitted in cross examination that he was coming from Groves' house at the time of the arrest and had then learned from Groves' wife, for the first time, that Groves was under arrest, but she did not know upon what charge.

Upon this state of facts, it is the opinion of the court that there was no error on the part of the presiding Judge in declining to strike out the testimony. The defendant had just been informed that his accomplice was under arrest. There was no apparent occasion for any legitimate use of the revolver by the defendant that day, and if it was not loaded and carried for the purpose of aiding him to escape by intimidating any officer who might recognize him and attempt to arrest him, the defendant had full opportunity to explain for what purpose he did have it. "It is today universally conceded, says Mr. Wigmore, that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name and related conduct, are admissible as evidence of consciousness of guilt and thus of guilt itself." 1 Wigmore on Ev., sec. 276; *State* v. *Frederic*, 69 Maine, 400. The possession of tools suitable for effecting an escape is also deemed an incriminating fact which may go to the jury. *State* v. *Duncan*, 116 Mo. 288, 22 S. W. 699; *Clark* v. *Com.* (Ky.), 32 S. W. 131; *State* v. *Palmer*, 65 N. H. 216. And evidence that the defendant had a revolver under his pillow when arrested and that he resisted arrest was held admissible in *People* v. *Burns*, 67 Mich. 537, 35 N. W. 154. So in a prosecution for picking a pocket, it is competent to show that the accused when arrested, had a billy on his person. *People* v. *Machen*, 101 Mich. 400, 59 N. W.

In the case at bar it was for the jury to estimate what weight and value should be given to the evidence excepted to as an indication of the conscious guilt of the defendant.

2. The defendant called a witness by the name of Jordan, a resident of Portland, who testified that he had known the defendant for five years, and that he had seen him quite frequently and had numerous business dealings with him. There was no testimony that the defendant had ever lived in Portland, nor that Jordan had ever lived in a community where the defendant had resided. The witness was asked by defendant's counsel if he knew the defendant's "reputation for honesty in that community," and the question was excluded by the court. The witness further testified, however, that in his dealings with the defendant, he had found him "honest and reliable," but that he had never heard his reputation in any community discussed or referred to. The defendant called another witness who offered to testify to substantially the same facts under the same conditions, and his testimony as to the defendant's "reputation for honesty in that community," was also excluded, and exceptions were taken in each instance.

It was not indispensable that the witnesses to his reputation should have resided in the same community with the defendant. His general reputation as to honesty may have been better established and more definitely understood in the community where the witnesses lived and where they had had "numerous business dealings with him." "In the conditions of life today especially in large cities, a man may have one reputation in the suburb of his residence and another in the commercial or industrial circles of his place of work. . . . . There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and personal observation of the man. There is no reason why the law should not recognize this. The traditional phrase about "neighborhood" reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. Alia tempora, alii mores." 2 Wigmore on Evidence, section 1616, and cases cited. "The rules of evidence" said Lord Ellenborough, "must expand

according to the exigencies of society." *Pritt* v. *Fairclough*, 3 Camp. 305.

In the case at bar the witness Jordan was allowed to testify that "in his dealings with the respondent, he had found him 'honest and reliable,' but that he had never heard his reputation in any community discussed or referred to." So far as this last statement implies that the witness had not had sufficient opportunity to learn what the defendant's reputation was, he would not be qualified to testify as to reputation. But if from long acquaintance and "numerous business dealings" with him, he had had opportunities for learning about his reputation, the fact that he had never heard it "discussed or referred to," would be cogent evidence that it was good. It is accordingly a rule of evidence that a witness to good reputation may testify that he has never heard anything said against the person. 2 Wigmore on Ev., sec. 1614. But since the defendant's reputation for honesty was not regularly provable by personal knowledge of the witness derived from specific instances in his dealings with the defendant, the ruling which allowed the witness to state that he "found him honest and reliable" was more favorable to the defendant than he was entitled to. If, therefore, it be assumed that the witness was qualified to state what the general reputation of the defendant was in that community, the defendant was not aggrieved by the refusal of the presiding Judge to permit him to answer the question and there was no exceptionable error.

3. A careful examination of all of the defendant's exceptions relating to the comments of the presiding Judge upon the testimony and the conduct and appearance of witnesses, and the language in which the instructions were given in his charge to the jury, fails to disclose any exceptionable infringement of the statute in that respect. In *McLellan* v. *Wheeler*, 70 Maine, 285, the court said: The statute does not go so far as to prohibit the presiding Judge from stating to the jury the questions which they are called upon to determine . . . . If the judge is of such a happy temperament as to be indifferent whether the cases tried before him are decided rightly or wrongly, or not at all, the statute will justify him in omitting such statement. But it does not prohibit it . . . .

Neither is the utterance of a mere truism, or of a matter of common experience which nobody would think of disputing, however it might bear upon the issue, an infringement of the statute prohibition." "It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact." See also *State* v. *Day*, 79 Maine, 120; *York* v. *R. R. Co.*, 84 Maine, 117; *Hamlin* v. *Treat*, 87 Maine, 310; *Jameson* v. *Weld*, 93 Maine, 345.

Furthermore, in the case at bar, in order that nothing in the conduct of the trial or the charge to the jury should be construed as an expression of opinion upon the question of the defendant's guilt, the presiding Judge made the following observations at the close of the charge: "The presiding Justice has no right, and in this case no intention to express any opinion as to the guilt or innocence of the respondent, or the effect or weight to be given to any evidence in the case; and that the jury, if they thought they detected any such expression of opinion, were to entirely disregard it, and, so far as their verdict was concerned, rely entirely upon their own independent judgment as to the weight and effect to be given to the testimony as a whole."

Exceptions overruled.

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

Androscoggin. Opinion November 5, 1908.

Excluded Evidence. Excepting Party Must Show that Exclusion was Prejudicial.

1. It is not enough for the excepting party to show that exclusive evidence was legally admissible. He must show that its exclusion was prejudicial to him.
2. When an issue of fact is determined in favor of the excepting party, the exclusion of evidence offered by him on that issue has not prejudiced him unless it appears that the excluded evidence tended to increase or diminish in his favor the results of the finding.
3. In an action for the agreed price of property sold and delivered, it appeared that the jury found that material misrepresentations were made by the vendor in the sale and that the damages assessed were reduced by reason of such misrepresentations. *Held:* That evidence that such misrepresentations had been made to other parties than the defendant could not affect the question of damages and that its exclusion was not prejudicial.

On motion and exceptions by defendant. Overruled.

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 recission, 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."

This case was first tried at the April term, 1907, Supreme Judicial Court, Androscoggin County, and the plaintiff recovered a verdict for $526.25. On exceptions filed by the defendant, a new trial was ordered. See *Pitcher* v. *Webber*, 103 Maine, 101. The

case was again tried at the January term, 1908, of said court in said county. Verdict for plaintiff for $510. The defendant excepted to various rulings made by the presiding Justice during the trial and also filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

George C. Webber, for defendant.

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

EMERY, C. J. This was an action to recover the agreed price of an automobile alleged to have been sold and delivered. The defendant denied acceptance, but we find in the evidence enough to warrant the verdict that there was an acceptance. The defendant further contended that the automobile was not as represented and that, if accepted, he effected a recission by seasonably tendering it back, which tender was refused. There was evidence, however, that the automobile was injured through the negligence of the defendant's servant after it came into his possession, which injuries were not repaired before the tender of re-delivery. This evidence warranted the jury in finding there was no effectual recission, since, to effect a recission of a sale, the article must be re-delivered or tendered back in as good condition as when received unless injured without the fault of the purchaser.

One other issue of fact in the case was whether the plaintiff's agent made certain material misrepresentations concerning the automobile to induce the plaintiff to purchase. Upon this issue there was evidence in favor of the defendant but he further offered in evidence the testimony of other persons to the effect that the plaintiff's agent had made similar representations to them about the automobile. This evidence was excluded and the defendant excepted.

The verdict, however, shows that the defendant was not prejudiced by the exclusion of the evidence offered and excluded. The agreed price was $750, or at least $725, in April 1906. Had there been no misrepresentations the verdict, if for the plaintiff at all, must have been for that sum and interest from the date of the

sale, April 1906 to the time of the verdict Jany. 1908, or more than $800. The verdict was for $510 only. To have cut the agreed price down to that sum the jury must have found that material misrepresentations were made, that is, must have found for the defendant upon the issue upon which he offered the excluded evidence.

Granting, arguendo, that the offered evidence would have tended to prove the affirmative of the issue, it is not made to appear that it would, or even might, have reduced the amount of the verdict still more. Whether it would or not is at the most merely conjectural. The verdict being in the defendant's favor upon the issue in question and it not being shown that the offered evidence would or even might have effected a result more favorable to the defendant, he clearly was not prejudiced by its exclusion, and is not entitled to a new trial on that account.

Motion and exceptions overruled.
Judgment on the verdict.

LINCOLN W. TIBBETTS *vs.* DEERING LOAN & BUILDING ASSOCIATION.

Cumberland. Opinion November 5, 1908.

Loan and Building Associations. Borrowing Members. Mortgage Contracts. Interest. Premiums. Dues. Fines. Shares. "Loan." "Lent." Lapse. Forfeiture. Accounting. Revised Statutes, chapter 48, sections 60, 63, 64, 65, 66, 68.

1. A borrowing member of a loan and building association has assumed more obligations to the association than those of a mere borrower to a lender of money. He is bound to make such payments of dues, interest and fines as are imposed by the statutes and by-laws and his contract made in pursuance thereof.
2. If such member contracts with the association for a specific loan and executes a note and mortgage therefor in which he stipulates in accordance with the statutes and by-laws, to pay specific sums as interest, premiums and fines at specific times, he must make such payments and does not perform his obligations by merely paying interest and premiums on the different installments advanced him on the loan from the time he received them.
3. The fact that the association does not advance to the borrowing member the whole amount of the agreed loan at the time of making the contract therefor, but only advances it in installments from time to time as the security justifies in the opinion of the directors, does not excuse the borrowing member from paying interest and premiums on the whole loan according to the terms of the contract; nor does the further fact that the association did not set apart as a special fund the amount of the loan.
4. The words "loan" and "lent" in sections 64 and 65 of Revised Statutes, chapter 48, relative to loan and building associations, do not mean the sum or sums of money actually drawn out, but mean the whole sum contracted for.
5. When a borrowing member increases his loan and gives a new note and mortgage of like tenor as the first for the whole amount thus increased, the first note and mortgage being cancelled, the new note and mortgage become security for the payment of all previous overdue installments of dues, interest and premiums.
6. In case of such increase of the loan and new note and mortgage being given for the whole loan thus increased, the limitation in section 68, Revised Statutes, chapter 48 that "no fines shall be charged after six

months from the first lapse," begins to run from the first lapse under the new note and mortgage.

7. When the shares of a borrowing member pledged for a loan have been duly forfeited to the association, then by section 69, Revised Statutes, chapter 48, an account is to be stated in which the borrowing member is to be debited with arrears of premiums, interest and fines to date, and credited with the withdrawal value of his shares at that date. The balance against the borrowing member constitutes a new principal which bears interest from that date to the day of payment. This balance and interest thereon must also be paid in order to redeem the mortgage given for the loan.

On exceptions by plaintiff and also by defendant. Plaintiff's exceptions overruled. Defendant's exceptions sustained.

Action of assumpsit brought to recover the sum of $37.33 alleged to have been overpaid by the plaintiff to the defendant association in settlement of a loan made to the plaintiff by the defendant association and which said loan was secured by a mortgage given by the plaintiff to the defendant association. Plea, the general issue, with a brief statement which in substance states that the defendant association received from the plaintiff in settlement of the loan $3241.87 and that afterwards a clerical error was discovered whereby it appeared that the plaintiff had paid $13.00 too much in settlement of the loan and that thereupon the defendant association repaid to the plaintiff said sum of $13.00.

The action was commenced in the Municipal Court, Portland, Cumberland County, and on appeal by plaintiff was transferred to the Superior Court in said county. An agreed statement of facts was then filed and the case was heard by the Justice of said Superior Court without a jury. Both plaintiff and defendant association reserved the right to take exceptions. When the Justice rendered his decision the plaintiff and the defendant each took exceptions to certain rulings therein contained.

The material facts are stated in the opinion.

The note dated March 1st, 1906, given by the plaintiff to the defendant association, and the condition in the mortgage of same date given by the plaintiff to the defendant association to secure said note, and article 10 of the by-laws of the defendant association are as follows:

NOTE.

"$2000. Portland, Me., March 1st, 1906.

"Having this day pledged and transferred to the Deering Loan and Building Association, a Corporation duly established by law, and having its office and principal place of business at Portland in the County of Cumberland and State of Maine ten (10) shares of its Capital Stock, as collateral security for payment of the sums herein mentioned, upon which shares the sum of two thousand (2000) dollars has been advanced to me by said Corporation, for value received I, Lincoln W. Tibbetts of Portland promise to pay to said corporation, or order, the sum of 2000 and 00-100 dollars in monthly installments of ten (10) dollars with interest at the rate of six per cent per annum payable in monthly installments of ten (10) dollars, and premiums at the rate of three (3) Dollars per month; amounting to twenty-three (23) Dollars payable in advance at the stated meetings of said corporation on the first Saturday of each month hereafter, being the amount of the monthly dues on said ten (10) Shares, and of the monthly interest and premiums upon said loan or advance of 2000 Dollars, for which said shares are pledged and this note and the accompanying mortgage given, and also all fines chargeable by the By-laws of said Corporation upon arrears of such payments, until said Shares shall reach the ultimate value of Two Hundred Dollars each, when said Shares shall be applied in payment of this loan as provided by law and said Shares cancelled. Or if said Lincoln W. Tibbetts shall desire to otherwise sooner pay to said Corporation, or order, said sum of two thousand (2000) Dollars, together with the said interest, premiums and fines as aforesaid, to the time of such payment, the value of said Shares at the time of such payment may be applied on said loan in part payment, as provided by law, and said Shares cancelled. In case of failure to pay the aforesaid monthly installments as above stipulated, or either of them, or said monthly dues, interest, premiums, fines, or any part thereof, for a space of six months after the same shall become due and payable in accordance with the terms of this note and the Rules and By-Laws of said Association, then the whole sum of the

principal then remaining, and the interest, premiums, fines then chargeable under the terms of this note and said Rules and By-laws of said Association, shall immediately become due and payable and be enforced against the several securities given for this loan, as provided by law and the terms of the above mentioned mortgage.

LINCOLN W. TIBBETTS."

"Witness:

"SCOTT WILSON.

MORTGAGE CONDITION.

"Provided nevertheless, that if the said Lincoln W. Tibbetts, his heirs, executors, or administrators shall well and truly pay to the said Association, its successors or assigns the sum of two thousand (2000) dollars, in monthly installments of ten (10) dollars, with interest at the rate of six per cent per annum, payable in monthly installments of ten dollars, and premiums at the rate of three (3) dollars per month, amounting to twenty-three (23) dollars, payable in advance at the stated meetings of said Association on the first Saturday of each month hereafter, according to the tenor of a certain note of even date herewith given by the said Lincoln W. Tibbetts to the said Association to pay the said two thousand (2000) dollars, with interest and premiums as aforesaid, and shall well and truly pay the monthly installments of twenty-three (23) dollars each month on said ten (10) shares of the 26th series of the stock of the said Association, and shall pay, when due, all fines assessed according to the By-laws of the Association and the laws of the State, until said shares shall reach the ultimate value of two hundred dollars each, or shall otherwise sooner pay to said Association said sum of two thousand (2000) dollars together with the interest, premiums and fines aforesaid to the time of such payment, and also shall pay all taxes, assessments and insurance on the above described property, and shall well and truly keep all covenants above named, then this obligation as also one certain promissory note, above described, shall both become null and void, otherwise shall remain in full force."

BY-LAWS, ARTICLE X.

"In default of the monthly payment of dues, interest, or premiums, the shareholder shall be subject to a fine of two cents per month upon each and every dollar, or fractional part thereof not less than fifty cents, in arrears."

Sherman I. Gould, for plaintiff.

Scott Wilson, for defendant.

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

EMERY, C. J. The case is this:—The Deering Loan and Building Association, the defendant, was incorporated under R. S., ch. 48, secs. 54 to 78 inclusive. As a contribution to its capital each subscriber for shares was bound by statute to pay in each month one dollar on each share held by him until the share reached the ultimate value of $200, or was withdrawn, cancelled or forfeited. (Sec. 60.) After reservation of enough to meet expenses and specified contingencies, the rest of the moneys of the association was to be loaned to the holders of shares at a rate of monthly premiums to be fixed by the directors not to exceed forty cents a share. The loan to any member or shareholder was limited to $200 for each share held by him, but for such loan he was required to give, in addition to pledging his shares, a real estate mortgage to the satisfaction of the directors. (Sec. 63, sec. 66.) In addition to the monthly dues upon his shares and the monthly premiums upon his loan, the borrowing member was further bound to pay a fixed sum monthly as interest on his loan until his shares reached the ultimate value of $200 each, or the loan was repaid. (Sec. 65.) In default of payment of these monthly dues, premiums and interest, the borrowing member was bound to pay a fine of two cents a month for each dollar so in arrears. (Sec. 68 of statute and art. 10 of by-laws.) Further, for every loan made there was a note to be given secured by a mortgage of real estate. The note and mortgage were to recite the number of shares pledged and the amount of money

advanced thereon, and were to be conditioned for the payment of the monthly dues upon the shares and the interest and premium upon the loan, together with all fines on payments in arrears until the shares reached the ultimate value of $200 each, or the loan was otherwise cancelled or discharged. (Sec. 66.)

It is not questioned that the purpose of the organization of the defendant association, like that of similar associations in this State, was to accumulate from small contributions capital to loan to members for building purposes, the money to be advanced as the building progressed.

To enable him to build, or finish building, a house on a lot of land owned by him, the plaintiff applied to the defendant association for a loan of $2000 offering as security a mortgage of the building and land. His application was accepted and on March 1, 1906 he subscribed for ten shares in the association and gave to it the mortgage and his note for $2000 as required by the statute and the association's by-laws. The note and the condition in the mortgage are printed by the reporter. It will be seen that in these the plaintiff promised to pay the association the sum of $2000 in monthly installments of $10, and interest at six per cent also in monthly installments of $10, and premiums also in monthly installments of $3, and, further, all fines incurred, until the ten shares should amount to $200 each or $2000 in all, or the $2000 loan be otherwise cancelled or discharged.

The whole of the $2000 loan was not advanced to the plaintiff at the date of his note and mortgage but only $610.50. Other sums were advanced at various times afterward as the directors adjudged the progress of the building warranted. Before the full amount of the $2000 had been thus advanced, he applied for an increase of the loan to $3000 which was granted. He thereupon subscribed for five more shares making fifteen in all, and gave July 11, 1906, a new note and mortgage for $3000 of the same tenor as the first except that the monthly dues on shares were $15, the monthly installments of interest were $15 and the monthly premiums were $4.50. The old note and mortgage were cancelled, the new ones taking their places. The association continued the advancement of money

to the plaintiff on the loan as before up to the 24th day of July, when all the advances from the beginning, March 1, amounted to $2858.96, the total amount advanced.

The plaintiff failed to pay the stipulated monthly payments and fines, and the association on July 6, 1907 effected a forfeiture of the fifteen shares of the plaintiff and on July 11 began proceedings for foreclosing the mortgage. In October following, the plaintiff, desiring to redeem his house and land from the mortgage, asked for an account of the amount due thereon. The association by the account rendered claimed $3241.65 to be due. The plaintiff paid the sum and his mortgage was cancelled. He now claims that sundry items of debit to him in the account were unauthorized by the law and the contract, and he has brought this suit to recover back the amount of those items. The case was tried by the Superior Court without a jury and various findings and rulings were made by that court to several of which exceptions were taken by one or the other party. It is not necessary to consider the numerous exceptions seriatim since but few questions of law are involved, and their solution will determine the case and the fate of the exceptions.

1. The principal question is as to the computation of interest and premiums. The plaintiff contends that he should pay interest and premiums only on the sums actually advanced him and reckoned on each only from the date of the advancement. The defendant contends that they are to be computed on the face of the notes and from their date. The plaintiff argues that the notes and mortgages, whatever their tenor, were, as to the loan, only security for the re-payment of such sums as he actually received with interest and premiums on each such sum from the time he received it.

If the relation between the parties were simply that of borrower and lender of money, it might be readily, and perhaps conclusively, inferred that such was the intention, and in such case the lender could only have interest on what he actually advanced and from the time he advanced it. In this case, however, there were between the parties other relations and rights and duties. The plaintiff voluntarily became a borrowing member of the defendant association and thereby bound himself to make to it all the payments

required of a borrowing member by its by-laws and the statute. In return he became entitled to have similar payments made by all other borrowing members. It was these payments by all the members that created the capital from which loans were made to members, and the income from which the necessary expenses were paid. If, on the one hand the payments required of him were more than the interest on the sums he received from the time he received them, on the other hand he had the benefit of similar payments by the other members. His share of the accruing profits was credited to him.

His note and mortgage were security, not merely for the repayment of money advanced with interest from the time of each advancement, but for the contract expressed in them, a contract permitted if not required, by the by-laws and the statute. In consideration of being received as a borrowing member entitled to the benefits of such membership, as well as in consideration of the association's duty to advance to him money as needed and as the security warranted up to the amount specified, he contracted, not simply to repay what money he received with interest, but to pay certain fixed, specified sums each month, until the payments plus his share of the earnings of the association should amount to $200 for each of his shares in the association, or the loan applied for and voted to him should be otherwise cancelled or discharged. It is true the association did not set apart in its vaults, nor specially deposit in some bank, the whole amount of money voted as a loan to the plaintiff, but kept all its unemployed money in one deposit in a bank on interest. The association was bound, however, to have the money instantly available to advance to the plaintiff as fast as he became entitled to it. He shared in the profits from the deposit in the bank. In this respect the transaction was much like that where a bank stockholder discounts his note at the bank and leaves a part of the proceeds there on deposit. He pays the full discount on the face of his note for the time it is to run though he takes away a much less amount. As a stockholder he gets his share of the bank's profits on his deposit.

But the plaintiff further contends that if the contract were as

claimed by the defendant, it was illegal, and he cites sec. 64 and sec. 65 of the statute. Sec. 64 enacts that "Premiums for loans shall consist of a percentage charged on the amount lent in addition to the interest." Sec. 65 enacts that the monthly interest on the "loan" shall not be at an annual rate of more than six per cent." The argument is that the words "loan" and "lent," in the sections cited, mean the sum or sums actually drawn out; but, reading the words in connection with the rest of the statute and in the light of its undisputed purpose, they rather appear to mean the whole sum contracted for between the parties. It was one "loan" and one sum "lent," though the money be advanced only in installments. The defendant's contention must be sustained.

2. The plaintiff also contends that, upon the defendant's theory, his second mortgage and note were only security for further payments of dues, premiums, interest and fines, and, though he might still owe the unpaid installments secured by the first mortgage, it is an unsecured indebtedness and cannot be included in the amount to be paid to redeem from the second mortgage. It was, however, very clearly the understanding of the parties that the new note and mortgage were to be a continuing security for the original contract. A change in the security does not cancel the contract. The second note and mortgage were intended, and operated, to be security for all previous overdue installments of dues, interest and premiums, and these were properly charged in the account.

3. The plaintiff again complains that there was an incorrect computation of the amount of fines to be paid to redeem. Sec. 68 of the statute enacts that "no fines shall be charged after six months from the first lapse." The first note was given March 1, and the plaintiff failed to pay the March and subsequent installments down to the time of the forfeiture of his shares, July 6, 1907. He claims that under the statute no fines could be charged after September, 1906, six months from his first lapse. But on July 11, 1906 he made a new promise with a new mortgage to pay installments and his first lapse under this new note and mortgage was in August, 1906. The defendant in making up the account under the mortgage did not charge any fines from March to August but did charge fines

for the six months from August, the time of the first lapse under the new mortgage and not afterward. The charge made was authorized.

4. The plaintiff continued in arrears for dues, interest, premiums and fines for more than six months from the date of his second, or $3000 note, and upon due proceedings his shares became forfeited to the association July 6, 1907, nearly a year afterward. By section 69 of the statute an account was then to be stated. The plaintiff was to be debited with arrears of premiums, interest and fines to that date, July 6, 1907, and of course with the sums advanced to him. On the other hand he was to be credited with the withdrawal value of his shares at that date. The balance of the account thus stated was to be enforced against the mortgaged property.

It is in controversy whether this balance becomes a new principal to bear interest from its date until paid or whether the interest from that date is to be computed only on the amount of the sums advanced. By the forfeiture of his shares the plaintiff ceased to be a member of the association and became simply its mortgage debtor for the balance found due at the date of the forfeiture upon the account stated according to the statute. The various items on either side of the account were merged in that balance and the plaintiff became indebted for the whole balance and should pay interest on the whole. There is no provision in the statute or contract for dividing it.

The foregoing practically disposes of all the questions finally in controversy, the parties having mutually conceded some other claims made at first. The result is that the exceptions by the plaintiff must be overruled, but the court below having ruled that interest after the forfeiture was not to be computed on the whole balance but only upon the sum advanced, the defendant's exception to that ruling must be sustained. Upon the whole record, the judgment below should be for the defendant.

Plaintiff's exceptions overruled.
Defendant's exceptions sustained.
Judgment for defendant ordered.

STATE OF MAINE *vs.* WILLIAM A. HOLLAND.

Cumberland. Opinion November 5, 1908.

Indictment. Motion to Quash. Exceptions.

1. A motion to quash an indictment or complaint is addressed to the discretion of the court, and if overruled no exceptions can be allowed.
2. The court has no occasion or duty to rule upon a plea in bar in a criminal case until it is traversed or demurred to.

On exceptions by defendant. Dismissed.

The defendant was indicted at the January term, 1908, Superior Court, Cumberland County, for maintaining a liquor nuisance. He then filed the following motion to quash the indictment: "And now the said William A. Holland, respondent in said case comes and moves that the said indictment be quashed for the following reasons, to wit: Because an indictment for a liquor nuisance was found against him on the first Tuesday of May, A. D. 1904, that it was a valid indictment, the court has jurisdiction of the offense, the jury was empanelled and the defendant placed on trial and was then and there in jeopardy. After a hearing on the said indictment the jury disagreed and at the September term of the Superior Court, A. D. 1904, said indictment as nol prossed by the State. A copy of said indictment is hereto annexed and made a part of this motion. (Omitted in this report.) Reference is hereby made to the records of this court in case No. 229 on this docket for the year, A. D. 1904. The defendant further says that the present indictment covers a period from the first day of October, A. D. 1903 covering several months of the period covered by the prior indictment of 1904. He says the offense in the prior indictment was the same as the offense alleged in the present indictment but that the period covered by the last indictment extends from October 1, 1903 to the first Tuesday of January, A. D. 1908. Defendant says that under the provisions of our constitution he cannot again be placed in

jeopardy for the same cause. Wherefore the defendant asks that said indictment be quashed." The motion was overruled and the defendant excepted.

The case is stated in the opinion.

Joseph E. F. Connolly, County Attorney, for the State.

Dennis A. Meaher, for defendant.

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

EMERY, C. J. The defendant was indicted for maintaining a liquor nuisance. He filed a motion to quash the indictment because of a former jeopardy. The facts relied upon to show the former jeopardy were set out in the written motion which concluded with the prayer "that said indictment be quashed." The court overruled the motion and the defendant excepted.

A motion to quash an indictment for any reason is addressed to the discretion of the court and exceptions do not lie to the overruling such a motion, since the defense stated therein may be made by plea, demurrer or motion in arrest of judgment. *State* v. *Stuart*, 23 Maine, 111; *State* v. *Hurley*, 54 Maine, 562.

If the motion filed in this case was intended for, or could be regarded, as a plea in bar, there was no question presented for the court to rule upon, since there was no demurrer to nor traverse of the plea. If a plea, the court had no occasion to rule upon its sufficiency until demurred to, nor to question its truth until traversed. The exceptions must be dismissed and the defendant left to interpose his defense by plea or demurrer.

Exceptions dismissed.

ROCKLAND SAVINGS BANK

vs.

W. G. ALDEN AND S. T. KIMBALL, AND J. E. MOORE, Trustee.

Knox. Opinion November 7, 1908.

Practice. Actions Marked "Law." Same Continued Without Further Entry. Trustee Process. Statute 1823, chapter 219, sections 1, 4. Statute 1852, chapter 246, sections 1, 8. Revised Statutes, 1841, chapter 96, sections 17, 18. Revised Statutes, chapter 79, sections 46, 49; chapter 88, section 79.

Revised Statutes, chapter 79, section 46, relating to cases which may come before the Law Court, provides, among other things, as follows: "They shall be marked 'law' on the docket of the county where they are pending, and there continued until their determination is certified by the clerk of the Law Court to the clerk of courts of the county, and the court shall immediately after the decision of the question submitted to it, make such order, direction, judgment or decree, as is fit and proper for the disposal of the case, and cause a rescript in all civil suits, briefly stating the points therein decided, to be filed therein, which rescript shall be certified by the clerk of the Law Court to the clerk of courts of the county where the action is pending," etc. *Held:* (1) That when an action is marked "law" it is continued by the express command of the statute and no other entry on the docket is required. Such entry ipso facto operates effectually as a continuance of the action until its determination by the Law Court is certified as provided by the statute. (2) That this rule applies to an action commenced by trustee process.

An action commenced by trustee process was entered at a January term, 1906, and after an entry on the docket "trustee to disclose next term as of this," the action was continued to the next April term when the following entry was made: "Trustee to disclose at the next term as of first; principal defendants defaulted; continued for judgment." At the following September term, the trustee's disclosure as to one Alden, who was one of the principal defendants, was filed and the action was continued for judgment, and marked "Law on report as to liability of trustee." There was no entry on the docket at the January, April or September terms, 1907. November 29, 1907, a rescript was received from the Law Court discharging the trustee as to the defendant Alden. There was no disclosure or entry effecting the trustee as to the other principal defendant. At the January term, 1908, the principal defendants filed a written motion that judgment be entered in the action as of the January term, 1907, contend-

ing that the action against them had gone to judgment at that time and that it should be entered as of that term. *Held:* That after the action was marked "law" it was continued by operation of the statute until its determination by the Law Court, and that judgment could not be entered against the principal defendants as of the January term, 1907.

If in an action commenced by trustee process final judgment is entered against the principal defendant before the liability of the trustee is determined, the plaintiff will be deemed to have waived all further proceedings against the trustee.

On exceptions by principal defendants. Overruled.

Action of assumpsit on a promissory note, commenced by trustee process and entered at the January term, 1906, Supreme Judicial Court, Knox County. After the trustee had filed his disclosure as to the defendant Alden, the action was marked "Law on report as to liability of trustee" and the case was then reported to the Law Court under the title "*Rockland Savings Bank* v. *William G. Alden, and Joseph E. Moore, Trustee.*" See 103 Maine, 230. In November, 1907, a certificate was received from the Law Court with an order to enter "trustee discharged." At the following January term of said court in said county, to wit, January term, 1908, the principal defendants Alden and Kimball filed the following motion:

"And now come the defendants in the above entitled case, and move that the same be dismissed from the docket of this court because the same is a cloud upon their title to real estate purporting to be attached in said suit, and because for other reasons they have a right to have said action against them removed from the docket of this court; and it should be so dismissed.

"Because both of said defendants were defaulted in said action at the April term of this court in the year 1906, and the said action was last continued for judgment at the September term, 1906, and it should have gone to judgment and been removed from this docket at the next succeeding January term, to wit, January, 1907.

"Wherefore they pray that said action may be dismissed and judgment may be ordered to be entered therein as of the January term, 1906."

The presiding Justice ruled as a matter of law that the motion could not be granted and the defendants excepted.

The docket entries in the case now at bar as shown by the record are as follows:

"Tr. to disclose next term as of this. Jan. T., 1906. Tr. to disclose next term as of first. Prin. Deft's def. and c. f. j. April T., 1906. Disclosure of Moore, Tr., as to Alden, filed and c. f. j. Law on report as to liability of Tr. Sept. T. 1906. Order from Law Court. 'Trustee discharged,' rec'd and filed Nov. 29, 1907. Mo. for judgment filed. Tr. disclosure as to Kimball filed. Mo. for judgment denied. Exceptions allowed and filed. Jan. T., 1908. Law."

The case is fully stated in the opinion.

Rodney I. Thompson, for plaintiff.

Arthur S. Littlefield, for defendant Alden.

S. T. Kimball, pro se.

J. E. Moore, pro se.

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

WHITEHOUSE, J. This is an action upon a promissory note signed by the defendants Alden and Kimball, in which Joseph E. Moore, Trustee in Bankruptcy of the Megunticook Woolen Co., was named as trustee of the defendants. The real estate of the defendants was also attached on the writ.

The action was entered at the January term, 1906, when an entry was made, "Trustee to disclose next term as of this." The case was thereupon continued to the next April term when the following entry was made, namely, "Trustee to disclose at the next term as of first; principal defendants defaulted; continued for judgment."

At the succeeding September term, the trustee's disclosure as to the defendant Alden, was filed and the case continued for judgment, and marked, "Law on report as to liability of trustee."

There was no entry at the January, April or September terms, 1907, November 29, 1907, a rescript was received from the Law Court discharging the trustee as to the defendant Alden. There has been no disclosure or entry affecting the trustee as to the defendant Kimball.

At the January term, 1908, the principal defendants filed a written motion that judgment be entered in the case as of the January term, 1907, contending that the case against them had gone to judgment at that time and that it should be entered as of that term.

The presiding Justice ruled as a matter of law that the motion could not be granted. The case comes to the Law Court on exceptions by the principal defendants to this refusal of the presiding Justice to order judgment in the case as of the January term, 1907.

The trustee process in this State is created by the provisions of chapter 88 of the Revised Statutes, the writ being in the form established by law, authorizing an attachment of goods and estate of the principal defendant in his own hands, and in the hands of the trustee, and the summons in substance as therein prescribed. Although the primary object sought by the use of the process undoubtedly is to obtain judgment against the trustee, it has never been treated in this State as merely a process of execution but has been uniformily regarded as a suit in which the person summoned as trustee is held to be a party adverse to the plaintiff and entitled to make his defense as the principal defendant may, either upon issues of law or fact. But the procedure must conform to the rules of civil pleading. *Boynton* v. *Fly*, 12 Maine, 17; *Dennison* v. *Benner*, 36 Maine, 227; *Hanson* v. *Butler*, 48 Maine, 81; *Hibbard* v. *Newman*, 101 Maine, 410.

In the case at bar the plaintiff in this trustee process sought to hold certain dividends declared by the referee in bankruptcy in favor of the principal defendant Alden. The action was entered at the January term, 1906, and was continued with the entries above specified until the September term, 1906, when the alleged trustee filed his disclosure, and the case was marked "Law on report as to liability of trustee." The case was duly presented to the Law Court and it was held that funds in the hands of a trustee in bankruptcy belonging to a bankrupt estate, are in the custody of the law and not amenable to the process of foreign attachment. Accordingly on the 29th of November, 1907, a certificate was

received from the Law Court with an order to enter "Trustee discharged."

It has been seen that the principal defendants were defaulted at the April term, 1906, and the case marked "c. f. j." at that term, and the next April term, and it is now contended that inasmuch as the action was not marked "c. f. j." at any subsequent term, it must have gone to judgment at the next term succeeding that at which it was so marked, viz., at the January term, 1907, and that the plaintiff's attachment of the defendants' real estate was dissolved at the expiration of thirty days from that time.

In determining this question, it will be found helpful and instructive to examine the history of the legislation bearing upon it; and in giving construction to these statutes, it is proper to consider the uniform system of practice that has prevailed since their enactment to the present time. For although acquiescence for no length of time can legalize a manifestly unauthorized practice, it must be conceded that a practical interpretation of a statute which has been accepted as correct for more than three-fourths of a century is entitled to great weight in the decision of such a question.

Chapter 219 of the Public Laws of 1823, entitled "An act additional to an act establishing a Supreme Judicial Court within the State" makes provision in section 1 for sessions of the Law Court to be holden by the three justices in each of the counties named, and in section f, provides as follows, viz:

"Exceptions being reduced to writing, in a summary mode, and presented to the court, before the adjournment thereof without day, and being found conformable to the truth of the case, shall be allowed and signed by the justice holding said court, and who tried such cause; and thereupon all such action or process, in and upon which judgment shall not have been rendered, at the time of allowing such exceptions, shall be continued to the next term of said court to be holden in the same county pursuant to the first section of this Act." And it has been seen that the next term holden in the same county pursuant to the first section of the Act, was the session of the Law Court.

The provisions of the Act of 1823 respecting the continuance of actions in case of exceptions, appear in sections 17 and 18 of chapter 96 of the Revised Statutes of 1841.

Chapter 246 of the Public Laws of 1852, entitled "An Act concerning the Supreme Judicial Court and its jurisdiction," abolishes the district courts in section 1, and provides in section 8 as follows, viz. "All motions for new trial upon evidence as reported by the presiding Justice, all questions of law arising on reports of evidence, exceptions, agreed statements of facts, cases in equity, and all cases, civil or criminal, where a question of law is raised for the determination of the Supreme Judicial Court, sitting as a court of law or equity, shall be respectively marked law on the docket of the county where they are so pending, and shall be continued on the same until the determination of the questions so arising shall be respectively certified by the clerk of the district to the clerk of the county where they are pending."

This provision for a continuance of actions marked "Law" has been retained in substantially the same language in all subsequent revisions of the statutes to the present time. See R. S., 1903, chapter 79, section 46.

During all of these years it is believed to have been the invariable rule and practice of the court to construe this statutory provision to be self-executing and to operate as a continuance of actions marked "law" without special order of court, until their determination is certified as therein provided. Such a construction is a reasonable and necessary conclusion from the mandatory language of the statute itself. The actions "shall be continued." The continuance is made an absolute and imperative requirement. The court has no power to prevent a continuance under such circumstances. The action is continued by the express command of the statute, and no other entry on the docket is required except to mark the case "Law." That entry ipso facto operates effectually as a continuance of the action until its determination by the Law Court.

The fact that in the case at bar the action was commenced by trustee process does not change the rule. It is provided by section 79, chapter 88, R. S., relating to trustee process that "Whenever

exceptions are taken to the ruling and decision of a single justice, as to the liability of a trustee, the whole case may be re-examined and determined by the law court, and remanded for further disclosure and other proceedings as justice may require."

Inasmuch as no useful purpose would be subserved by obtaining judgment against the trustee, or the funds in his hands, unless the liability of the principal defendant was established, the principal defendants were properly defaulted at the April term, 1906. On the other hand, if the action had been allowed to go to final judgment against the principal defendants at that term, and execution taken out against them, the plaintiff would be deemed to have waived all further proceedings against the trustee. *Jarvis* v. *Mitchell*, 99 Mass. 530. The case was therefore properly "continued for judgment" until it was made and marked "law," and thereafter it was continued by operation of law.

It is provided by section 49 of chapter 79, R. S., that "The clerk of courts of a county, by virtue of a certificate provided for in this chapter, received in vacation, shall enter judgment as of the preceding term, and execution may issue as of that term, but attachments then in force continue for thirty days after the next term in that county." In this case the certificate of the decision of the Law Court was received November 29, 1907, in vacation, and if the principal defendants had not interposed the motion now under consideration and made up a second case for the Law Court, the judgment would have been entered as of the preceding September term, 1907, and not as of the January term, 1907. The defendants' motion was properly overruled.

Exceptions overruled.

In Equity.

WILLIAM M. BRADLEY, Admr., d. b. n. c. t. a.,

vs.

LUMAN WARREN et als.

Cumberland. Opinion November 7, 1908.

Wills. Construction. Intention of Testator. Devise. Repugnant Limitation. Estate in Fee.

The intention of a testator is to have a controlling influence in the interpretation of the language used in his will, but if he would have that intention, when discovered, fully carried out, he must be expected to conform to the reasonable rules for the regulation of the practical affairs of life, and to the fundamental laws which establish and secure the rights of property, and when an intention is discovered to accomplish two purposes so inconsistent that both cannot be accomplished in accordance with those rules and laws, there must be a failure as to one of them.

It is a well settled rule that a devise absolute and entire in its terms, presumptively conveys an estate in fee without words of inheritance and that any limitation over afterwards is repugnant and void.

The third clause of the will of a testator, Joseph B. Bradley, reads as follows: "Third: The residue of my estate, real personal and mixed, I give devise and bequeath in equal shares to wit. One moiety thereof, to my said wife. One moiety thereof to my daughter Alice Buck now wife of Luman Warren, provided however that if my said daughter shall before this will take effect die without issue, said share shall descend to and be distributed among my heirs at law, and if at her decease this will shall have taken effect, and she shall have entered into possession of said estate so much thereof as may remain at her decease shall so descend and be distributed to and among my heirs at law, meaning those who would be my heirs at her decease according to the laws of this State." The said Alice Buck Warren died intestate leaving a husband but no issue living at the time of her death. The will had taken effect, however, and she had taken possession of her half of the estate before her decease.

Held: (1) That the said Alice Buck Warren took an absolute estate in fee in a moiety of the residue of the testator's estate.

(2) That even upon the assumption that she did not obtain a fee but only a life estate by implication the same result must follow for the reason that an unqualified power of disposal was annexed to the gift.

In equity. On report. Decree according to opinion.

Bill in equity brought by William M. Bradley, of Portland, Maine, administrator de bonis non cum testamento annexo, against Luman Warren, of Bucksport, Maine, Franklin A. Buck, of Seattle, State of Washington, Margaret A. Barnard, of Rowe, Mass., Kia C. Fisher, of Brookline, Mass., and George H. Buck, executor of the will of Mary L. Buck, of Chelsea, Mass., to obtain the judicial construction of the will of Joseph B. Bradley, of Bucksport, Maine, deceased testate. The defendant Warren filed an answer and the answers of all the other defendants were the same. When the cause came on for hearing before the Justice of the first instance, and by agreement of all the parties thereto, the case was reported to the Law Court.

The case appears in the opinion.

Geo. E. Bird, and Wm. M. Bradley, for plaintiff.

Anthoine & Talbot, for defendants Barnard, Fisher, and Buck, executor.

F. H. Appleton, and Hugh R. Chaplin, for defendant Franklin A. Buck.

T. H. Smith, for defendant Warren.

Also all defendants pro se.

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

WHITEHOUSE, J. This is a bill in equity brought to obtain a judicial construction of the will of Joseph B. Bradley late of Bucksport in the County of Hancock. The case comes to the Law Court on report from Cumberland County.

The controversy arises in connection with paragraph third of the will which reads as follows: "Third: The residue of my estate, real, personal and mixed, I give, devise and bequeath in equal shares to wit. One moiety thereof to my said wife. One moiety thereof to my daughter Alice Buck now wife of Luman Warren, provided however that if my said daughter shall before this will take effect die without issue, said share shall descend to and be distributed among my heirs at law, and if at her decease this will shall have taken effect, and she shall have entered into possession of said

estate so much thereof as may remain at her decease shall so descend and be distributed to and among my heirs at law, meaning those who would be my heirs at her decease according to the laws of this State."

Alice Buck Warren died intestate on the twenty-third day of December, 1906, leaving a husband, but no issue living at the time of her death. The will had taken effect, however, and she had taken possession of her half of the estate before her decease.

The question presented for the determination of the court relates to the nature and quantity of the estate taken by the testator's daughter Alice under the provisions of this paragraph of the will. It is contended in behalf of the husband and heirs at law of Alice Buck Warren, that she took an absolute estate in fee in a moiety of the residue of the testator's real and personal estate and that the limitation over to the testator's heirs at law was void. On the other hand, it is argued that it was the intention of the testator that his daughter Alice should not take an absolute fee in a moiety of the estate and that whether she took a conditional fee with an executory devise over, or whether she took a life estate with a remainder to her issue and failing issue a limitation over to the testator's heirs, that limitation over is valid as to what remained at the decease of Alice.

It is the opinion of the court that the former contention must be sustained, and that according to the rule established by a uniform line of decisions upon this question in this State and Massachusetts, it must be held that under the terms of the will, Alice Buck Warren did take an absolute estate in fee in a moiety of the residue of the testator's estate.

It has been observed from the reading of paragraph three of the will that the devise to the daughter Alice was not limited to a life estate by the use of explicit language for that purpose. If it be held that a life estate only was created in her favor, it must result from implication and not from direct and positive terms.

This question arose upon a closely analogous provision of the will in *Taylor* v. *Brown*, 88 Maine, 56. The testamentary clause there in question reads as follows:

"I will, devise and bequeath to my beloved wife, Lila Judkins, my home lot and buildings thereon situated at West Farmington, near the depot and known as the Davis Stand, and also all my household goods, beds and bedding and two hundred dollars in money; and at her decease what remains I wish to be divided equally between Jacob J. Brown and Nellie Washburn, children of my wife's sister."

It was held that an estate in fee passed to the widow in the property described, and that if the testator intended a devise over to the children of his wife's sister, he failed to employ suitable terms to effectuate the intention. In the opinion the court say: "We think it clear that this case falls in the category of a long list of cases where it has been held that, if the testator intended a devise to one person for life and then a devise over to another, he or she has failed to use appropriate terms to effectuate such an intention. The trouble in many cases is that a testator seeks to accomplish two or more inconsistent purposes in one bequest. In the present case the testator makes an absolute gift, and then expresses a wish as to how the donee may dispose of a portion of the estate before her death. The title of property once given away cannot be regained by the hand that gave it." See also an instructive discussion of this principle in *Copeland* v. *Barron*, 72 Maine, 206.

In *Joslin* v. *Rhoades*, 150 Mass. 301, the construction of the following provision of the will was brought in question, viz.

"First. After the payment of all just and legal claims against my estate I give, bequeath and devise to my beloved wife, Ellen M. Joslin, all of my estate both real and personal to be to her and her heirs and assigns forever, but upon the express condition that if any portion of my said estate should remain in the possession of my said wife at the time of her decease, such remaining part shall be divided as follows: (part to Abby S. C. Putney and the remainder to the testator's legal heirs)."

In the opinion the court says: "We think that the construction to be given to the first article of the will is that the testator intended to give absolutely to his wife all his real and personal estate remaining after the payment of his debts; that he did this upon condition

that if any of it remained in her possession at her death it should be divided according to the provision of the last clause of this article, and that he did not intend to give his wife merely a life estate with a power of disposal by deed. Such a condition is inconsistent with the gift and is void." See also *Mitchell* v. *Morse*, 77 Maine, 423; *Kelley* v. *Meins*, 135 Mass. 231; *Damrell* v. *Hartt*, 137 Mass. 213; *Foster* v. *Smith*, 156 Mass. 379; *Knight* v. *Knight*, 162 Mass. 460; *Church* v. *Harris*, 62 Conn. 93; *Rodenfels* v. *Shuman*, 45 N. J. Eq. 383; *Pierce* v. *Simmons*, 16 R. I. 689.

In the foregoing cases the courts were governed by the well settled rule that a devise absolute and entire in its terms, presumptively conveys an estate in fee without words of inheritance, and that any limitation over afterwards is repugnant and void. It may be true that this rule sometimes appears to operate harshly in defeating the probable intention of the testator, but the observance of it has been deemed indispensable to the required certainty and security in establishing titles to property and especially in the disposition of landed estates. As remarked by the court in *Taylor* v. *Brown*, 88 Maine, supra,—"It is a safer rule than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty."

If Alice Buck Warren took an absolute fee, under the rule above stated it cannot be limited or diminished by the subsequent proviso or condition.

But even upon the assumption that Alice did not obtain a fee but only a life estate by implication the same result must follow, for the reason that an unqualified power of disposal was annexed to the gift. The clause in question declares that "if at her decease this will shall have taken effect and she shall have entered into possession of said estate, so much thereof as may remain at her decease shall so descend," etc. In *Ramsdell* v. *Ramsdell*, 21 Maine, 288, the language of the testator was "I give and bequeath, after the decease of my wife, all my property if any remains, to my brothers and sisters," etc. It was held that the widow had the absolute right to dispose of the entire property. In the opinion the court says: "The intention of the testator, is to have a controlling influence in

the interpretation of the language used in his will. If he would have that intention, when discovered, fully carried into effect, he must be expected to conform to the reasonable rules for the regulation of the practical affairs of life, and to the fundamental laws, which establish and secure the rights of property. When an intention is discovered to accomplish two purposes so inconsistent, that both cannot be accomplished in accordance with those rules and laws, there must be a failure as to one of them."

In *Harris* v. *Knapp*, 21 Pick. 412, the terms of the will in question were as follows: "And whatever shall remain at her death I give," etc., and it was held that there was an unqualified power of disposal." See also *McGuire* v. *Gallagher*, 99 Maine, 334; *Williams* v. *Dearborn*, 101 Maine, 511, and *Young* v. *Hillier*, 103 Maine, 17.

The language of the will of Joseph B. Bradley in question, viz: "So much thereof as may remain at her decease," clearly implies an unqualified power of disposal.

If then Alice Buck Warren is to be deemed to have taken a life estate by implication, with an unqualified power of disposal annexed, it is well settled that any limitation over is repugnant and void. *Stuart* v. *Walker*, 72 Maine, 145; *Ramsdell* v. *Ramsdell*, 21 Maine, supra; *Copeland* v. *Barron*, 72 Maine, supra.

It is accordingly the opinion of the court that under the terms of the third paragraph of the will in question, Alice Buck Warren became the absolute owner of one-half of the residue of the real and personal estate of the testator.

Decree accordingly.

HENRY HUDSON

vs.

CHARLES P. WEBBER, JOHN P. WEBBER AND JOHN P. WEBBER, JR.

Piscataquis. Opinion November 17, 1908.

Deeds. Certificate of Acknowledgment. Venue. Recorded Deed. Unsealed Deed. Records. Erasures. Presumptions. Judicial Notice. Township. Quarters. Acreage Shrinkage. Partition Proceedings. Evidence. Statute, 1831, chapter 36. Revised Statutes, chapter 75, section 26; chapter 84, section 125; chapter 106, section 10.

1. An office copy of a deed, the original of which was unacknowledged, or without proper acknowledgment, is invalid and inadmissible against third parties; and whether the original deed was properly acknowledged, not only in form, but before a magistrate having jurisdiction, must appear upon the copy itself, when offered as evidence.
2. A certificate of acknowledgment is insufficient when the place or venue where it was taken is not disclosed.
3. It is not indispensable that the place of acknowledgment should appear from the certificate alone. It will suffice if it can be discovered with reasonable certainty by inspection of the whole instrument.
4. Where the venue was laid in the certificate of acknowledgment as, "Suffolk ss. Boston," and the grantor was described in the deed as residing in "Waltham, in the County of Middlesex and Commonwealth of Massachusetts," and the grantee as of "Boston in the County of Suffolk and commonwealth aforesaid," it sufficiently appears that the acknowledgment was taken in the County of Suffolk and Commonwealth of Massachusetts.
5. Where the venue in a certificate of acknowledgment was laid merely as "Suffolk ss." and one of the parties was described as living in Waltham, Massachusetts, it was *held* that the court may properly hold that the acknowledgment was taken in the County of Suffolk in Massachusetts.
6. This court takes judicial notice of the fact that there is a Suffolk County in Massachusetts, because it was created by laws which were in force in the District of Maine as well as in the mother commonwealth.
7. When a deed and its record have stood unchallenged for more than seventy years, and many conveyances have been based upon them, it

may be presumed from the lapse of time that the magistrate taking the acknowledgment acted within his jurisdiction, and that the deed was properly acknowledged, and hence that it was properly recorded. And an office copy of it is admissible in evidence.

8. A deed recorded does not take priority over another deed of the same premises, earlier in date, but recorded later, unless it appears by the record to have been a sealed instrument. The record is evidence only of what appears upon it.

9. It is to be presumed that all entries or erasures in a book of official records are made by the proper recording officer, at the time of making the record, in the absence of evidence to the contrary.

10. In the case at bar, the record of the deed from Hobbs to Bascomb does not disclose affirmatively that the original deed was sealed, notwithstanding the statement in the testimonium clause that it was sealed. But whether it was sealed or not, it was not recorded as a sealed instrument, and did not take priority over a sealed instrument recorded later.

11. When lines established by partition proceedings are referred to in the declaration in a real action as the boundaries of one or more sides of the demanded premises, the returns of the partition commissioners are admissible, as against the plaintiff, to show the length of the lines, and the consequent dimensions of the land divided, and of the separate parcels bounded by these lines.

12. When the owner of a tract of land conveyed definite numbers of acres in common and undivided to several grantees successively, and it now appears that the entire acreage of the tract was not sufficient to satisfy all the grants in full, the shrinkage falls upon the last grantee.

13. The predecessors in title to the parties in the case at bar owned one quarter of a township in common and undivided. They owned it, not in fractional parts, but by acreages varying in amount. As the result of partition proceedings, and presumably in consequence of the unequal values of different sections of the township, their quarter as set off was smaller territorially than the other quarters, and smaller than their combined acreages, based upon the size of a full quarter. *Held:* That the shrinkage caused by the partitions must be borne by the owners of that quarter in proportion of their holdings at the time of the partitions.

14. In the case at bar, the court finds that the actual area of the entire township was 21,716 5-8 acres, of which after deducting the public lots, one quarter was 5,189 5-32 acres, and that the actual area of the quarter set off to the predecessors of these parties was 5,002 2-5 acres. Upon the basis of a full quarter, the plaintiff would be entitled to 1,829 5-32 acres. But in consequence of the shrinkage caused by the partition proceedings, the plaintiff's acreage must be reduced by the ratio that 5,189 3-32 bears to 5,002 2-5.

On report. Judgment for plaintiff.

Real action to recover one-half part in common and undivided of a certain parcel of land in Township No. 5, Range 9, north of Waldo Patent, Piscataquis County. Plea, the general issue with disclaimer as to part of the demanded premises.

Tried at the September term, 1906, Supreme Judicial Court, Piscataquis County. At the conclusion of the evidence it was agreed that upon so much of the "evidence as is competent and legally admissible," the case should be reported to the Law Court for decision.

The case appears in the opinion.

Frank E. Guernsey, and Hudson & Hudson, for plaintiff.

F. H. Appleton and Hugh R. Chaplin, and J. B. & F. C. Peaks, for defendants.

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

SAVAGE, J. Writ of entry to recover one-half part in common and undivided of a parcel of land in township number 5, range 9, north of Waldo Patent, in Piscataquis County. The defendants have pleaded the general issue, with a disclaimer as to part. The case comes up on report. We need notice only such questions as have been controverted in argument. It is incumbent on the plaintiff to show some title, and the defendants deny that he has any title. This raises the first question. But if the plaintiff has a title, it is admitted in argument, on the assumption that the township was six miles square, as stated in the earliest deeds, and that a quarter, less public lands, was 5520 acres, that the plaintiff owns 880 acres in common and undivided, while he claims 2160 acres. And this presents the second issue. The plaintiff in his writ claims an undivided half, but he will be entitled to judgment for so much as he shows title to, less than one-half. R. S., chap. 106, sect. 10. The defendants are admittedly the owners of at least one undivided half of the parcel.

The township was conveyed by the city of Boston to Samuel Thatcher in 1833; Thatcher gave a deed of a quarter of it to George Miller in 1835; in the same year, Miller gave a deed of

the same to Luther Billings, under whom the plaintiff claims. In proof of the last two of these links in his chain of title the plaintiff introduced against the defendant's objection, attested copies of the deeds from the registry of deeds, commonly called office copies. The objection made is that the certificate of acknowledgment fails to show where, that is, in what State, the acknowledgment was taken. It is claimed that a deed must be properly acknowledged before it can be recorded, R. S., chap. 75, sect. 26, and that an office copy of an unauthorized record is not admissible in evidence under R. S., chap. 84, sect. 125, which provides that office copies may be used in certain cases where the original deeds would be admissible. It is claimed further that the place of the acknowledgment must appear on the deed to entitle it to be recorded. In one deed, dated February 11, 1835, and recorded March 10, 1835, the venue of the acknowledgment appears on the certificate merely, "Suffolk ss; Feby 19th 1835." In the other deed dated September 10, 1835, and recorded November 16, 1835, it is "Suffolk ss; Boston, Oct. 12, 1835."

An original unacknowledged deed, or deed with defective certificate of acknowledgment is valid and admissible in evidence as against the grantor and his heirs. But if not properly acknowledged and recorded it is not valid or admissible, so far as this case is concerned, except as against the grantor and his heirs. Such was the law when these deeds were executed. Public Laws of 1821, chap. 36.

It will be seen that the statute, R. S., ch. 84, sect. 125, above cited, which permits the use of office copies, limits their admissibility to cases where original deeds would be admissible. Since an original deed, unacknowledged, or without proper acknowledgment, is invalid and inadmissible against third parties, an office copy of the same is not admissible. Whether the deed was properly acknowledged, not only in form, but before a magistrate having jurisdiction, we think must appear upon the copy itself, when an office copy is offered.

It seems to have been held wherever the question has arisen, and we think properly, that a certificate of acknowledgment is insufficient

when it does not disclose the place or venue where it was taken. For a magistrate has no authority to take acknowledgments outside the State, within and for which he is appointed. It must appear that he acted within the territorial limits of his jurisdiction. A deed which does not show this fact is not admissible except as against the grantor and his heirs. *Brooks* v. *Chaplin*, 3 Vt. 281; *Ives* v. *Allen*, 12 Vt. 589; *Vance* v. *Schuyler*, 6 Ill. 164; *Hardin* v. *Kirk*, 49 Ill. 153; *Hardin* v. *Osborne*, 60 Ill. 96; 1 Cyc. 572, and cases cited. The case of *Elliott* v. *Peirsol*, 1 Pet. 328, is cited by counsel as being to the contrary. The certificate in that case was like the ones in the case at bar. It was attacked on other grounds, but not on the one we are now examining, and this point was not considered by the court. So we do not regard this case as authority.

When the venue of acknowledgment appears upon the deed, the law attaches to the acts of the officer the presumption of regularity. But it is not indispensable that it should appear from the certificate of acknowledgment itself. It will suffice if the place of acknowledgment can be discovered with reasonable certainty by inspection of the whole instrument, *Hardin* v. *Osborne*, supra; *Brooks* v. *Chaplin*, supra; *Fuhrman* v. *London*, 13 Serg. & Rawle, 386. In *Brooks* v. *Chaplin*, supra, the grantor described himself in the deed as residing in "Suffield, County of Hartford and State of Connecticut," and the certificate showed that the acknowledgment was taken in "Hartford County," but no State was named. The court by inferences based on the stated residence of the grantor and upon other facts shown by the deed, found that it was "Hartford County, Connecticut," and held the acknowledgment good. In *Hardin* v. *Osborne*, where the certificate contained the words "County of New York," without any State named, the court held the acknowledgment good, it appearing in the certificate of the authority of the officer who took the acknowledgment, which was attached to the certificate of acknowledgment, that he was at the time of taking it a commissioner of deeds for the city, county and State of New York.

One of the copies before us presents no real difficulty. The venue of the certificate is "Suffolk ss; Boston." The grantor is described in the body of the deed as of "Waltham in the county of Middlesex and commonwealth of Massachusetts," and the grantee as of "Boston in the county of Suffolk and commonwealth aforesaid." We think this sufficiently shows that the acknowledgment was taken in the county of Suffolk and commonwealth of Massachusetts. In the other copy the venue appears merely as "Suffolk ss." The plaintiff claims that this refers to Suffolk County, Massachusetts. We think we may take judicial notice of the fact that there is a Suffolk County in Massachusetts. It is true that courts do not generally take judicial notice of the territorial subdivisions of other States into counties, and towns, although they sometimes do of the location of the great commercial centers, like Boston, New York and Chicago. But Suffolk County was created while this State was yet a part of Massachusetts. It was created by laws which were in force in the District of Maine as well as in the mother commonwealth, by laws which were ours as well as hers, and are ours still. We know of our own territorial subdivisions because we take judicial notice of the laws which made them, though the laws may have been enacted long before Maine became a State. We see no good reason why we should not judicially know the creation of Suffolk county in Massachusetts, as well as of York county in Maine, which was created long before the Act of Separation.

The difficulty here is not in knowing judicially that there is a Suffolk county in Massachusetts, but in ascertaining whether that Suffolk county is the one where this deed was acknowledged. There are, or may be, other Suffolk counties. It appears that one of the parties, the grantee, lived in Waltham, Massachusetts, within the territory of which Boston in Suffolk County was then as now the business and commercial center. This fact has slight probative force, but it has some. Prima facie, it leads us to think that the deed was acknowledged in that Suffolk County which is in Massachusetts, rather than in any other one.

But there is another ground upon which we think a conclusion that the deed was properly acknowledged can be based. This deed

and its record have stood unchallenged for more than seventy years. Upon them many conveyances have been based. And we think a presumption may arise from the lapse of time that the magistrate acted within his jurisdiction and that the deed was properly acknowledged. Such a presumption is to be favored in proper cases, since it tends to quiet title, after all witnesses have died, and all other means of establishing it have been lost or destroyed. *Bucklen* v *Hasterlik*, 155 Ill. 423. And as, in such case, the deed is to be taken, as properly acknowledged, it must also be taken as properly recorded. Hence we conclude that the deed was properly acknowledged and recorded, and that the office copy of it was admissible.

We now pass on in the plaintiff's chain of title. Whatever interest remained in Billings it is conceded has since come to the plaintiff. Billings owning a quarter of the township sold July 1, 1837, 4500 acres to William Hobbs and 500 acres to Jonathan Weeks. Upon the assumption stated, that the township was six miles square, Billings had 520 acres left, and it is conceded that the title to these has come to the plaintiff. Hobbs out of his 4500 acres conveyed 2760 to Francis Bowman in 1837, which have come to the defendant, and 1000 to Daniel W. Bradley, in 1838, which have come to the plaintiff, unless the Bradley deed was rendered inoperative in part by a conveyance of 1380 acres to one Bascomb, by a deed which was made later than the Bradley deed, but recorded earlier. After the conveyance to Bowman, Hobbs had only 1740 acres left, and this would not satisfy both the Bradley and Bascomb deeds, as they together called for 2380 acres.

The defendants claim that the Bascomb deed had priority by reason of its being recorded earlier. On the other hand, the plaintiff contends that the Bascomb was not sealed, and, therefore, that it was never effective as a deed, because a seal is essential to the conveyance of real property. *McLaughlin* v. *Randall*, 66 Maine, 226. The proof offered of the Bascomb deed is an office copy. We have also examined, as the parties stipulated, the book of records. Upon the record there are no letters or words or characters to indicate the place of seal. There is an erasure where the place of the seal should be, and through it is drawn a horizontal

line. There is still discernible, notwithstanding the erasure, a faint trace of a mark or letter, which may have been the letter "L."

In this situation the defendants contend in the first place that when an original deed cannot be produced, a copy from the records which recites that it is sealed, although no seal appears, raises a presumption that the original was sealed. 25 Am. & Eng. Ency. of Law, 2nd Ed. 78, and cases cited. It should be observed however that in some of these cases much importance seems to have been attached to the fact that the statutes did not require the place of seal to be indicated upon the record. *LeFranc* v. *Richmond*, 5 Sawy. 601; *Starkweather* v. *Martin*, 28 Mich. 470. It seems to us rather that a deed is not properly recorded unless the place of seal is also indicated. A seal is an essential part of a deed. The record is not complete unless the seal is recorded. Further it is claimed that lapse of time will raise the presumption of sealing. But it is unnecessary to examine these claims at greater length, for they do not reach the difficulty in this case. The Bascomb deed is set up as having priority over the Bradley deed, by reason of its being recorded earlier. If the earlier record disclosed a conveyance, it was good against an earlier deed, recorded later; otherwise not. So the question is, not whether the Bascomb deed was originally sealed, but whether the record disclosed that it was sealed. If by the record it did not appear to be a sealed instrument it did not take priority. A record is notice only of what appears upon it. The language of the court in *Todd* v. *Union Dime Savings Inst.*, 118 N. Y. 337, is directly in point:—"The record, to be effectual as evidence of the conveyance of the legal title to the property mentioned in it, must in some manner represent that the instrument was sealed. The record as first made did not have any mark of the seal of the grantor upon it, and was, therefore, ineffectual evidence of the conveyance of such title to the premises. Was it as evidence any more comprehensive in its effect than that? The record of a conveyance is by the statute made admissible as evidence, and its admissibility as such is to prove a conveyance so far as its legal import is to that effect, and to that extent it also has the character of notice to subsequent purchasers."

We think the record of the Bascomb deed does not disclose affirmatively that the original deed was sealed, notwithstanding the statement in the testimonium clause that it was sealed. It is not a case of an omission merely of any reference to a seal. It seems to us apparent that the recording officer or clerk wrote or began to write something to indicate that the instrument was sealed. Then at some time the writing was erased. The defendants urge that the inference proper to be drawn is that the deed was first recorded by the proper officer or clerk as a sealed deed, and that afterwards the mark for a seal was erased by some other hand, perhaps by an interested party. But we think the presumption is that all entries or erasures in a book of official records are made by the proper recording officer, at the time of making the record, in the absence of evidence to the contrary. The inference which we believe would suggest itself to reasonable minds as quickly as any is that the copyist began to write characters for the place of seal automatically, from force of habit, and then having noticed that there was no seal, erased the marks that had been made. Since, then, it is not made to appear that the Bascomb deed was recorded as sealed, it did not gain priority over the Bradley deed, even if it had been in fact sealed. And so the Bradley title to 1000 acres has come to the plaintiff.

The plaintiff also claims title to 640 acres additional, in this way;—that Hobbs had 4500 acres; that he sold by valid conveyances 2760 acres to Bowman, 1000 to Bradley, and 100 to one MacKay, 3860 acres in all; that he still held, so far as the record shows, the legal title to what was left, which was 640 acres, notwithstanding the Bascomb deed, so called; that after his death, all the interest he had had in the premises was conveyed by his heirs to the plaintiff. We think the evidence sustains this claim. So that the case shows that the plaintiff has 2160 acres in all.

So far we have proceeded upon the assumption that the estimates of the size of the township found in the early deeds, and which the succeeding owners acted upon, were correct, and that the Billings quarter amounted to 5520 acres in common and undivided. But it is contended by the defendants that the township was less than six

miles square, and that the effect of two partitions made in 1844 and 1850 was to confine the Billings acreage to one territorial quarter of the township, which quarter was smaller in area than the others, but presumably not in value.

No survey of the township was made for use in this case.

But the plaintiff in his writ described the parcel of which the demanded acres are a part as bounded on the west and south sides by lines established by the partition proceedings referred to. Those proceedings were introduced in evidence by the plaintiff. They show that the west half of the township was set off in 1844 to Edward Smith, owner of an undivided half, the line of partition being described substantially as two and one-half miles east from and parallel with the west line of the township and six miles and twelve rods long north and south; and that the south half of the east half was set off in 1850 to Preserved B. Mills, who owned an undivided half of that half, the division line being described substantially as three miles and one hundred and forty rods from and parallel with the south line of the township, and three miles and two rods in length, east and west. There is no doubt that the effect of these partitions was to confine the Billings quarter acreage to the northeast corner of the township, bounded west by land of Smith and south by land of Mills.

If the distances stated in the returns of the partition commissioners are correct, and if the returns are admissible to show it, it appears that the township was actually six miles and twelve rods long, north and south, and only five miles and one hundred and sixty-two rods wide, east and west, and contained all told 21,716 5-8 acres, one quarter of which after deducting the acreage of the public lands would be 5189 5-32 acres. This last amount, then, represents the Billings quarter before any partition proceedings were had. But by the partition proceedings, in consequence, no doubt, of the unequal values of different sections of the township, the Billings quarter was limited to a rectangular section two miles and one hundred and ninety-two rods, north and south, and three miles and two rods, east and west, containing 5002 2-5 acres. We think these returns are admissible and should be considered by us upon

the question of quantity of land. They are admissible, if for no other reason, because the plaintiff in his writ has made the lines established by them his boundaries. They are all the evidence we have, and are much more satisfactory than the "more or less" estimates in the old deeds.

Here then are two shrinkages of the Billings quarter, the first reduction from 5520 to 5189 5-32 acres, because the township was actually smaller than it was estimated, and the second from 5189 5-32 to 5002 2-5 acres, in consequence of the partition proceedings. It becomes necessary to recast the amount of the plaintiff's holdings. The Bradley 1000 acres and the Hobbs 640 acres, which have come to the plaintiff, are not affected by the first shrinkage. But the Billings residue, after his sale to Hobbs and Weeks, is affected. Billings in 1837 owned actually 5189 5-32 acres instead of 5520. He sold 5000 acres to Hobbs and Weeks, and had left only 189 5-32 acres, which have come to the plaintiff, instead of 520. So that prior to the partition proceedings the titles which have come to the plaintiff covered only 1829 5-32 acres.

The shrinkage in acreage caused by the partitions must be borne proportionably by the owners of the Billings quarter. The plaintiff's acreage of 1829 5-32 acres must be reduced by the same ratio that 5189 5-32 bears to 5002 2-5. Or stating it as it should be in fractional parts, the plaintiff is entitled to judgment for 1763.3-5002.4 parts of the parcel described in his writ.

Judgment for plaintiff accordingly.

DANIEL W. SIMONDS

vs.

MAINE TELEPHONE AND TELEGRAPH COMPANY.

Somerset. Opinion November 19, 1908.

Ways. Telephone Company. Suitable Appliances for Erecting Poles and Wires not Nuisances Per Se. Horses. Verdict.

1. Authority given by a municipality to a telephone company to erect and maintain telephone poles and wires on its streets carries with it the right to use at needful places on the streets suitable appliances for such erections and maintenance.
2. Such appliances at such places on the streets, though they are likely to frighten well broken horses carefully driven, are not nuisances per se.
3. A reel three feet long and four feet in diameter with lead pipe coiled upon it, and placed next the side walk in the line of telephone poles for the present purpose of stringing the pipe on the poles to enclose telephone wires, and leaving ample room for the travel along the street, is not shown to be an unsuitable appliance or in a needless place, and so is not a nuisance, though so placed it is likely to frighten well broken horses carefully driven.
4. Owners and drivers of horses have no monopoly of the public streets and must accustom their horses to the appearance of, at least, such inert objects as are lawfully thereon.
5. A verdict not directed can be set aside on motion if from the whole record it appears clearly wrong.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by an alleged obstruction consisting of a large reel containing "new bright telephone cable," placed by the defendant in Main street, Madison Village, and thereby constituting an alleged nuisance, whereby the plaintiff's horse became frightened and ran away and the plaintiff was thrown out of his wagon and injured. Plea, the general issue. The plaintiff recovered a verdict for $695.25, and the defendant then filed a general motion for a new trial.

The case appears in the opinion.

Bernard Gibbs, for plaintiff.

Butler & Butler, for defendant.

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

EMERY, C. J. The defendant telephone company had acquired from the proper authority the right to erect and maintain in Main street and other streets in Madison Village "telephone poles and wires to be placed thereon together with such supporting and strengthening fixtures and wires as the company might deem requisite." In the erection of its plant there the company made use of cables or groups of wires enclosed in lead pipe a little over an inch in diameter and strung upon its poles. The lead pipe used came from the factory wound on wooden reels three feet in length and four feet in diameter and so constructed that they could be mounted on axles and the pipe be unwound from them into its proper place in the plant. On May 11, 1907, the defendant's foreman of construction in Madison sent men to Main street to prepare for stringing and to string such wires and cables on the poles already erected in that street. For this work some of the men under his direction placed one of these reels of lead pipe on the side of the street next the sidewalk and in the line of the poles upon which the cables were to be strung. While the men were at work upon the poles and wires preparing to string the cables and pipe, but before they had begun to unwind the pipe from the reel, the plaintiff came driving his horse along the street toward the reel when the horse became frightened from the appearance of the reel, or of the lead pipe wound around it, and ran away to the plaintiff's injury.

The plaintiff's horse was an ordinarily well broken horse and was being driven with ordinary care. The reel and pipe were inert, not in operation, and were placed close to the sidewalk leaving ample room for the public travel, but were of such appearance as would be likely to frighten well broken horses unaccustomed to them, though in this case it is uncertain whether it was the appearance of reel or the brightness of the pipe that caused the fright. There was no evidence that the company was any more aware than the plaintiff that the reel was likely to frighten horses.

Upon the foregoing facts established by the evidence the plaintiff contends in support of the verdict that the reel and pipe were, at the time and place, per se an unlawful obstruction to public travel in the street. In his declaration and in his evidence he bases his claim for damages on that proposition alone. He does not complain of any negligence in the operation or care of the reel and pipe.

We do not think the proposition can be sustained. Having the right to erect and maintain its poles and string on them its wires and cables where it did in the street, the company had the concomitant right to use suitable appliances there for and in reasonably needful places. For the work of stringing on the poles the wires and lead pipes enclosing them, some kind of a reel was appropriate and needful, and it needed to be in the street in the line of the poles. There is no suggestion in the evidence that any other kind of a reel, larger, smaller or of different shape or color, would have been less likely to frighten horses, or that it could have been so located as to be still serviceable and less startling to horses. Indeed, so far as appears, the horse would have been equally frightened by the bright lead pipe coiled on the ground or in a cart.

It is not the law that economic progress is to be arrested or even turned aside, whenever a well broken horse, carefully driven, is frightened or likely to be frightened thereby. To say that well broken horses, carefully driven, must not be frightened, is to say that no new appliance, however useful, shall be used on or near highways. It is common knowledge that all horses, even those well broken and carefully driven, are liable to be frightened by any unaccustomed appearance or noise, and indeed by accustomed appearances and noises in unaccustomed situations; that they are susceptible to fright from the most trivial things; that their vagaries are unforeseeable, and that it is practically impossible to guard against them. On the other hand, it is equally common knowledge that well broken horses can ordinarily be so accustomed to appearances and noises as not to be at all frightened by them.

In this age of economic progress it is the more reasonable and workable, and hence the legal rule, that owners and drivers of

horses should recognize that the highways are not exclusively for their use; that other and new instrumentalities for transportation and transmission, and appliances for their construction and maintenance, are often legally allowed upon the highways; and that they should early accustom their horses to whatever new conditions thus arise and be on their guard against them. In this case it was as much incumbent on the plaintiff as on the defendant to foresee that his horse might be frightened by the reel or the lead pipe, and have taken measures to avoid or prevent the possible consequences. The reel and the lead pipe being otherwise lawfully where and when they were in the street, the mere fact that they were likely to frighten horses unaccustomed to them did not make their presence there unlawful. The consequences of the fright must therefore remain where they fell. *Farrell* v. *Oldtown*, 69 Maine, 72; *Winship* v. *Enfield*, 42 N. H. 197; *Hughes* v. *Fond du Lac*, 73 Wis. 380; *Thompson* v. *Dodge*, 58 Minn. 555, 28 L. R. A. 608; *Steiner* v. *Phila. Traction Co.*, 134 Pa. St. 199, 19 Atl. 491.

The plaintiff further claims, however, that the defendant should have brought the case to the Law Court upon exceptions to the rulings of the presiding Justice instead of upon a motion to set aside the verdict, and cites in support of his claim, *Stephenson* v. *Thayer*, 63 Maine, 143. It was not necessary for the defendant to except and rely upon exceptions to the rulings of the presiding Justice, no verdict having been directed. A verdict not directed can be set aside on motion if from the whole record it appears clearly wrong.

Motion sustained.
Verdict set aside.

INHABITANTS OF GREENVILLE *vs.* LYMAN BLAIR.

Piscataquis. Opinion November 19, 1908.

Taxation. Action for Recovery of Taxes. Irregularities in Election of Assessors. Collector of Taxes. Written Authority. Non-Assessment of Non-Exempt Property. Revised Statutes, chapter 10, sections 31, 65.

1. Actions by towns for the recovery of taxes are not defeasable by mere irregularities in the election of assessors or collector or in the assessment itself, but only by such omissions or defects as go to the jurisdiction, or deprive the defendant of some substantial right, or by an omission of some essential prerequisite.
2. In such actions it is not necessary for the town to show that the person acting as collector of taxes is such collector de jure. It is enough if he was collector de facto.
3. Also it is enough if the written authority to the collector to bring the action is signed by the selectmen, without the addition of the words "selectmen" after their signatures.
4. That the assessors knowingly and wilfully omitted to assess another resident for certain non-exempt property, is no defense to an action for taxes. The defendant must resort to other proceedings to right that wrong.

On exceptions by defendant. Overruled.

Action of debt to recover certain taxes assessed in 1905 against the defendant as an inhabitant of the plaintiff town. Plea, the general issue and also a brief statement as follows:

"And for brief statement, defendant further says no tax was ever legally assessed by the assessors of the town of Greenville for the year 1905 against said Lyman Blair. The defendant did not have three thousand dollars at interest for which he was liable to be assessed in the town of Greenville, as of the first day of April 1905."

Tried at the September term, 1907, Supreme Judicial Court, Piscataquis County. At the conclusion of the evidence the presiding Justice directed the jury to return a verdict for the plaintiff town for the amount of the tax with interest from the date of the writ, and the jury thereupon returned such verdict for $193.01.

The defendant excepted to the order directing the verdict and also excepted to several rulings made during the trial.

The case appears in the opinion.

P. H. Gillin, and Aubrey L. Fletcher, for plaintiff town.

Hudson & Hudson, and J. B. & F. C. Peaks, for defendant.

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

EMERY, C. J. This is an action of debt to recover the State, county and town tax of 1905 alleged to have been duly assessed against the defendant as an inhabitant of the plaintiff town. The presiding Justice excluded some evidence offered by the defense and admitted some evidence against the defendant's objection. After the evidence was all in the presiding Justice directed a verdict for the plaintiff. To this ruling and some rulings on the evidence the defendant excepted.

This not being a case where the defendant's person or property is levied upon by direct warrant from the assessors, but being, instead, an action for the tax, the action will not be defeated by any mere irregularities in the election of assessors or collector, or in the assessment itself, but only by such omissions or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing the action.

The defendant argued the following points only.

1. The record of the March 1905 town meeting of Greenville, as to choice of collector of taxes, is as follows: "Ninth, Voted that the clerk be instructed to cast a vote for Aubrey L. Fletcher for Tax Collector in the town of Greenville for the ensuing year." It further appears that Aubrey L. Fletcher was duly sworn as collector of taxes, and gave bonds as such and entered upon the duties of that office. The assessment of that year and a collection warrant therefor were issued to him by the assessors.

The defendant contends that Mr. Fletcher was not chosen "by ballot" and therefore was not a legal collector. But, if not regularly elected, he was the choice of the town and was de facto col-

lector of taxes. The irregularity in his election, if any, does not affect the validity of the assessment of the tax, nor the obligation of the defendant to pay it. Even if he could for that reason lawfully refuse to pay it to Mr. Fletcher and resist his efforts to collect it by levy, he cannot for that reason avoid payment entirely, nor avoid judgment in this suit, which is by the town itself.

2. A necessary prerequisite to the maintenance of this action by the town, is that it should have been directed in writing by the selectmen of the town, R. S., ch. 10, sec. 65. Aubrey L. Fletcher, the collector of taxes, (de facto at least), testified that before the action was brought he prepared a writing directed to himself as collector of taxes directing him to begin the action, and that it was signed by the three assessors and came so signed into his possession. The writing itself had been destroyed in a fire that consumed Mr. Fletcher's office. He did not testify that the writing was signed by the selectmen, but he did testify that it was signed by Hunt, Metcalf and Young who were the selectmen at the time as well as the assessors. The defendant contends that such a writing was not in compliance with the statute since it does not appear that it was signed by Hunt, Metcalf and Young as selectmen. If necessary that they should have written the word "selectmen" after their names, we think it may be presumed that they did so in the absence of evidence to the contrary under the maxim, "Omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium.

3. The defendant offered to show that the assessors knowingly and intentionally omitted to assess one resident of the town for money at interest though he had $20,000 of such property liable to assessment. The presiding Justice ruled that, even if such were the fact, it would not be a defense to this action. The ruling was right. The defendant must resort to some other proceeding to right that wrong. He cannot because of it avoid the payment of the tax assessed upon him. R. S., ch. 10, sec. 31. As said by the Massachusetts court per Shaw, C. J., in *Watson* v. *Princeton*, 4 Metc. 601, "It has often been held that the omission to tax any particular individual who may be liable does not render the whole tax

illegal and void; and it would be scarcely possible to assess a valid tax if it were otherwise." The defendant therefore, to quote further from the opinion in that case, "has no ground to contend that the tax was void, that he was not liable to be assessed, or that he was assessed for more property than he was liable for. But the gravamen of his complaint is that other persons were not taxed enough, by means of which his rate was higher than it should have been. This cannot be inquired into in an action against the town for money had and received." (to recover back the tax.) No more can it be inquired into in an action by the town to recover the tax. *Dover* v. *Maine Water Co.*, 90 Maine, 180.

No other rulings were argued, and we find no error in them.

Exceptions overruled.

HENRY B. SPITZ et al. *vs.* GEORGE H. MORSE, Administrator.

Somerset. Opinion November 20, 1908.

Guaranty. Promissory Note. Payment. Presumption of Payment. Same May be Rebutted.

In an action upon a written guaranty given to the plaintiffs by defendant's intestate to cover all debts for merchandise to be subsequently sold to one V. C. Bowman, "whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of such debt,"

Held: (1) That the subsequent acceptance by the plaintiffs of three notes aggregating the amount of the bill, and signed by both Bowman and his wife, was a discharge neither of the debt nor the guaranty under the facts as shown by the case and which appear in the opinion.

(2) That while a negotiable promissory note, given for a simple contract debt, is prima facie to be deemed a payment or satisfaction of such debt as between the parties thereto, yet this presumption is one of fact and may be rebutted by evidence showing a contrary intention.

(3) That whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that

he intended to abandon his security and rely upon his note. In the case at bar the existence of the guaranty is of sufficient evidential strength to rebut the presumption of payment, and the other evidence in the case still further militates against such a presumption.

(4) That even if the taking of the notes had discharged the debt, it did not discharge the guaranty, for the guarantor bound himself in express terms to pay all notes given by Bowman to the plaintiffs up to a stated amount and the notes in suit fall within that limit.

On report. Judgment for plaintiffs.

Assumpsit upon a written guaranty dated October 22, 1901, whereby the defendant's intestate, Donald G. Ferguson, guaranteed the prompt payment, at maturity, of all sums of money and debts for merchandize to be subsequently sold by Spitz Bros. and Mork, to his son-in-law V. C. Bowman, not exceeding seven hundred and fifty dollars, "whether such debts be on book account, by note, draft or otherwise and also any and all renewals of such debt." Plea, the general issue with brief statement alleging in substance that the acceptance by the plaintiffs of certain promissory notes, signed by said V. C. Bowman and his wife Lela E. Bowman, aggregating the balance due the plaintiff from said V. C. Bowman when the notes were given, was a discharge of the original debt owed by said V. C. Bowman to the plaintiffs and therefore of the guaranty.

By agreement the case was reported to the Law Court upon an agreed statement of facts supplemented by certain testimony taken out before a commissioner duly appointed for that purpose, with the stipulation that the case should be decided upon so much of the agreed statement and testimony as was legally admissible.

The case is stated in the opinion.

The written guaranty given by the defendant's intestate, Donald G. Ferguson, is as follows:

"For Value Received, the receipt whereof is hereby acknowledged, I do hereby guarantee to Spitz Bros. & Mork, the prompt payment, by V. C. Bowman to Spitz Bros. & Mork, at maturity, of all sums of money and debts which said V. C. Bowman may hereafter owe Spitz Bros. & Mork, for merchandise which they may from time to time sell him whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of any such debt.

"The undersigned shall not be compelled to pay, on this guaranty, a sum exceeding seven hundred & fifty dollars; but this guaranty shall be a continuing guaranty, and apply to, and be available to said Spitz Bros. & Mork, for all sales of merchandise they may make to said V. C. Bowman, until written notice shall have been given by the undersigned to said Spitz Bros. & Mork, and received by them, that it shall not apply to future purchases; and it shall not be terminated by the death of the guarantor without such written notice.

"Notice of the acceptance of this guaranty, and of sales under the same, and demand upon said V. C. Bowman for payment, and notice to D. G. Ferguson of nonpayment is hereby waived.

"In Witness Whereof, the undersigned I hereunto set my hand and seal, this twenty-fourth day of October, A. D. nineteen hundred and one.

"In presence of

V. C. BOWMAN, D. G. FERGUSON."

Walton & Walton, for plaintiffs.
Butler & Butler, for defendant.

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

CORNISH, J. Assumpsit upon a written guaranty dated October 22, 1901, whereby the defendant's intestate, Donald G. Ferguson, guaranteed the prompt payment, at maturity, of all sums of money and debts for merchandise to be subsequently sold by Spitz Bros. and Mork, to his son-in-law V. C. Bowman, not exceeding seven hundred and fifty dollars, "whether such debts be on book account, by note, draft or otherwise and also any and all renewals of such debt." The guaranty was to continue until written notice withdrawing the same was given by the guarantor, and was not to be terminated by the death of the guarantor without such notice.

Merchandise was subsequently sold by Spitz Bros. and Mork to said Bowman on the strength of said guaranty, various payments on account were made and the balance due on January 30, 1902 was $968.92. Shortly after this, Bowman sent to Spitz Bros. &

Mork, three notes, aggregating the balance due, signed by himself and his wife Lela E. Bowman, which were entered by Spitz Bros. and Mork on their books to the credit of the husband on February 13, 1902, and endorsed and cashed in the bank in the ordinary course of business. Spitz Bros. and Mork made an assignment to Spitz Bros. & Co., the plaintiffs, on March 31, 1902, and for the sake of convenience, either firm will be designated as plaintiffs in this opinion. Bowman paid one note for $254.60 at maturity but failed to pay the other two, amounting to $714.32, and these the plaintiffs as endorsers were obliged to take up from the bank and pay. This suit is the result. Ferguson died December 24, 1901, without withdrawing the guaranty.

The defense interposed is that the acceptance by the plaintiffs of the notes signed by Mrs. Bowman, was a discharge of the debt and therefore of the guaranty.

It is a well settled rule of law in this State and Massachusetts that a negotiable promissory note, given for a simple contract debt, is prima facie to be deemed a payment or satisfaction of such debt as between the parties thereto, which simply means, that without further evidence of intent than the giving and receiving of such note, it is construed to be payment. Equally well settled is the rule that this presumption of payment, which is a presumption of fact, may be rebutted by evidence showing a contrary intention. These two rules are usually stated together. *Paine* v. *Dwinel*, 53 Maine, 52; *Strang* v. *Hirst*, 61 Maine, 9; *Crosby* v. *Redman*, 70 Maine, 56; *Bunker* v. *Barron*, 79 Maine, 62; *Thatcher* v. *Dinsmore*, 5 Mass. 299; *Melledge* v. *Boston Iron Co.*, 5 Cush. 158; *Davis* v. *Parsons*, 157 Mass. 584.

Were this simply a question between Bowman and the plaintiffs, in the absence of any guaranty on the part of Ferguson, there might be some ground for claiming that the acceptance of the notes discharged the account. But the existence of the guaranty is of sufficient evidential strength in itself to rebut the presumption of payment, for the plaintiffs cannot be presumed to have intended action so prejudicial to their interests. "The fact that such presumption would deprive the party who takes the note of a substantial benefit

has a strong tendency to show that it was not so intended." *Curtis* v. *Hubbard*, 9 Met. 322. Where a bond was given to secure a balance of account, and a promissory note was afterwards given for the balance of the account, it was held not to be an extinguishment. *Butts* v. *Dean*, 2 Met. 76. "Whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon his security and rely upon his note." *Kidder* v. *Knox*, 48 Maine, 551. To the same effect are *Mehan* v. *Thompson*, 71 Maine, 492; *Titcomb* v. *McAllister*, 81 Maine, 399.

The other evidence in the case still further rebuts the presumption of intended payment. The notes were not sought by the plaintiffs but were voluntarily forwarded by Bowman without any request that the guaranty should be surrendered or discharged. Upon their receipt the plaintiffs at once wrote to Mr. Morse, who was then acting as attorney for the Bowmans, as well as for the Ferguson estate, of which he was subsequently appointed administrator, for information as to the financial condition of Mrs. Bowman and after stating that a recent disastrous fire had compelled them to collect all their accounts, they added "while we are willing to grant Mr. Bowman the extension of time he requests on these notes, we feel we should be secured." Mr. Morse replied that Mrs. Bowman had a third interest in the Ferguson estate, which estate was estimated at six or seven thousand dollars, with liabilities against it of two notes amounting to $1100, "and a guarantee which I understand he signed with Mr. Bowman for your firm." This was after the notes had been forwarded by Bowman and shows conclusively that the guaranty was still recognized by his attorney and presumably by himself, as an existing liability against the estate, while the plaintiffs testify emphatically that they did not receive the notes in discharge of the guaranty. Counsel for defendant contends that the presumption of payment holds because the exchange was advantageous to the plaintiffs, as the notes signed by Mrs. Bowman covered the full amount of the indebtedness $968.92, while the guaranty was limited to $750. The parties themselves did not so regard it nor could the plaintiffs be expected to surrender a certainty of $750 for an uncer-

tainty of $968.92. The purpose of Bowman in sending the notes signed by his wife was not to effect a discharge of the guaranty but an extension of credit, and before granting the extension, the plaintiffs naturally inquired as to the financial condition of Mrs. Bowman, who became surety for the excess of $218.92 after the guaranty had been complied with. The information they received made them willing to accept her signature for that amount which would be otherwise unsecured, but subsequent events proved that their confidence even to this extent was misplaced.

Moreover an extended correspondence was carried on between these parties and their attorneys during the more than two years between the giving of the notes in February 1902 and the bringing of this suit on April 9, 1904, and there was neither claim nor intimation on the part of the defendant of the legal position taken now. The court can usually adopt with safety the interpretation of a transaction fixed at the time by the parties themselves. The taking of the notes did not therefore discharge the debt.

But even if it had, it did not discharge the guaranty. *Parham Sewing Machine Co.* v. *Brock*, 113 Mass. 194. If the notes could be treated as payment as between debtor and creditor, the guarantor would still be held, for he bound himself in express terms to pay all notes given by Bowman to the plaintiffs, up to the amount stated. The notes in suit were so given and the fact that they were also signed by Lela E. Bowman does not remove them from the scope of the guaranty. The defendant is asked in this case simply to fulfil his promise and no legal excuse has been presented for his failure to do so.

In accordance with the terms of the agreed statement, the entry must be,

Judgment for plaintiffs for $718.11, with interest from May 11, 1902, the date of demand.

PHILANDER E. NOYES vs. GEORGE M. GODING AND JOHN O. LEGROO.

Franklin. Opinion November 27, 1908.

Deed. Reservation of Trees. Executory Contract.

The defendants by deed of warranty dated May 2, 1904, conveyed certain land to the plaintiff. The deed contained the following clause: "Excepting and reserving, however, from the above described premises all the pine trees now growing on the same, with the right for the same to remain for a period of two years from date of this deed and not longer." In December, 1907, the defendant entered the premises conveyed by them as aforesaid to the plaintiff and cut and carried away certain of the pine trees standing and growing thereon.

Held: That the clause permitting the removal of the pine trees was an executory contract, the performance of which was to be consummated within two years from the date of the deed and that at the expiration of the two years the right of the defendants to remove the trees had expired.

On report. Judgment for plaintiff.

Trespass quare clausum. The declaration in the plaintiff's writ is as follows: "In a plea of trespass, for that the said George M. Goding and the said John O. Legroo on the first day of December, A. D. 1906, and on divers other days and times between that date and the day of the purchase of this writ, with force and arms, broke and entered the plaintiff's close, situate in Wilton, in said County of Franklin, to wit, a certain piece or parcel of land situated in Wilton aforesaid, bounded and described as follows, to wit: (Description omitted in this report.) "And being so entered as aforesaid, felled, cut down and carried away fifty certain pine trees of great value, to wit, of the value of four dollars each and all of the value of two hundred dollars; also twenty-five hemlock trees each of the value of two dollars and all of the value of fifty dollars; also twenty-five maple trees each of the value of one dollar and all of the value of twenty-five dollars; also certain other trees of different and mixed kinds, to wit, twenty-five trees of the value of twenty-five dollars; also broke down, tore up and injured the soil of said premises particularly great damage to the orchard on said premises

to the value of two hundred dollars, then and there did; and all of the above damage then and there done as aforesaid is to the damage of the said plaintiff (as he says) the sum of five hundred dollars." Writ dated December 21, 1907. Plea, the general issue with brief statement as follows:

"1. That the pine trees were the property of the defendants, and that they had the right to cut and haul them from the ground, and that they had the permission and oral agreement of the said plaintiff to cut and haul off said logs from the premises described in plaintiff's said writ.

"2. That said pine logs were not the property of the plaintiff, but were the property of the defendants and that they had a legal right to said pine trees and logs, and the permission and license and right to enter said premises for the purposes aforesaid.

"3. That in cutting and hauling said logs they did no more damage than was absolutely necessary for the purposes of cutting and removing said logs and lumber from the premises aforesaid."

The premises on which the alleged trespasses were committed and previous to said alleged trespass, had been conveyed to the plaintiff by the defendants by deed of warranty dated May 2, 1904. Said deed contained the following clause: "Excepting and reserving, however, from the above described premises all the pine trees now growing on the same, with the right for the same to remain for a period of two years from date of this deed and not longer."

When the action came on for trial, it was agreed "that the timber cut on the premises was cut in December, 1907, against the objection of the plaintiff," and that "if the defendants were entitled to the trees and the right to cut and remove them at the time they did, the damages are to be assessed at $15; if they were not so entitled the damages are to be assessed at $87," and that on these agreements together with the writ and plaintiff's deed as a part of the case, the action should be reported to the Law Court "to render such judgment as the law and the facts requires."

The pith of the case is stated in the opinion.

Enoch O. Greenleaf, for plaintiff.

Joseph C. Holman, for defendant.

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

SPEAR, J. This is an action of trespass quare clausum. The plaintiff purchased the locus in quo of the defendants by deed dated May 2, 1904. It was an ordinary warranty deed containing the following clause: "Excepting and reserving, however, from the above described premises, all the pine trees now growing on the same, with the right for the same to remain for a period of two years from date of this deed and not longer."

It is admitted that the timber purporting to be reserved, was cut in December 1907 against the objection of the plaintiff. No plainer language could be used, calculated to fix the defendants' rights, than that contained in the reserving clause. The trees were all the time a part of the realty. The clause permitting their removal was an executory contract, the performance of which was to be consummated within two years from the date of the deed. At the end of that time, the contract was self-terminating, and the deed then had precisely the same effect touching the trees as if no reservation had ever been made. At the expiration of two years, the defendants' right to remove them had ceased. *Pease et al.* v. *Gibson*, 6 Maine, 81; *Donworth* v. *Sawyer*, 94 Maine, 242; *Emerson et als.* v. *Shores*, 95 Maine, 237 and *Erskine* v. *Savage*, 96 Maine, 57.

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

Judgment for the plaintiff for $87.

JACOB F. BROWN et als.

vs.

MOUNT BATTIE MANUFACTURING COMPANY.

Knox. Opinion November 27, 1908.

Res Judicata. Admission of Indebtedness.

Where the issue raised by a plea in abatement was whether the name "Mount Battie Manufacturing Company" and the name "Mt. Battie Mfg. Co." were legally identical, and such issue was decided in the affirmative, *Held:* That it then became res judicata that the "Mount Battie Manufacturing Company" named in the writ and the "Mt. Battie Mfg. Co." were one and the same defendant and that the defendant's admission that the "Mt. Battie Mfg. Co." was indebted to the plaintiffs was an admission that the "Mount Battie Manufacturing Company" was indebted to the plaintiffs.

On exceptions by defendant. Overruled.

Action of assumpsit on account annexed. Plea, the general issue and brief statement. Cause heard before the presiding Justice with the right of exception. The following admission was made as a part of the record.

"The defendant admits that the bill sued for in the writ was contracted for by the Mt. Battie Mfg. Company with the plaintiffs and is unpaid." No other evidence was offered. Thereupon the presiding Justice ruled that "upon the admission and pleadings in the case, and the decision of the court upon the plea in abatement previously filed, the plaintiffs are entitled to recover and to have judgment for the amount sued for." To this ruling the defendant excepted.

The case is stated in the opinion.

Reuel Robinson, for plaintiffs.

J. H. Montgomery, for defendant.

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

SPEAR, J. This is an action of assumpsit. The defendant is a corporation. The plaintiffs named the defendant as Mount Battie Manufacturing Company. The defendant filed a plea in abatement averring a misnomer in that it should have been impleaded by the name, Mt. Battie Mfg. Co. To this plea the plaintiff filed a replication that the name averred in the plea was but an abbreviation of the name which appeared in the writ; that there was no difference in the pronunciation of the two forms of the name and that the two forms were identical; that the plaintiff is and at the time of the purchase and service of the writ was called and known as well by the name, Mount Battie Manufacturing Company, as by the name, Mt. Battie Mfg. Co. To this replication the defendant filed a demurrer. The demurrer was overruled and the plea adjudged bad. The defendant had leave to plead over upon the payment of costs from the date of his plea. To these rulings the defendant filed exceptions. An order from the Law Court "exceptions overruled for want of prosecution" was received and filed December 24, 1907. The costs were paid and the defendant was allowed to file a new plea.

The case was heard by the presiding Justice who rendered judgment for the plaintiffs. The exceptions show the following agreed statement: "The defendants admit that the bill sued for in the writ was contracted for by the Mt. Battie Mfg. Co. with the plaintiffs and is unpaid." No other evidence was offered. The presiding Justice then ruled that "upon the admission and pleadings in the case, the decision of the court upon the plea in abatement previously filed, the plaintiffs are entitled to recover and to have judgment for the amount sued for." Upon exceptions to this ruling the case comes to the Law Court.

The defendant's contention is that the plaintiff's declaration should have been amended to contain an averment that the defendants named in the plea of abatement was the same defendant named in the writ; that the admission made by the defendant did not show this. We think otherwise.

The issue raised by the plea in abatement was whether the name Mount Battie Manufacturing Company, and the name, Mt. Battie Mfg. Co., were legally identical and was decided in the affirmative. It then became res judicata that the Mount Battie Manufacturing Company named in the writ and the Mt. Battie Mfg. Co. averred in the plea were one and the same defendant. Therefore the defendant's admission that the Mt. Battie Mfg. Co. was indebted to the plaintiffs was an admission that the Mount Battie Manufacturing Company was indebted to the plaintiffs, the two names, as already seen, having been adjudicated to indicate one and the same corporation.

Exceptions overruled.

THOMAS RYAN, JR., vs. A. J. SANBORN.

Androscoggin. Opinion November 27, 1908.

Judge of Probate. Unsigned Decrees. Revised Statutes, chapter 65, section 16.

A Judge of Probate has authority under the provisions of Revised Statutes, chapter 65, section 16, to sign and authenticate decrees which, through inadvertence his predecessor left unsigned or unauthenticated.

The plaintiff filed in the Supreme Judicial Court, Androscoggin County, a petition for partition of certain real estate. It was admitted the plaintiff at the time of filing the petition was the owner of one undivided eighth part of the premises described in the petition unless he has been divested of title by the action of the Probate Court in said county. In 1902 at a Probate Court held in said county, upon proper petition and notice and the filing of a legal bond, the guardian of the plaintiff was granted license to sell said eighth part of said real estate and a guardian's deed of conveyance of said eighth part was executed and delivered to one Parker Carson who had previously acquired title to the remaining seven-eighths. Carson then conveyed the whole of the real estate to the defendant. The Judge of Probate then in office through inadvertence failed to sign the decree granting the license or to approve the bond. After the expiration of his

term of office, his successor, some three years later, signed the decree and approved the bond, upon the ground that the decree was not signed and the bond approved through the inadvertence of his predecessor. But before the Judge of Probate signed the decree and approved the bond, a petition was filed for the removal of the guardian and a decree of removal was signed by the Judge upon the back of which was entered the minute, "Do not docket." Nothing further was done with the decree of removal.

Held: (1) That the action of the Judge of Probate in signing the decree left unsigned and in approving the bond left unapproved by his predecessor, was authorized by the statute, R. S., chapter 65, section 16. (2) That the action of the Judge of Probate under the statute, independent of any question affecting the guardianship of the plaintiff, related back to the act of his predecessor in office and is to be determined solely with reference to what his predecessor had done. (3) That it was unnecessary to decide whether the decree for the removal of the guardian was effective or not.

On report. Case remanded to court below.

Petition for partition filed in the Supreme Judicial Court, Androscoggin County. An agreed statement of facts was filed and the cause was then heard by the presiding Justice who ruled that a certain petition previously filed in the Probate Court for the removal of the guardian of the plaintiff "is still pending, and that the guardian has not yet been removed, and further that for this reason the petitioner is not entitled to maintain this petition." Thereupon by agreement of the parties the case was reported to the Law Court upon the following stipulation: "If the foregoing rulings are correct, the petition is to be dismissed. Otherwise, the Law Court is to direct such judgment as the right of the parties require, upon the foregoing statement of facts."

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Ralph W. Crockett, for defendant.

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

SPEAR, J. This is a petition for partition and involves the title of the petitioner. It is admitted that he is the owner of the undivided eighth of the premises described in the petition unless he has been divested of title by the action of the Probate Court as follows:

On October 14, 1902, the petitioner was an adult person under guardianship. His duly appointed and qualified guardian Maggie G. Ryan, on that day filed her petition for license to sell said estate at public or private sale, in the Probate Court for Androscoggin County. Due notice thereof was given and on November 11, 1902, she filed a bond for the sale of such estate in said court. The decree for the sale was not signed by the Judge of Probate, nor was the form of approval printed on the bond signed, though both were then dated, nor was the bond then approved in any way. No license to sell was ever issued. But on the same day, November 11, 1902, the guardian made a guardian's deed of conveyance in due form of the said estate to one Parker Carson who had previously acquired title to the remaining seven-eighths. Carson conveyed the whole to the defendant. The Judge of Probate then in office, Hon. Franklin M. Drew, continued in office until January 1, 1905, when he was succeeded in the office by Hon. William H. Newell. Nothing further was done in the matter by Judge Drew while he remained in office.

On April 9, 1907, a petition was filed in the Probate Court for the removal of the guardian, on which after notice and hearing, Judge Newell on July 20, 1907, made and signed the following decree:

It is decreed that said Maggie G. Ryan be and she is hereby removed from her said office and trust as guardian of Thomas Ryan, Jr. for causes set forth in the petition.

WM. H. NEWELL,
Judge of Probate.

After leaving the probate office, Judge Newell from his own office telephoned the Register of Probate not to docket the decree, but to hold it. Thereupon the following minute was made on the back of the petition: "Do not docket. Hold by order of Judge Newell, July 20, 1907." Nothing further has since been done with respect to that decree.

On January 14, 1908, Judge Newell signed the decree of sale of November 11, 1902, in the following form:

STATE OF MAINE.

Androscoggin, ss.

At a Probate Court held at Auburn in and for said county, on this eleventh day of November in the year of our Lord, one thousand nine hundred and two.

On the foregoing petition, public notice thereon having been given pursuant to the order of court a hearing having been had, and it appearing that the allegations therein are true.

It is decreed that said petitioner have license as prayed for, to sell and convey said real estate described in said petition, at public or private sale, for the purpose therein named, she first giving bond with sufficient securities in the sum of three hundred dollars.

On January 14, 1908, I signed the within decree, which was made by my predecessor as Judge of Probate Court for the County of Androscoggin, and which it appears from his statement, was not signed through inadvertence.

WILLIAM H. NEWELL,
Judge.

And on the same January 14, 1908, Judge Newell approved the bond for the sale of Real Estate filed November 11, 1902, by decree in the following form:

STATE OF MAINE.

Androscoggin ss. Probate Court.

Nov. 11th, A. D. 1902.

Examined and approved by me on January 14th, 1908, it having been made to appear from Hon. Franklin M. Drew that the same was presented to him for approval, and that the same was not done through inadvertence.

WILLIAM H. NEWELL,
Judge of Probate.

Upon the foregoing statement of facts we deem it immaterial and therefore unnecessary to decide, whether the decree for the removal

of the guardian was effective or not. The action of the Probate Court under the statute, independent of any question affecting the guardianship of the petitioner, related back to the act of his predecessor in office and is to be determined solely with reference to what his predecessor had done. R. S., chapter 65, section 16, is clear upon this point. "Every Judge, upon entering upon the duties of his office, shall examine the records, decrees, certificates and *all proceedings connected therewith*, which his predecessor left unsigned or unauthenticated, and if he finds them correct, he shall sign and authenticate them, and they shall then be valid to all intents and purposes, as if such duty had been done by his predecessor while in office."

In the above decrees, Judge Newell, in issuing the license to sell and approving the bond, specifically states that it was made to appear that his predecessor in office had failed to sign them through inadvertence. It seems to the court that the statute was intended to cover just this case.

In the report it is stipulated: "If the foregoing rulings are correct, the petition is to be dismissed, otherwise the Law Court is to direct such judgment as the rights of the parties require upon the foregoing statement of facts."

The entry therefore must be,

Case remanded to the court below for such further proceedings upon the plaintiff's petition as the law requires.

STATE OF MAINE

vs.

INTOXICATING LIQUORS,

MAINE CENTRAL RAILROAD COMPANY, Claimant.

Androscoggin. Opinion December 1, 1908.

Intoxicating Liquors. Common Carrier. Constructive Delivery. Interstate Commerce. "Wilson Act."

The rule is well established that a constructive delivery of goods by a carrier can be effected only by an agreement between the carrier or middle man and the buyer or person claiming under him whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage to and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent.

The relation of carrier to the shipper, the consignee and the goods is originally fixed by law and by a contract between the parties, which is that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract once existing can be changed only by the operation of law or by an agreement between the parties. When the goods arrive at their journey's end, it is the duty of the carrier to store them. This duty is imposed by law. When stored they are still in the possession and custody of the carrier and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery or by a new contract with the consignee in the place of the contract of carriage.

Certain intoxicating liquors were shipped from different points without the State, arriving at different times by way of the Maine Central Railroad at its freight station in the city of Lewiston. All the liquors were shipped in the names of local firms who did not order nor claim them, or to fictitious names, persons to the railroad company unknown. The various liquors upon their arrival were placed in the freight shed of the railroad company and from time to time thereafter were seized upon proper warrants charging the liquors to be deposited within the State for the purpose of illegal

sale. The longest time any package was in the custody of the railroad company after its arrival at Lewiston, before seizure, was a period of 24 days.

Held: (1) That the evidence was not adequate to establish proof of constructive delivery. (2) That the liquors at the time of their seizure were in transit as interstate commerce in the hands of the carrier.

On report. Judgment for claimant.

Seven search and seizure cases where certain intoxicating liquors shipped from different points without the State, were seized from time to time while in the freight shed of the Maine Central Railroad Company in Lewiston, Androscoggin County, on warrants issued by the Municipal Court of Lewiston charging that the liquors were deposited within the State for the purpose of illegal sale.

The seized liquors were all duly libeled and at the hearings on the libels the Maine Central Railroad Company appeared and claimed the liquors. In each case the Municipal Court held that the seizure was legal and declared the liquors forfeited. The claimant then appealed to the Supreme Judicial Court, in said county. The cases all came on for hearing at the September term, 1907, of said court, at which time an agreed statement of facts was filed in each case and by agreement all the cases were reported to the Law Court, the stipulations, in each case, being as follows: "This case is reported to the Law Court upon the foregoing agreed statement of facts. If upon the material facts therein stated the court shall decide that said liquors were liable to seizure and forfeiture, the judgment of the lower court is to be affirmed; otherwise judgment is to be rendered for the claimant and said liquors ordered to be returned." The cases were all considered together by the Law Court.

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

Frank A. Morey, County Attorney, for the State.

White & Carter, for claimant.

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

SPEAR, J. Seven cases are considered in this opinion, each involving the single question of constructive delivery of intoxicating

liquors by a common carrier under the so-called Wilson Act. No other question is raised either by the State or claimant of the liquors seized. The facts disclose that certain intoxicating liquors were shipped from different points without the State arriving at different times by way of the Maine Central Railroad at its freight station in the city of Lewiston. All the goods were shipped in the names of local firms who did not order nor claim them, or to fictitious names, persons to the railroad company unknown. The various invoices upon their arrival were placed in the freight shed of the defendant company and from time to time thereafter were seized upon proper warrants charging the liquors to be deposited within the State for the purpose of illegal sale. The warrants were served, the seizures made, the liquors libeled, the claimant appeared, a hearing was had, the liquors were declared forfeited and the claimant appealed. The fact that a portion of these liquors finally declared forfeited had been once seized and ordered returned on the ground that they then came within the protection of the interstate commerce clause of the Constitution, becomes immaterial in the consideration of the one issue involved. The longest time any package was in the custody of the railroad company after its arrival at Lewiston, before seizure, was a period of 24 days. The element of time makes this case the strongest for the State, as all the other elements are common to all the cases.

No question is raised that the goods seized were moving in interstate commerce unless they had been constructively delivered to the consignees. *Heymann* v. *Southern Railroad Co.*, 203 U. S. 270; *State* v. *Intox. Liquors*, 102 Maine, 385.

In the Heymann case, the court intimate what facts may be regarded as sufficient to establish constructive delivery in cases of this kind. They say—"Of course we are not called upon in this case, and do not decide if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt

with have come under the operation of the Wilson Act, because constructively delivered." In this paragraph the court seems to have undertaken to state but not to decide the three essential elements of constructive delivery to be, notice to the consignee of the arrival of the goods; a reasonable time on his part after notice to receive them, and a mutual design or arrangement with the carrier to hold them for the consignee. The only evidence of constructive delivery in the case at bar is found in the fact that the goods were retained by the Railroad Company without actual delivery for a space of 24 days (giving the State the benefit of the strongest case) and that the consignees were represented by fictitious names and were to the claimant unknown.

In specifying the elements above named the court uses a phrase which seems to have peculiar significance in its application to the class of cases now under consideration, namely; "designedly left in the hands of the carrier for an unreasonable time." This phrase was undoubtedly intended to allude to a passive or silent understanding between the shippers of liquors, the carriers and the consignees with reference to those transactions which operate to enable an evasion of the law and assist consignees in obtaining a safe delivery of their contraband goods. Yet, notwithstanding this interpretation of the phrase, if a correct one, and sufficient to authorize the inference of constructive delivery, we are unable to find any evidence in the statement of facts which warrants us in declaring that the goods in question were constructively delivered. It will be observed by a reading of the above paragraph that the conduct which might be sufficient for the predication of constructive delivery is ascribed to the acts of the consignee and not to the acts of the carrier. But in the case at bar, it is not the consignee but the carrier who is the claimant. Therefore it appears that the elements of constructive delivery referred to in the Heymann case as applicable to consignees are not found at all in the case at bar against the carrier, as the consignees were fictitious.

The essential elements of constructive delivery are well defined in law. The rule is well established that a constructive delivery can be effected only by an agreement between the carrier or middle man

and the buyer or person claiming under him whereby the former agrees to hold goods for the latter for some purpose other than that of carriage to and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent. American and Eng. Encyc. of Law, Vol. 26, page 1096, and cases cited. See also *Harding Paper Co.* v. *Allen*, 65 Wis. 584; *Jeffris* v. *Fitchburg Railroad Co.*, 93 Wis. 250; *Brewer Lumber Co.* v. *Boston & Albany Railroad Co.*, 179 Mass. 228.

The last case involved the replevin of lumber, sold by the plaintiff to George A. Paul, claimed by right of stoppage in transitu. It appears that the car of lumber was shipped January 31, 1908, and arrived at the yard of the defendant in Boston on February 19, and Paul was notified by an agent of the defendant. On March 4, the defendant stored the lumber in one of its sheds and notified Paul of this fact. On April 9, Paul made an assignment for the benefit of his creditors and on April 16, the plaintiff notified the defendant not to deliver the lumber to Paul claiming the right of stoppage in transitu. The court held that the transit of the lumber was not ended when the plaintiff asserted his right to it and that it made no difference whether the goods were in the hands of the carrier as carrier or whether the carrier at the journey's end put them in a ware-house, laying down this rule: "While the position of carrier may be changed to that of bailee or agent for the purchaser of the goods, yet this is a question of an agreement between the carrier and the purchaser." In this case it will be seen that the goods were in the hands of the carrier about two months before they were claimed by stoppage in transitu, yet the court held that there was no constructive delivery.

The relation of carrier to the shipper, the consignee and the goods is originally fixed by law, and by a contract between the parties which is, that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee.

This contract, once existing, can be changed only by the operation of law or by an agreement between the parties. When the goods arrive at their journey's end it is the duty of the carrier to store them. This duty is imposed by law. When stored they are still in the possession and custody of the carrier and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. *State* v. *Intoxicating Liquors*, 102 Maine, 385. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery or by a new contract with the consignee in the place of the contract of carriage. As already seen in the case before us, no actual delivery of the goods was made and no evidence is found adequate to establish proof of constructive delivery. Therefore, the various packages of goods seized must be held at the time of their seizure to have still been in transit as interstate commerce in the hands of the carrier.

In accordance with the stipulation in the report, the entry must be in numbers 19 to 25 inclusive,

Judgment for the claimant.
Liquors ordered to be returned.

RUTH F. FULLER, by her next friend,

vs.

J. K. BLAIR et al. & Trustee.

Cumberland. Opinion December 3, 1908.

Minor. Wages Belong to Father, When. Action in Name of Minor. Same Cannot be Maintained, When.

1. The wages earned by a minor belong to his father, unless the latter has voluntarily relinquished them.
2. And a suit to recover such wages, brought in the name of the minor cannot be maintained, in the absence of proof of such relinquishment by the father.
3. No such relinquishment is shown in the case at bar.

On exceptions by plaintiff. Overruled.

Action of assumpsit on a quantum meruit count, brought in the Superior Court, Cumberland County, by the plaintiff, "Ruth F. Fuller, an infant under the age of twenty-one who brings this action by William D. Fuller of said Portland her next friend," to recover compensation for her services as a singer in a certain place of amusement in Portland, conducted by the defendants, J. K. Blair and J. E. McGuiness, copartners doing business under the name and style of the "New York Amusement Company." Plea, the general issue. Tried at the April term, 1908, of said Superior Court. The bill of exceptions further states the case as follows: "During the presentation of the evidence, counsel for plaintiff requested that the plaintiff might sing some of the songs for which she claimed compensation in her declaration but the presiding Justice declined to allow her to sing before the jury. After the plaintiff's evidence was presented, on motion of William H. Gulliver, Esq., attorney for the defendants, the court ordered a nonsuit because the action was not brought in the name of William D. Fuller, the father of Ruth F. Fuller, but by Ruth F. Fuller by

the father as next friend. It appeared that the father took no active part in making the trade but was informed that his daughter was engaged to sing prior to the services rendered for which the action is brought." The plaintiff then excepted to the aforesaid rulings and order of nonsuit.

Dennis A. Meaher, for plaintiff.

William H. Gulliver, for defendants.

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

SAVAGE, J. Exceptions to an order of nonsuit. The plaintiff is a minor and brings this suit in her own name by her father as next friend, to recover compensation for her services as a singer. The sole question presented by this exception is whether her earnings belong to her or to her father. If they belong to her, the order of nonsuit was erroneous. But if they belong to her father, she cannot maintain a suit for them in her own name, even if her father is willing. The father might waive his right to her services, and permit her to labor on her own account for her own benefit, in which case she could recover in her own name; but, of course, he cannot change a liability of the defendant to himself into a liability to his daughter by simply waiving his claim.

The law upon this subject has been so recently discussed by the court in *Merrill* v. *Hussey*, 101 Maine, 439, that it will suffice to state briefly the rules involved in this case. It is the general rule that a father, since he is bound to support his minor child, is entitled to the child's wages. They belong to him, just as his own wages do. He may relinquish this right to the child. He may do so by a general emancipation, or he may relinquish his right pro tanto, or in a particular instance. If a minor earns wages with the consent of the father that they shall belong to the minor, the latter is entitled to them, and not the father. *Boobier* v. *Boobier*, 39 Maine, 406. If a minor makes a contract for his services on his own account, and the father knows of it and does not object, the law implies the father's consent that the wages shall belong to the

minor. *Whiting* v. *Earle*, 3 Pick. 201; *Boynton* v. *Clay*, 58 Maine, 236. So, when a minor makes contracts for himself with the knowledge of the father, this is evidence of the latter's consent. *Manchester* v. *Smith*, 12 Pick. 113. So, when the father authorizes the minor to go into a particular service and have his earnings, the minor is entitled to recover them in his own name, to his own use. *Merrill* v. *Hussey*, supra.

It will be noticed that in these cases the right of the minor to his own wages, in the absence of a general emancipation, was recognized only when the wages were earned "with the consent of the father that they shall belong to the minor," or when the minor, with his father's consent, made a contract for his services "on his own account," or when the minor, with like consent, made a contract "for himself," or when the father authorized him to "have his earnings."

In this case no general emancipation is claimed. The contrary appears. The plaintiff, a thirteen years old school girl, was permitted by her parents to sing in public for hire. In general the mother made the arrangements, with the consent of the father. The earnings were paid to the mother and put into the family purse, for family use. In the particular instance involved in this case, the mother made the contract, and the father knew of it and consented to it. But there is no evidence that he consented that the daughter's wages should belong to her. It is plain, on the contrary, that he did not.

It follows that a nonsuit was properly ordered.

Exceptions overruled.

U. S. PEG WOOD, SHANK AND LEATHER BOARD COMPANY

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion December 3, 1908.

Trespass. Railroad Location. Record Proof Lost. Secondary Evidence. Presumptions. Oral Agreement. Estoppel. Nonpayment of Damages. Waiver. Statute, 1876, chapter 120, sections 6, 8.

1. When the record proof of a railroad location, under the statute, has been lost or destroyed, secondary evidence of compliance with the statutory requirements may be introduced.
2. Where, after the lapse of more than twenty-five years during which a railroad had been maintained and operated over the premises of a land owner without objection, *held* that every presumption should be given in favor of the regularity of the proceedings whereby the railroad was located.
3. Where there was an oral agreement between a land owner and a railroad company under which the railroad was to cross the premises of the land owner, *held* that such owner was estopped from setting up, as against the validity of the location, the failure of the railroad company to file a plan in the registry of deeds.
4. Where there was an oral agreement between a land owner and a railroad company under which the railroad was to cross the premises of the land owner, *held* that the nonpayment of compensation to the land owner could not defeat the validity of the location if the claim for damages was waived by the land owner at the time, and that the existence of such oral agreement together with the subsequent occupation of the land by the railroad company were convincing evidence of such waiver.
5. Where there was an oral agreement between a land owner and a railroad company under which the railroad company was to cross the premises of the land owner, *held* that the railroad company was not entitled to a full four rod location across the premises but was to have as much land as was needed for a road bed and road purposes or "whatever was needed for a road to go across."
6. In the case at bar, *Held:* That the evidence coupled with the surveys and plans leads to the conclusion that the defendant in relaying its tracks in 1902, did not trespass beyond the limits of its right of way.

On report. Judgment for defendant.

Action of trespass quare clausum alleging that "the defendant corporation on the first day of October A. D. 1902 and on divers other days and times between that day and the day of the purchase of this writ with force and arms, broke and entered the plaintiff's close, situate in Brownville, in the county of Piscataquis," and "then and there dug up the soil, made excavations, made fills, threw up embankments, built and constructed a railroad over and across said land," etc. Plea, the general issue with brief statement alleging a legal taking of the locus as a part of the location of the Bangor and Katahdin Iron Works Railway in 1881.

Tried at the September term, 1906, Supreme Judicial Court, Piscataquis County, and at the conclusion of the testimony it was stipulated as follows: That "upon so much of the foregoing evidence as is competent and legally admissible, the parties agree that this case shall be reported to the Law Court for a decision. If judgment is rendered for the plaintiff it is agreed that the damages are to be assessed by the Law Court at one hundred dollars."

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

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

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

CORNISH, J. Trespass quare clausum. The title of the plaintiff and the entry by the defendant are admitted. The defendant justified by reason of an alleged legal taking of the locus as a part of the location of the Bangor and Katahdin Iron Works Railway in 1881. The plaintiff admits that the defendant has succeeded to the rights of the Bangor & Katahdin Iron Works Ry., but denies that the locus is within any legal location.

Two questions arise:

First. Has the defendant proved a legal location over the plaintiff's land?

Second. Are the tracks, as relaid by the defendant in 1902, within that location?

The case discloses that the Bangor and Katahdin Iron Works Railway was organized under the general laws of the State on August 2, 1881, for the purpose of building a standard gauge railroad from Milo through Brownville and other townships to the Katahdin Iron Works, all in the County of Piscataquis. A corporation to build a narrow gauge railroad over the same route had been formed earlier in the same year but proceedings under that charter were abandoned. The charter of August 2, 1881, was accepted by the corporation on August 13, 1881.

Chapter 120 of the Public Laws of 1876, the then existing general law under which this railroad corporation was formed, specified in detail the legal steps to be taken both before and after the construction of the road.

Section six of that act required the following proceedings before commencing construction,

1. A petition to the railroad commissioners for approval of location, accompanied with

a. A map of the proposed route on an appropriate scale.

b. A profile of the line on a vertical scale of ten to one compared with the horizontal scale.

c. A report and estimate prepared by a skilful engineer from actual survey.

2. Notice and hearing on such petition.

3. The approval of the proposed location by the railroad commissioners and the finding that public convenience required the construction of the road.

4. Filing with the clerk of court of county commissioners within two years from the time the articles of association were filed with the secretary of state, a plan of the location, defining its courses, distances and boundaries.

5. Filing with the board of railroad commissioners, a copy of said plan within the same time.

Section eight required the following proceedings within one year after any part of the road had been constructed and opened for operation.

1. Filing in the office of Secretary of State a map and profile of the road and of the land taken or obtained for the use thereof, certified and signed by the president and engineer of the corporation.

2. Filing a like map in the registry of deeds.

The record proof of many of these steps was not in the possession of the defendants. Unfortunately, as the evidence shows, the railroad commissioners of this State had no official home and kept no official records prior to 1889. A few scattered papers involving matters that arose between 1883 and 1889 were discovered and rescued, but the office is furnished with nothing relating to railroad proceedings prior to 1883. The original papers therefore which should be in the office of the railroad commissioners cannot be found.

Under these circumstances the defendant was properly allowed to introduce secondary evidence of the facts. The confident and trustworthy attorney, who had charge of the incorporation testified that all the legal requirements of section 6 of chapter 120 of the Laws of 1876, were in fact complied with; that upon a proper petition and after due notice, the location was approved by the railroad commissioners on August 19, 1881 and that a plan of the location of the road defining its courses, distances and boundaries and perfect in every respect was duly filed with the clerk of courts of county commissioners and a copy of the same with the railroad commissioners; that he subsequently borrowed the plan from the clerk's office and left directions for its return, but evidently the directions were not carried out. Whatever plan was filed with the railroad commissioners disappeared like all their other papers and documents.

This testimony is corroborated so far as the hearing is concerned by a newspaper containing a copy of the petition for approval of location and order of notice thereon, which recites that the corporation presents therewith a map of the proposed route and a profile of the line of the same, together with a report and estimate thereof, prepared by a skilful engineer from actual survey. The original profile bearing the approval and original signatures of the railroad

commissioners under date of August 19, 1881, was found among the papers of the defendant's predecessor in title and offered in evidence. Under the circumstances of this case and after the lapse of more than twenty-five years, during which the road has been maintained and operated over the land of the plaintiff and its predecessor in title without objection, every presumption should be given in favor of the regularity of the proceedings. *Cushing* v. *Webb*, 102 Maine, 157. This published notice, if its recitals are correct, and we take them to be so especially in view of the approved profile, meets six of the requirements of section six. The testimony of the attorney supplies the balance, and all are confirmed by the railroad commissioners' report of 1882 stating that a portion of the road had already been built and the remainder would be completed early the coming season.

The requirements of section eight of chap. 120, Public Laws of 1876, are fulfilled by the production of the original papers from the office of the secretary of state, namely, a map and a profile of the road and of the land taken or obtained for the use thereof, each certified and signed by the president and engineer of the corporation, the map being dated June 1882 and the profile being filed November 28, 1882.

A copy of the same could not be produced from the registry of deeds although a like map of the location under the abandoned narrow gauge corporation was produced and the plaintiff contends that no other was filed under the standard gauge location. Were this true we do not think it could affect the rights of the parties in this case. The object of filing the plan in the registry of deeds is to enable the land owner to secure that "just compensation" required by the Constitution, and if he secures satisfaction otherwise he certainly cannot complain. The plaintiff itself introduced evidence in this case to show an oral agreement between the president of the railroad company and the owner of the land in 1881 under which the road was to cross the premises in question. Such conduct on the part of the land owner estops him from subsequently setting up as against the validity of the taking, the failure to file the plan in the registry of deeds. *Rockland Water Co.* v. *Tillson*, 69 Maine,

255; *Moore* v. *Boston*, 8 Cush. 274; *Stubbs* v. *Railway Co.*, 101 Maine, 355.

The plaintiff further attacks the validity of the location because no compensation was paid to the land owner. But this also may be waived by the land owner, *Perkins* v. *Maine Cen. R. R. Co.*, 72 Maine, 95, and the agreement before referred together with the subsequent occupation by the defendant for so many years without objection are convincing evidence of such a waiver.

It is therefore the opinion of the court that the defendant has introduced ample evidence to prove a legal location over the plaintiff's land.

We come now to the second proposition, are the tracks as relaid in 1902 within the legal location.

The maps of the location filed with the clerk of the county commissioners and with the railroad commissioners being lost and only the center line being given on the profile and map filed with the secretary of state, it is impossible to ascertain from record evidence the exact width of such location across the plaintiff's premises. The statute permitted a location not exceeding four rods in width for a standard gauge road. Competent engineers who testified at the trial, made a survey of the line for a long distance both north and south of the mill property and found from existing monuments that the width was four rods. In the absence of other evidence it might be presumed that the width at the mill property was the same. Such a presumption, however, is in a measure rebutted by the fact that the side lines of a location of that width would have passed through buildings then and still standing.

Moreover the plaintiff introduced evidence of an arrangement made between the president of the road and the then owner of the land, by which, according to the owner's testimony, the railroad company was to have what was needed for a road bed and for road purposes or as he restated it, "whatever was needed for a road to go across," and the center line was then staked out by them. Subsequently upon finding that the center line had been moved in his absence nearer to his buildings, the land owner sent for the president and the stakes were replaced in their original position.

Such an agreement, though oral, in the absence of any valid record location to control it, confined the right of way to the agreed width namely, "whatever was needed for a road to go across." This reduces our question to another form, how much was needed for a "road to go across" and has the defendant trespassed beyond that limit?

It appears that the road was built in 1881 with a single track through these premises. In 1894 a branch track was constructed between the main track and the plaintiff's mill, extending partly, and later on, wholly across the lot, for which the defendant did the grading and furnished the iron. In 1902 the defendant when it came into possession of the property, took up the branch track, moved the old Katahdin Iron Works track toward the west and laid its own main line within what it claims was the original location of the Bangor and Katahdin Iron Works Railway.

It is not seriously controverted that proper railroad construction requires on level ground for a single track a width of at least two rods in addition to a suitable width for ditches to take care of the drainage. In case of a fill this width is increased, every additional foot in depth requiring three feet additional in width. The fill across these premises was of varying depths, being seven feet at the deepest point, which would require a width of thirty-seven feet. By ascertaining from the plans and profiles the center line of the original location upon the face of the earth for a long distance both north and south of the plaintiff's premises, it can be reproduced across the premises themselves, and then by applying the admitted rule of proper railroad construction, the actual width of the original right of way agreed upon by the parties can be ascertained and the actual location reproduced. The actual location of the present tracks as relaid in 1902 can then be compared with the original location and the question of trespass can be readily determined. The results of these steps are shown in the plans introduced by the defendant, and in a measure by that introduced by the plaintiff. It is unnecessary to enter into a detailed statement of the facts and figures, as contained in the reported evidence which we have critically examined. It is sufficient to say that in the opinion of the

court the defendant has maintained its claim by a preponderance of the evidence, and the answer to the second question must therefore be that the tracks as relaid in 1902 were within the legal location.

Judgment for defendant.

JOHN W. BARRETT

vs.

LEWISTON, BRUNSWICK & BATH STREET RAILWAY COMPANY.

Sagadahoc. Opinion December 4, 1908.

Accord and Satisfaction. Settlements. Written Release.

The plaintiff was a passenger on a street car of the defendant company and by reason of a partial derailment of the car, his right leg was fractured so that eventually it became necessary to amputate the leg above the ankle and later to amputate it above the knee. The liability of the defendant company for the damages sustained by plaintiff was not denied, and twenty-five days before the first amputation a settlement of the plaintiff's claim was effected and a release under seal was executed by the plaintiff and delivered to the defendant in consideration of the payment of $500 in cash and the assumption by the defendant company of all the hospital expense and surgeon's bills. Afterwards the plaintiff brought suit against the defendant company to recover damages for the injuries sustained. The execution of the aforesaid release on the part of the plaintiff and the full payment by the defendant company of the full consideration aforesaid, were not controverted by the plaintiff but the settlement was repudiated by him and its validity denied on the ground that as a result of the injury he was in such feeble condition of body and mind at the time of the alleged settlement that he "had neither the memory or the power of connected thought, nor the will to make a legal contract." The jury returned a special finding that at the time the plaintiff signed the release he did not have "sufficient mental capacity to understand that he had a claim against the railway company for compensation for the injury to his leg, and that by accepting the $500 and signing the release he was discharging the company from that claim." A general verdict was also returned for the plaintiff for $1612.50.

Held: That there was not sufficient evidence to warrant the special finding of the jury that the plaintiff did not have sufficient mental capacity to comprehend the questions involved in his negotiations for a settlement of his claim and that, therefore, the general verdict must be set aside.

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. Plea, the general issue.

Tried at the April term, 1908, Supreme Judicial Court, Sagadahoc County. During the trial, the defendant introduced in defense a certain instrument signed and sealed by the plaintiff and by him delivered to the defendant and of the following tenor:

"To all whom these presents shall come or may concern, Greeting:

Know ye, That I, John W. Barrett, for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to me in hand paid by the Lewiston, Brunswick and Bath Street Railway, the receipt whereof is hereby acknowledged, have remised, released and forever discharged, and by these presents do for myself, my heirs, executors and administrators remise, release and forever discharge the said Lewiston, Brunswick and Bath Street Railway, its successors and assigns, of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against the said The Lewiston, Brunswick and Bath Street Railway ever had, now have, or which I or my heirs, executors or administrators, hereafter can, shall or may have, for, upon or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents.

"In Witness whereof, I have hereunto set my hand and seal the 27th day of October in the year of our Lord one thousand nine hundred and six.

"Sealed and delivered
in the presence of
"F. C. Farr, Witness.

John W. Barrett. (Seal)"

The plaintiff contended that at the time he executed the aforesaid instrument and as a result of his injury he was in such a feeble condition of body and mind that he "had neither the memory or the power of connected thought, nor the will to make a legal contract," and upon that issue the following question was submitted to the jury: "At the time of his signing the written release did the plaintiff have sufficient mental capacity to understand that he had a claim against the railway company for compensation for the injury to his leg, and that by accepting the $500 and signing the release, he was discharging the company from that claim?" The jury answered the question in the negative and also returned a general verdict for the plaintiff for $1612.50. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Newell & Skelton, for defendant.

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

WHITEHOUSE, J. On the eleventh day of October, 1906, the plaintiff, a farmer living in the town of Topsham, was a passenger on the defendant's street railway car and by reason of a derailment of the rear wheels at a curve in the road north of the short bridge across the river, the body of the car came in collision with the iron truss of the bridge, and the right leg of the plaintiff, who was standing on the running board, was caught between the car and the bridge and both bones of the leg fractured near the ankle.

The plaintiff was immediately taken in a team to the office of Dr. Palmer in Brunswick, where the fractures were temporarily adjusted and the leg dressed by Dr. Palmer with the assistance of Dr Elliot. Subsequently on the same day, he was removed to the Sisters of Charity Hospital at Lewiston, where he remained until sometime in February, 1907. By reason of the injury to the muscles and blood vessels of the leg, it was the judgment of Dr. Russell in charge of the hospital from the time he saw the plaintiff on the twelfth day of

October, 1906, that amputation would be necessary, but the plaintiff would not consent to it until November 21, when the leg was amputated between the knee and the ankle, and the plaintiff says he remembers "how mad" he was with the doctor for amputating it then. But the improvement hoped for and expected was not realized and on the 29th day of January following, a second amputation was made above the knee. Thereupon satisfactory progress towards recovery was observable and the plaintiff was able to leave the hospital and go to his home in about three weeks from that time.

The liability of the defendant company for the damages resulting to the plaintiff from this injury was not contested and on the 27th day of October, 1906, twenty-five days before the first amputation, a settlement of the plaintiff's claim was effected by means of a personal interview between the plaintiff and Mr. Farr, the manager of the Railway Company, and a release under seal was executed by the plaintiff and delivered to the defendant in consideration of the payment to him of $500 in cash and the assumption by the company of all hospital expenses and surgeons bills.

The execution of this release on the part of the plaintiff and the payment by the defendant of the full consideration above specified, were not controverted by the plaintiff but the settlement was repudiated by him and its validity denied on the ground that as a result of the injury he was in such a feeble condition of body and mind at the time of the alleged settlement that he "had neither the memory or the power of connected thought, nor the will to make a legal contract."

At the trial of this action brought by the plaintiff to enforce his claim for damages, the jury returned a special finding that at the time the plaintiff signed the written release he did not have "sufficient mental capacity to understand that he had a claim against the railway company for compensation for the injury to his leg, and that by accepting the $500 and signing the release he was discharging the company from that claim." A general verdict was accordingly returned in favor of the plaintiff with damages assessed at

$1612.50. The case comes to the Law Court on a motion to set aside this verdict as against the evidence relating to the validity of the settlement.

With respect to the plaintiff's knowledge of his condition at the time of the execution of the release, Dr. Russell states that he had advised amputation from the beginning; that it was evident for three or four weeks that the plaintiff must lose his leg and that he so informed him before the settlement was made.

In regard to the circumstances leading to the negotiations for a settlement and the conditions under which the settlement was made, it appears from the testimony of Mr. Farr and Dr. Palmer that the plaintiff had expressed a desire to make a settlement with the company without the intervention of a lawyer and a willingness to negotiate with any representative of the company for that purpose and Dr. Russell testifies as follows in relation to that interview:

"Mr. Barrett was moved in the private room and Mr. Farr was in with him a certain length of time, I don't know how long; but after a time Mr. Farr sent for me and asked me if I wouldn't come in and witness Mr. Barrett's signature, as he had settled with him, and I did so. I asked Mr. Barrett if he was satisfied with the trade that he had made. I knew nothing of what he had got at that time, and he says, "I am." "Well, now," I says, "do you know if you lose your leg, or whatever comes up, that you wont get any more out of this if you sign this paper?" and he says, "I do, Mr. Farr has used me all right, and I am satisfied." I then asked him if he had read the paper he was going to sign. He said he hadn't, and I took the paper and read it to him, and asked him if he was satisfied to sign that paper, knowing that he would get nothing more. He said he was. He signed it and I witnessed it."

Dr. Russell further testifies that he saw the plaintiff every day from October 12 until October 31; that on the morning of October 27 when the settlement was made, the plaintiff's temperature and pulse were normal and that he saw nothing in his appearance to indicate that he did not perfectly understand the contract or release which he read to him. He states that subsequently there were times when he had sepsis or blood poisoning caused by the absorp-

tion of pus, and in order to relieve his suffering at such times it was necessary to give him morphia which "made him wandering a good deal," but that it was proved by the hospital chart kept in his case that this condition did not exist until November 1, and that on the morning of October 27 his mind was clear.

Dr. Palmer continued to visit the plaintiff after he took him to the hospital and saw him there four times before the settlement of October 27, and seven times after that time. He states that there was nothing in the plaintiff's physical condition or in the injuries from which he was suffering on October 27, which would indicate any impairment or weakening of his mental processes. He further testifies to a conversation with the plaintiff in relation to the settlement as follows:

"I came up from Brunswick to see him, and I hadn't talked with him but a few moments when he said, "Doctor, I have settled with the Road," and seemed pleased about it, and I asked him, or set out to ask him, what he got, and there were patients all around in the ward and I thought perhaps he wouldn't want to talk before them, and I set down some figures on a piece of paper and asked him if he got that, and he said "No." I judged from the way he talked that after I set down the figures he thought I was disappointed, and he said, "Doctor, you don't know how bad I wanted this money." He said, "I had some notes coming due at the bank, and," he says, "I wanted the money." I says, "Are you satisfied?" He says, "Perfectly satisfied." I remember very clearly the making of this remark: He says, "I have got the money and I am going to keep the leg."

Mr. Farr, the manager of the railroad, who made the settlement in behalf of the company, testified that in pursuance of the plaintiff's expressed wish to have a personal interview with the agent of the company for the purpose of obtaining a prompt settlement of his claim for damages, he called at the hospital on the morning of October 27 and found the plaintiff capable of discussing the matter clearly and intelligently. He testifies that after the terms of settlement had been agreed upon, he called Dr. Russell into the room and stated to him in presence of the plaintiff that they had agreed

upon a settlement and showed him the release which had been prepared but not signed. According to his testimony the following conversation then occurred between Dr. Russell and the plaintiff.

"Now," he says, "Mr. Barrett, do you understand that when you sign this release, that you can get nothing more from the company?" Mr. Barrett says, "Yes, I do." Dr. Russell says, "I want to read this release through to you, so as to be absolutely certain that you understand what you sign." He read the release from start to finish. "Now," he says, "Mr. Barrett, you understand it?" Mr. Barrett says, "Yes." He says, "When you put your name to that release you understand that it forever releases the company from any liability?" "Yes." "It is satisfactory to you?" "Yes." There was a board that set in the room, some kind of a fixture; I took it and put it up on the bed and Mr. Barrett signed it and I witnessed it."

It is not contended in behalf of the plaintiff that any misrepresentations of fact were made by Mr. Farr during the negotiations for a settlement or that the release was obtained by any fraudulent methods. It is not attacked on the ground of fraud. Nor is there any suggestion that apart from the effect of the injury and the medical treatment the plaintiff was not a man of good intelligence and full legal competency to make contracts and transact business. The validity of the release is denied solely on the ground that by reason of the alleged septic poisoning and the influence of morphia administered to relieve his suffering, the plaintiff did not have sufficient mental capacity and strength to appreciate the existing conditions and to make the contract of settlement comprised in the release signed by him on the morning of October 27.

On the other hand the defendant says it is conclusively shown by the testimony of two disinterested surgeons based upon personal observation of the patient as well as the hospital chart, that whatever his condition may have been weeks or months later, there was nothing on the morning of October 27 to indicate that he was not in a normal condition of mind, possessed of sufficient active memory to collect all of the elements of the business to be transacted and sufficient mental power to form a rational judgment in relation to them.

It is further claimed that there is nothing in the testimony introduced by the plaintiff which has any legitimate tendency to show that on the morning of October 27, he did not talk coherently and act intelligently in making the settlement.

The plaintiff says he has no doubt that the name of John W. Barrett at the bottom of the release is his signature, although he has no recollection of writing it, and he remembers that Dr. Russell talked with him about the settlement and that he had in his possession $500 which he gave to the Sisters of Charity for safe keeping. He admits that he supposed he was all right up to the time of the final amputation, but says there are now two reasons why he thinks he was not in his right mind at the time of the settlement; one is the release itself, and the other is the fact that since the paper was written he has lost his leg.

Eight witnesses were called by the plaintiff. A patient who lay on a cot next to the plaintiff testifies that when he returned from the conference with Mr. Farr, he said he had settled with the company and "lay right down and went to sleep like." The male nurse who had care of him gives no testimony showing that he was not in a normal condition of mind on the morning of October 27, and admits in cross examination that the plaintiff then appeared as well and talked as rationally as he had before. He says the plaintiff went off to sleep as soon as he put him to bed, but Dr. Russell testifies that no narcotics were administered to him either that day or the day before. This nurse further states that he had repeatedly told the plaintiff both before and after the settlement that his leg could not be saved.

Six of the plaintiff's neighbors who called upon him at different times while he was under treatment at the hospital give testimony tending to show that on some occasions he was drowsy, or incoherent or irrational, but in no instance does this testimony relate to his condition on October 27, or at any time prior to that date; nor is it in conflict with the testimony of the surgeons.

The plaintiff was a man forty-five years of age, and that he was a man of unusually robust health and strength at the time of the accident is evident from the fact that after two amputations of his

leg he made such a prompt and excellent recovery that he was able to go to his home in three weeks after the last operation and has since suffered no appreciable pain. It may also be worthy of observation that the small amount of tissue and the crushed condition of the blood vessels at the point of the fractures near the ankle joint had a tendency to diminish the liability of a rapid absorption of the septic poison in the system, and to render more probable the accuracy of the surgeon's testimony and the reasonableness of the defendant's contention in regard to the alleged septic condition of the plaintiff on October 27.

Upon full consideration it is therefore the opinion of the court that there was not sufficient evidence to warrant the special finding of the jury that the plaintiff did not have sufficient mental capacity to comprehend the questions involved in his negotiations for a settlement of his claim and to form a rational judgment in relation to them. As observed by this court in *Valley* v. *Boston & Maine R. R. Co.*, 103 Maine, 106. "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."

The certificate must accordingly be,

Motion sustained.
Verdict set aside.

In Equity.

LUCY C. FARNSWORTH, Admx.,

vs.

GEORGE F. WHITING, ISABELLA A. MARTIN AND DAVID N. MORTLAND.

SAME

vs.

GEORGE F. WHITING, ISABELLA A. MARTIN, DAVID N. MORTLAND AND SECURITY TRUST COMPANY.

Knox. Opinion December 4, 1908.

Bill in Equity. Demurrer. Amendments. Allegations. "Equitable Replevin." Jurisdiction. Bill for Restitution of Notes, Bonds, etc., Sustainable. Revised Statutes, chapter 66, section 70; chapter 79, section 6, paragraph IX.

1. A bill in equity for an injunction may be amended in matters of mere form without an affidavit to the amendment. An amendment inserting the words "and therefore alleges" after the words "is informed and believes" in such a bill is allowable without affidavit.
2. A bill in equity for the purpose of "equitable replevin" of chattels need not allege fraud and is not demurrable for want of allegation of facts constituting fraud.
3. In a bill in equity for the restitution of chattels, the plaintiff's title is sufficiently stated by an allegation that they belonged to the plaintiff and that he is entitled to the possession of them.
4. The omission to specify in a bill in equity the particular time and place where a demand was made and refused is not cause for general demurrer if demurrable at all.
5. If the case stated in a bill in equity is one within the equitable jurisdiction of the court whether by the general principles of equity jurisdiction or by statute, there is no need to allege that there is no plain adequate and complete remedy at law.
6. A bill in equity for restitution of promissory notes, bonds and stock certificates, and of a key to a safe deposit box, is sustainable upon general principles of equity jurisdiction and also by statute, R. S., chapter 79, section 6, paragraph IX.

7. A bill in equity by an administrator to compel the delivery of chattels, notes, bonds, etc., belonging to the estate is not a bill for discovery and can be sustained without first citing the defendant for examination under R. S., chapter 66, section 70.

Caleb v. *Hearn*, 72 Maine, 231, distinguished.

In equity. On report. Demurrers overruled. Defendants to answer.

Two bills in equity brought by the plaintiff, Lucy C. Farnsworth, in her capacity as administratrix, with the will annexed, of the estate of James R. Farnsworth, deceased testate. In the first entitled cause the bill was brought to compel the defendants, George F. Whiting, Isabella A. Martin and David N. Mortland, to return to her as administratrix aforesaid certain notes, bonds, checks and stock certificates belonging to the said James R. Farnsworth and alleged to have been taken and carried away from his house by the defendants, George F. Whiting and Isabella A. Martin, and by them deposited with the defendant David N. Mortland. In the second entitled cause the bill was brought to compel the defendants, George F. Whiting, Isabella A. Martin, David N. Mortland, and the Security Trust Company, to deliver to the plaintiff as administratrix aforesaid all the keys to a certain safe-deposit box rented by the said Security Trust Company to the said James R. Farnsworth and containing at the time of his death, certain bonds, certificates of stock and other valuable papers belonging to him, also to prevent the said Security Trust Company affording either of the other defendants access to the box, and also to compel the said Security Trust Company to afford the plaintiff access to the box. A demurrer, general and special, was filed in each case. After the filing of the demurrers, motions to amend the bills were filed.

When these causes came on to be heard on bills and demurrers, it was agreed that each case should be reported to the Law Court "upon bill and demurrer, together with the complainant's motion to amend," and with the following stipulation in each case: "If, in the opinion of the Law Court, as matter of law, the amendments are not allowable, the court is to decide the demurrer on the bill as it stands; but if allowable, the bill is to be taken as amended; and the demurrer is to be decided as if filed to the amended bill."

The cases are stated in the opinion.

Orville Dewey Baker, for plaintiff.

David N. Mortland, and Rodney I. Thompson, for defendants Whiting and Mortland.

Arthur S. Littlefield, for defendant Security Trust Company.

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

EMERY, C. J. Ignoring for the present whether it has been told in sufficient legal phraseology or with sufficient directness and completeness of statement, the story the plaintiff tells in these two bills in equity is substantially as follows:

Helen A. Farnsworth of Rockland died May 5, 1905, intestate and without issue, but leaving as heirs her husband James R. Farnsworth, a brother Mr. Whiting, and a sister Mrs. Martin, the last two residing then and now out of the State. David N. Mortland of Rockland was duly appointed administrator of the estate.

James R: Farnsworth, the husband, died testate a few days later. His will was duly probated and the plaintiff Lucy C. Farnsworth duly appointed admx. c. t. a. in January, 1907. For some years prior to his death, James R. Farnsworth rented a safe-deposit box of the Security Trust Company in Rockland, receiving the keys thereto. By the terms of the contract with the Security Trust Company the box was not to be opened by any one except Farnsworth himself, his legal representative in case of his death or a person having written authority therefor from him or his legal representative. Since his death the box has been retained and the rent therefor paid by his legal representative, now the plaintiff. At the time of his death the box contained bonds, certificates of stocks, and other papers of value belonging to him, and also two certificates of stock issued to his wife Helen. Also at the time of his death Farnsworth owned and had in his immediate possession, outside of the safe deposit box, certain promissory notes, checks, bonds and certificate of stock.

At the time of the death of James R. Farnsworth and for some days before and after his death, Whiting and Martin, heirs of his wife, were in his house and chamber, and obtained possession of the last named papers, and also of the keys to the Farnsworth safe deposit box rented from the Security Trust Co., and deposited them with Mr. Mortland the administrator upon the estate of their sister Helen, the wife of James. Mr. Mortland now holds them and refuses to deliver them to the plaintiff, the admx. c. t. a. on estate of James. The Trust Company also refuses to afford her access to the box and is contemplating affording Whiting and Martin access to the box upon receiving satisfactory idemnity from them.

The plaintiff, as admx. c. t. a. of James R. Farnsworth, has now brought one bill in equity against Whiting, Martin and Mortland to compel them to return to her, as such admx., the notes, bonds, checks and stock certificates they obtained possession of as above stated. In the bill a list of such papers is set forth. The plaintiff in the same capacity has also brought another bill in equity against the same three defendants and also against the Security Trust Company, to compel a return to her of the keys of the safe-deposit box above described, to prevent the Security Trust Company affording either of the other defendants access to the box, and to compel the company to afford her access.

A demurrer, special and general, was filed to each of these bills and both cases were then reported to the Law Court for consideration of the demurrers.

1. In several paragraphs of each bill the allegation is merely that "the plaintiff is informed and believes" the matters set forth in the paragraphs, without any averment of them. This is urged by the defendant as special cause for demurrer. After the demurrers were filed the plaintiff asked leave to amend each bill by inserting in the faulty paragraphs the words "and therefore avers" after the words "The plaintiff is informed and believes." The proposed amendments were also reported to the Law Court with the stipulation that if they are allowable, the bill shall be taken as thus amended.

The defendants contend that the amendments are not now allowable because not sworn to, the bills being for injunction, etc., and required to be on oath. If the proposed amendments contained any statement of additional facts, or even varied any statement of matters of fact contained in the bill, the objection might be valid. In these cases, however, the proposed amendments are purely in matters of form. No statement of fact is added; none is varied. It is only the manner of stating them that is varied. The proposed amendments are therefore allowable and are allowed and the bills taken as amended accordingly. *Livingston* v. *Marshall*, (Ga) 11 S. E. Rep. 542.

2. The defendants further urge as cause of demurrer, that fraud is not sufficiently alleged, that no facts are stated which would constitute fraud. Neither bill, however, purports to charge fraud upon the part of any defendant. They set forth simply that the defendants obtained possession of the securities and keys. There is no allegation that they did so through deception or other fraud. The bills are not based on fraud, and hence lack of sufficient allegation of fraud is not cause for demurrer.

3. The defendants further insist that the bills do not set forth facts showing the plaintiff to have a clear title to the securities, etc., sought to be recovered. It is distinctly alleged in the bills that the securities belonged to James R. Farnsworth at the time of his death and that as admx. c. t. a. she has the title to them, and is entitled to possession of them for the purposes of the administration of her trust as such. The allegation of title seems to be direct and explicit. The plaintiff was not obliged to set forth how Farnsworth acquired his title.

4. The defendants again urge that the allegations of the demands made on them for the delivery of the securities and keys and for access to the box, and of the refusals to comply with the demands, do not set forth the particular times and places when and where the demands were made and refused. This however at the most can be reached by special demurrer only, and no such cause was stated in the demurrers filed.

5. Another cause for demurrer alleged is that several paragraphs in the bills "are so vague, indefinite, ambiguous and uncertain that the defendants cannot ascertain the meaning thereof nor obtain sufficient information therefrom as to the cause which they are required to answer." None of the paragraphs seem to us open to that objection, even if such objection could be made by demurrer instead of exceptions to the bills. What is meant to be charged, and the necessary information for an answer, is ascertainable out of every paragraph, though perhaps not stated as clearly as desirable.

6. The defendants also contend as cause for demurrer, that the bills do not contain statements of facts showing that the plaintiff has not a plain complete and adequate remedy at law, and further, generally, that she has not in either bill stated a case entitling her to any relief in equity. This objection raises the main question in the cases, the question whether the bills state cases within our equity jurisdiction. We think they do.

As to the keys to the safe-deposit box in the vaults of the Security Trust Co., it is clear that no suit at law would be effectual. The keys cannot be got at to be replevied, and an action of trover for their value would manifestly be inadequate. Even though she could procure duplicate keys at small cost, it would be detrimental to her to have the present keys outstanding; and the payment of the judgment for their value would vest the title to them in the defendants. She is entitled and needs to have, not some keys to the box, but the identical keys withheld by the defendants. If there could be any doubt that these bills are sustainable as to the keys upon the general principles of equity jurisdiction, there should be no doubt that they are authorized by the statute. R. S., ch. 79, section 6, par. IX, which authorizes suits in equity for the redelivery of property so withheld that it cannot come at to be replevied.

As to the bonds, notes, and stock certificates, it was held in *Gibbons* v. *Peeler*, 8 Pick. 253, and *Mills* v. *Gore*, 20 Pick. 28, that notes and other securities for debts were goods and chattels within the true meaning of the statute authorizing suits in equity to compel delivery when so situated they could not be replevied.

In *Clapp* v. *Shephard*, 23 Pick. 228, a suit in equity was upheld to compel the delivery of a promissory note.

Further, it seems that suits to compel the surrender of promissory notes, bonds and other negotiable instruments are within the general principles of equity jurisdiction without regard to the statute. In Story's Equity Jurisprudence Vol. 2, sec. 703, 7th Ed. it is said that courts of equity under a very ancient "head of equity jurisdiction" will render remedial justice by decreeing the delivery of deeds and other writings to those entitled to them. In the same section the learned author says: "The same doctrine applies to other instruments and securities such as bonds, negotiable and other evidences of property." *Scarborough* v. *Ocolten*, 69 Md. 137, was a suit in equity to compel the delivery up of some promissory notes and bills. It was urged as cause for demurrer that an action of trover for their value would afford adequate remedy. The court however sustained the suit.

Promissory notes, bonds, stock certificates, etc., have no intrinsic value; they are only evidences of debts due the owners, or of the owner's share in corporations. The value of those debts and shares depends upon the financial condition and prospects of the persons or corporations issuing them. It manifestly would be very difficult, if not impracticable, to go into all these matters in an action of trover. Again, the owner should not be obliged to sell them at such time as the defendant in trover has elected, and at such price as a jury may fix. He is entitled to the securities themselves to hold, or sell as and when he may be advised. The owner of physical chattels is not obliged to resort to an action of trover. He is allowed to replevy them if they can be got at to be replevied. If so withheld by the defendant that they cannot be replevied, then by express statute a suit in equity may be maintained to compel their re-delivery. The right to a jury trial, if any, can be exercised in a suit in equity as well as in a suit at law. The reasoning applies with still greater force to bonds, stock certificates, etc.

7. The defendants further contend that the plaintiff should first have exhausted all other remedies unavailingly, before resorting to remedies in equity. This rule does not apply where the court has

full equity jurisdiction or special statutory jurisdiction covering the case. As already stated, the court's present jurisdiction in equity covers these cases, and hence the remedy in equity can be resorted to at once on the occurrence of the wrong.

8. The defendants still further contend that as the plaintiff sues as administratrix, and the suit concerns personal property of the estate, she should first have cited the defendants into the Probate Court for examination under R. S., ch. 66, sec. 70. The bills in these cases, however, are not for discovery. They are simply suits "of equitable replevin," suits to get back certain specified articles of personal property which are so withheld they cannot be replevied by an action at law. The cases *Fletcher* v. *Holmes*, 40 Maine, 364, and *Caswell* v. *Caswell*, 28 Maine, 232, cited by defendants were decided before the court was vested with the general and special equity jurisdiction invoked in these cases. In *Caleb* v. *Hearn*, 72 Maine, 231, the suit was to recover money damages only, for which of course an action at law was a remedy plain, adequate and complete. In *Dunbar* v. *Dunbar*, 80 Maine, 152, the question did not arise.

The demurrers to each bill overruled.
Defendants to answer.

DORA L. SPEAR *vs.* CITY OF WESTBROOK.

Cumberland. Opinion December 4, 1908.

Way. Defect. Notice. Revised Statutes, chapter 23, section 76.

In relation to the written notice to be given to a town by a person who has received bodily injury through any defect or want of repair in a way which the town is by law obliged to repair, as a condition precedent to his maintaining a suit against the town to recover for such injury, Revised Statutes, chapter 23, section 76, provides that such person or some person in his behalf, shall within fourteen days after the injury notify one of the municipal officers of such town, "by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury." This statutory requirement of the fourteen days notice has never been construed to impose upon the sufferer any unreasonable or burdensome duty. He is only required to give a defendant town the benefit of all the information he possesses relating to the bodily injuries for which he claims damages. He is not compelled to specify or predict the effects and consequences which may or may not flow from such injuries. The results may be neither known nor anticipated the time of preparing the notice. But he may reasonably be required to describe the physical conditions caused by his injuries fully and frankly according to the best of his knowledge and information.

The plaintiff having received a bodily injury through an alleged defect or want of repair in a certain sidewalk in the defendant city, seasonably gave to the mayor and aldermen of the defendant city the following written notice signed by her: "You are hereby notified that on Monday, the fifth day of August nineteen hundred and seven, while walking along Seavey Street in said City, on the sidewalk on the easterly side of the street, and myself being in the exercise of due care, I sustained an injury to my person by falling into a hole in the sidewalk nearly opposite the premises of Albion Senter, badly bruising myself and sustaining other bodily injury of a serious nature. I hereby give notice that it is my intention to hold the city of Westbrook responsible for the injury I have sustained, in damages."

Held: That this notice fails to specify upon what part of the body the bruises were received, whether upon the head or back, the arms or legs or to state in what manner and to what extent the bruises affected the plaintiff and therefore fails to specify the nature of her injuries and consequently is fatally defective.

When a person has been injured through any defect or want of repair in a way which a town is obliged to repair, such person can recover damages arising from such injuries as are specified in his notice and for the results

actually flowing from such injuries, although those results may not be anticipated or described in the notice. A sufficient specification of the nature of the injuries themselves is a sufficient notice of the results which actually flow from them.

Blackington v. *Rockland*, 66 Maine, 332, in effect overruled in *Lord* v. *Saco*, 87 Maine, 231.

On motion and exceptions by defendant. Exceptions sustained.

Special action on the case brought by the plaintiff in the Superior Court, Cumberland County, against the defendant city to recover damages for personal injuries alleged to have been received by the plaintiff August 5, 1907, through a defect or want of repair in the sidewalk on the easterly side of Seavey Street in the defendant city. Plea, the general issue.

Tried at the April term, 1908, of said Superior Court. During the trial the defendant city excepted to several pro forma rulings made by the presiding Justice. Verdict for plaintiff for $900. The defendant city then filed a general motion for a new trial. The Law Court did not consider the motion but the case was decided on the exceptions.

The case appears in the opinion.

The written notice given by the plaintiff under the provisions of Revised Statutes, chapter 23, section 76, is of the following tenor:

"To the Mayor and Aldermen of the City of Westbrook in the County of Cumberland and State of Maine.

"You are hereby notified that on Monday, the fifth day of August, nineteen hundred and seven, while walking along Seavey Street in said City, on the sidewalk on the easterly side of the street, and myself being in the exercise of due care, I sustained an injury to my person by falling into a hole in the sidewalk nearly opposite the premises of Albion Senter, badly bruising myself and sustaining other bodily injury of a serious nature, I hereby give notice that it is my intention to hold the city of Westbrook responsible for the injury I have sustained, in damages."

"Dated at said Westbrook, this eighth day of August, 1907.

Dora L. Spear."

Frank P. Pride, for plaintiff.

William Lyons, for defendant city.

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

WHITEHOUSE, J. This is an action on the case to recover damages for personal injuries received by the plaintiff on the 5th day of August, 1907, by reason of an alleged defect or want of repair in the sidewalk on the easterly side of Seavey street in the defendant city.

The liability of the town in this class of cases is created solely by statute and among the conditions precedent to the plaintiff's right of recovery prescribed by section 76 of chapter 23, R. S., is the following requirement respecting notice to the town after the injury, namely: "Any person who sustains injury or damage as aforesaid, or some person in his behalf, shall within fourteen days thereafter notify one of the municipal officers of such town by letter or otherwise, in writing, stating his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

In attempting to comply with this requirement of the statute, the plaintiff in this case seasonably gave to the mayor and aldermen of the defendant city the following written notice signed by her: "You are hereby notified that on Monday, the fifth day of August, nineteen hundred and seven, while walking along Seavey Street in said City, on the sidewalk on the easterly side of the street, and myself being in the exercise of due care, I sustained an injury to my person by falling into a hole in the sidewalk nearly opposite the premises of Albion Senter, badly bruising myself and sustaining other bodily injury of a serious nature. I hereby give notice that it is my intention to hold the city of Westbrook responsible for the injury I have sustained, in damages."

The defendant's counsel seasonably objected to this notice on the ground of its insufficiency and requested the presiding Justice to give the following instruction, to wit: "That the statute notice given by the plaintiff to the defendant as required by chapter 23, section 76, of the Revised Statutes, was and is wholly insufficient, in that it wholly fails to specify the nature or kind of her bodily

injuries alleged by her to be sustained, that it wholly fails to specify whether the injuries, or any of them, were upon her head or back, or upon her arms or legs, and that no part of her head, body or limbs are specified as having been injured, and therefore she cannot recover in this action."

The defendant's counsel further requested the court to direct the jury to return a verdict in favor of the defendant. The presiding Justice declined, pro forma, to give either of the requested instructions and the case was thereupon submitted to the jury who returned a verdict for the plaintiff for $900. The case comes to the Law Court on exceptions.

It is the opinion of the court that upon the authority of the previous decisions in this State upon similar notices, the exceptions must be sustained and the notice held insufficient.

In *Goodwin* v. *Gardiner*, 84 Maine, 278, the plaintiff's injuries were described in his notice to the town as "severe bodily injuries," and it was held that this was not a sufficient specification of the "nature of his injuries." In the opinion of the court it is said: "The statute requires more than a bare statement that a bodily injury was received. The nature of the injury must be stated. . . . It would have been more natural for the plaintiff, if really injured severely, to state how and to what extent the injury affected him, whether upon the head or back, upon his arms or legs, and whether general or particular. The assertion is that he met with injuries, and not one of them is named. No kind of injury is either included or excluded by the notice.

One object of the statute requiring notice within fourteen days after an injury is alleged to have been received, is that the injured person shall thus early commit himself to a statement of his condition when he will be more likely to describe it frankly and fairly than at a later period. There is great temptation to magnify and exaggerate such personal injuries, and the town is entitled to as particular a notice as can reasonably be given."

In *Low* v. *Windham*, 75 Maine, 113, the plaintiff's notice was "Of injuries I received in going through the bridge at Great Falls,"

and it was rejected by the court as insufficient because the nature of the bodily injuries was not stated.

In *Lord* v. *Saco*, 87 Maine, 231, the plaintiff's notice stating that his horse was "greatly injured by reason of the defect," was declared to be defective because it "fails utterly to state the nature of his injuries:" thus in effect overruling *Blackington* v. *Rockland*, 66 Maine, 332.

In *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79, the plaintiff stated in his notice that he was "thrown violently from his wagon and seriously injured in the thigh and internally injured in his right lung and otherwise injured by being violently shaken up and jarred in his fall to the ground." The court says in the opinion: "The declaration is comprehensive enough to warrant the introduction of proof of any bodily injury resulting from his "being violently shaken up and jarred in his fall to the ground." It is not necessary to detail all the results thence accruing in the declaration nor in the notice." See also *Joy* v. *York*, 99 Maine, 237, in which the recent decisions of the court upon this question are critically analyzed and compared.

In the case at bar, the language of the plaintiff's notice is "I sustained an injury to my person . . . badly bruising myself and sustaining other bodily injury of a serious nature." As in *Goodwin* v. *Gardiner*, 84 Maine, and *Low* v. *Windham*, 75 Maine, supra, this notice fails to give a sufficient specification of the nature of the plaintiff's injuries. This statutory requirement of the fourteen days notice has never been construed to impose upon the sufferer any unreasonable or burdensome duty. He is only required to give the defendant town the benefit of all the information he possesses relating to the bodily injuries for which he claims damages. He is not compelled to specify or predict the effects and consequences which may or may not flow from such injuries. The results may be neither known nor anticipated at the time of preparing the notice. But he may reasonably be required to describe the physical conditions caused by his injuries fully and frankly according to the best of his knowledge and information. The plaintiff, it is true, states that she was badly bruised, but a bruise is only a bodily

injury without laceration and like other bodily injuries, has the attribute of locality. The notice fails to specify upon what part of the body the bruises were received, whether upon the head or back, the arms or legs or to state in what manner and to what extent the bruises affected her. The severity and critical nature of an injury obviously depend largely upon its locality, and it is important for the municipal officers to be informed whether the bruises are upon a vital or other less vulnerable part of the body. She could not be expected to anticipate nor reasonably be required to specify in her notice that she would suffer from "traumatic neurasthenia" or nervous prostration, as the result of her bruises and injuries, but it would not have been difficult for her to state upon what part of her body the bruises and injuries were received. The sufferer can recover damages arising from such injuries as are thus specified in his notice and for the results actually flowing from such injuries, although those results may not be anticipated or described in the notice. A sufficient specification of the nature of the injuries themselves is a sufficient notice of the results which actually flow from them. The fatal defect in the plaintiff's notice is its failure to specify the nature of her injuries.

Exceptions sustained.

STATE OF MAINE

vs.

INTOXICATING LIQUORS,

MAINE CENTRAL RAILROAD COMPANY, Claimant.

Piscataquis. Opinion December 11, 1908.

Intoxicating Liquors. Interstate Commerce. Adulterated Liquors. Police Power. "Pure Food Law." U. S. Statute, chapter 3915, approved June 30, 1906.

1. By the Act of Congress known as "The Pure Food Law," approved June 30, 1906, misbranded and adulterated intoxicating liquors are forbidden transportation into any State from another State or foreign country, and hence are removed from the protection of the "Commerce Clause" of the Federal Constitution.
2. Such liquors brought into the State in violation of the Act of Congress become subject to the police power of the State immediately upon arrival within its territory and can be seized under such power before delivery to a consignee.

On exceptions by claimant. Overruled.

Search and seizure process issued by the Municipal Court of Dover, Piscataquis County, whereby certain intoxicating liquors, shipped from Boston, Massachusetts, and consigned to Henry N. Bartley, Greenville Junction, Piscataquis County, Maine, were seized at Foxcroft, in said county, while in the possession of the Maine Central Railroad Company, a common carrier.

The liquors seized were as follows: "Two kegs containing twenty gallons of ale, one keg containing thirty gallons of gin, one barrel containing seventy-two quarts of gin, thirty-six quart bottles of Manhattan cocktail, one barrel containing seventy-one quart bottles of whiskey, one barrel containing seventy-two quart bottles of whiskey, one barrel containing seventy quart bottles of whiskey, one barrel containing thirty-six quart bottles of rum, one barrel containing thirty-six quart bottles of brandy, one barrel containing fifty gallons of whiskey, and one keg containing twenty gallons of whiskey."

At the hearing before the Municipal Court the Maine Central Railroad Company duly appeared and claimed the liquors. The Municipal Court declared the liquors forfeited and thereupon the claimant company appealed to the Supreme Judicial Court, in said county, January term, 1908. The case was then heard before the presiding Justice at said term of said Supreme Judicial Court, upon the following agreed statement of facts:

"The car containing the liquors arrived at Foxcroft, Maine, on the morning of the nineteenth day of September, A. D. 1907, and on the same day, before the said car was transferred from the tracks of the Maine Central Railroad to the tracks of the Bangor and Aroostook Railroad, the liquors were seized by the officers, while in said car. The warrant was duly and properly issued and served, the liquors were properly libelled, and the claimant duly appeared and became a party. It is admitted that Professor Ora W. Knight of Bangor, Maine, an expert chemist, will testify that all of the whiskey is either misbranded or adulterated or both under the provisions of the United States Pure Food Law, Act of June 30, A. D. 1906; that all the rum is misbranded under the provisions of said act; that the brandy is both adulterated and misbranded under the provisions of said act. That all other of said seized liquors comply with said act.

"It is further admitted that all said goods were billed as crockery; and that said liquors were intended for unlawful sale in the State of Maine."

The presiding Justice "ordered and decreed that two kegs containing twenty gallons of ale, one keg containing thirty gallons of gin, one barrel containing seventy-two quarts of gin, and thirty-six quart bottles of Manhattan cocktail, be returned by the officers to the said claimant forthwith." The presiding Justice further ordered and decreed "that the remaining liquors and the vessels in which they were contained," to wit: "One barrel containing seventy-two quart bottles of whiskey, one barrel containing seventy-one quart bottles of whiskey, one barrel containing seventy quart bottles of whiskey, one barrel containing thirty-six quart bottles of rum, one barrel containing thirty-six quart bottles of brandy, one

barrel containing fifty gallons of whiskey, one keg containing twenty gallons of whiskey, be declared forfeited, and that the same be turned over to the sheriff of said Piscataquis County to be disposed of by him in accordance with the law."

To the ruling declaring a forfeiture of the liquors last above enumerated, the Maine Central Railroad Company excepted.

The United States "Pure Food Law," approved June 30, 1906, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," is chapter 3915 of the "Statutes of the United States of America passed at the first session of the Fifty-ninth Congress, 1905-1906."

The case appears in the opinion.

W. A. Burgess, County Attorney, *and C. W. Hayes*, for the State.

Forrest Goodwin, for Maine Central Railroad Company, Claimant.

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

EMERY, C. J. The intoxicating liquors in question, the rum, whiskey and brandy, were seized in this State in the car of the claimant railroad company while in transit from another State to a consignee in this State. It is admitted they were intended for unlawful sale in this State. The claimant contends that having been seized while in such transit they are protected from forfeiture and even seizure under the State law by "the commerce clause" of the constitution of the United States.

It appears from the evidence, however, that in addition to being intoxicating and intended for unlawful sale in this State, the liquors were misbranded, or adulterated or both, within the meaning of the United States "Pure Food Law" approved June 30, 1906. That act of Congress prohibits the introduction into any State from another State or country of any liquors misbranded or adulterated within the meaning of the act, and provides that if so transported

from one State to another, they shall be liable to seizure and confiscation by the United States and shall not be sold in any jurisdiction contrary to the law of that jurisdiction. By this statute, Congress has in effect enacted that adulterated or misbranded liquors shall not be lawful articles of commerce between the States or with foreign nations. As to such liquors, the statute removes the federal barrier to the operation of the police power of the State upon them. Having been brought into the State in violation of the act of Congress, they became subject to the laws of the State the moment they came within its limits.

The claimant urges that only the United States can enforce the act of Congress; that the act does not confer upon the States the power to seize and confiscate such liquors. This process is not to enforce the act of Congress, but only to enforce the laws of the State. The proceeding is not under the act of Congress, but under the statutes of the State. Granting that the act of Congress does not confer any new power upon the State, it removes the federal barriers to the exercise of the powers conferred upon the State by its own people.

The judgment of forfeiture rendered by the presiding Justice was right and the exceptions to his decision must be overruled.

Exceptions overruled.

City of Biddeford *vs.* Frederick Yates.

York. Opinion December 14, 1908.

Municipal Corporations. City Government. Delegated Authority. Authority to Make a Lease. Same May be Delegated to a Committee. In Futuro Lease Valid.

While the personnel of a city government may change, yet the tribunal itself is a continuous body.

While one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government, composed of a different set of individuals, yet, what the individuals of different city governments might do, can in no way effect the right of the tribunal as a city government, to act upon any measure properly before it.

A municipal government represented by its city council should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter, and when not limited to a prescribed method it should be permitted to act with the same business foresight that is accorded to other business institutions.

Whether a city government can delegate authority to a committee to let city property, depends entirely upon whether the delegation of such authority invests the committee with judicial or ministerial powers.

Functions which are purely executive, administrative or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative or discretionary which cannot be delegated.

A purely ministerial duty is one as to which nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.

The plaintiff city, on May 24, 1904, was the owner of a certain city building containing a hall known as the opera house. On the same day the city council by its committee on public property made and delivered to the defendant an instrument, purporting to be a lease of the hall, expiring June first, 1907. On February 20, 1907, another city council by the same committee made a second instrument purporting to be a lease of the same hall to the defendant to take effect, in futuro, at the expiration of the first lease, to wit, June 1, 1907, for a term of three years from the latter date. Between February 20, 1907, the date of the second lease, and June first, 1907, when it was to take effect, the term of office of the city officials, under whom this latter lease was made, had expired, and on the third Monday of March, a new city government had been inaugurated. Under the facts, which are stated in the opinion, and the city charter and ordinances the parts of which material to the case are also stated in the opinion,

Held: (1) That the city council had authority to authorize a lease of the hall. (2) That the city council had authority to execute and deliver a lease under one city government to take effect in futuro, under another city government. (3) That the city council could delegate authority to its committee on public property to make and execute such lease.

On report. Judgment for defendant.

Trespass quare clausum alleging that the defendant with force and arms broke and entered a certain close belonging to the plaintiff city. Plea, the general issue with a brief statement alleging in substance that during the time mentioned in the writ the defendant was legally in possession of the premises described in the writ, under and by virtue of a certain lease of the premises given to the defendant by the plaintiff city, and that under said lease the defendant had a legal right to do all the things which he did do.

When this action came on for trial, an agreed statement of facts was filed and the case was then reported to the Law Court 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."

The case is stated in the opinion.

Robert B. Seidel, City Solicitor, *and N. B. Walker*, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

SPEAR, J. This is an action of trespass involving the validity of a lease of the plaintiff to the defendant. There is no material dispute upon the facts. The locus in quo is the opera house, so called, embracing the hall in the city building and used for the purpose of giving plays, operas, etc., together with all the rooms and appurtenances belonging to and connected with the hall. On May 24, 1904, the plaintiff was the owner of the hall and appurtenances. On the same day the city council by its committee on public property made and delivered to the defendant an instrument, purporting to be a lease of the hall, expiring June first, 1907. On February 20, 1907, another city council by the same committee

made a second instrument purporting to be a lease of the same hall to take effect, in futuro, at the expiration of the first lease, to wit: June 1, 1907, for a term of three years from the latter date. Between February 20, 1907, the date of the second lease, and June first, 1907, when it was to take effect, the term of office of the city officials, under whom this lease was made, had expired, and on the third Monday of March, a new city government had been inaugurated.

On the 10th day of June, the city council passed the following order: "Ordered, that the city solicitor be, and hereby is, authorized to obtain possession of the opera house and to adopt any proceedings that he may deem necessary therefor, including the institution and prosecution of any action at law or equity."

On the 23rd day of August, 1907, the city solicitor, whose official capacity is admitted, took physical possession of the leased premises without the knowledge or consent of the lessee, for the express purpose of excluding him therefrom, and notified the defendant of his assumption of possession and the purpose thereof and to abstain from any interference therewith. On the 24th day of August, Yates, the lessee, demanded of the city solicitor permission to enter, without being obliged to break in, claiming a right of occupancy under the instrument purporting to be a lease dated Feb. 20, 1907. Being refused admission, he forcibly entered, and took possession of the hall.

This was the only public hall owned by the city of Biddeford from May 1, 1904, to the date of the plaintiff's writ. The charter of the city of Biddeford contains the following clause: "The city council shall have the care and superintendence of city buildings and the custody and management of all such property, with power to let or sell what may be legally let or sold." Under the city charter admitted to have been duly accepted, authorizing the establishment of by-laws and ordinances for the government of the city, was promulgated in 1887, the following ordinance:

"Chapter 15, City Building. Sec. 1. The committee on public property shall have the care and custody of such building and its appurtenances, and all the alterations and repairs thereof.

Sec. 2. The said committee are authorized to lease any part of said building not already under lease or appropriated to any of the branches of the city government for any period not exceeding the term of three years, and upon such terms and conditions as they may deem expedient, subject, however, to the approval of the mayor and aldermen."

During the period covering both the first and the second alleged lease, the following joint rule was passed both by the city council of 1904 and that of 1907: "Rule 1. At the commencement of the municipal year the following joint standing committees shall be appointed by the mayor unless otherwise ordered by the respective boards, namely: Committee on public property . . . . to consist of the mayor, one alderman and three members of the common council." A committee thus appointed negotiated the terms and executed the leases above referred to both of which were approved by the mayor and a majority of the aldermen of the city. At the time the above leases were executed and delivered to Yates, that part of the city building known as the opera house was not appropriated to the use of any of the branches of the city government nor leased to any other person. The defendant fulfilled all the stipulations and conditions contained in the first lease. He had also complied with all the requirements of the second lease so far forth as he could, the city having refused to accept payment of rent and having notified the defendant that it would not in the future accept rent.

In addition to the admitted facts, the plaintiff claims that the second lease was made to usurp the powers of the administration then about to be elected and was given for a grossly inadequate consideration, and was thereby fraudulent. As the evidence does not sustain the allegation of fraud, the political aspect of the case disappears and we feel authorized to consider it only upon the admitted facts.

These in our opinion involve simply a question of power on the part of the city government.

1st. Could the city council itself authorize a lease of this property?

2nd. If so, could it delegate its powers to a committee to effectuate its purpose?

3rd. If yes, could the city council execute and deliver a lease under one city government to take effect, in futuro, under another?

Plaintiff admits the authority of the city government to lease the opera house, if of that species of city property that "may be legally let." But the city claims that the property covered by the second lease was "already under lease" and therefore within the exception of the ordinance, ch. 15, sec. 2. We think this position untenable. The second lease did not take effect until after the expiration of the term of the first one, and therefore cannot be said, in the sense in which the ordinance should be construed, to cover property, "already under lease." The interpretation of this phrase as claimed by the plaintiff would prevent the city from renewing a lease even a day before it expired. Such construction is contrary to all business methods and should not be established unless the language of the ordinance expressly requires it. The phraseology does not require it, but rather its usual and ordinary meaning, the one naturally suggested is, that the city should not execute two leases covering the same property for the same period of time. If the ordinance was intended to mean any more than this, it could easily have been made to say so, and if the construction claimed by the plaintiff had been in the mind of the legislature, it would have said so. It would never have left so important and unusual a provision, if intended to mean what the plaintiff claims, to be established by the uncertain interpretation permissible by the language employed.

Again the plaintiff contends that the premises let were public property, and could be rented only for public purposes, *Thorndike* v. *Camden*, 82 Maine, 39, *Goss* v. *Greenleaf*, 98 Maine, 436, and could be used for private purposes when not needed for public use, *Reynolds* v. *Waterville*, 92 Maine, dissenting opinion, page 317, and cases cited, and that under the leases in question the public use was made subservient to the private use. The agreed statement does not furnish any evidence of this contention, and so far as it goes, tends to show the reverse, it being admitted that the part of the city building known as the opera house, was not appropriated

to the use of the city, and was reserved for memorial day, for the graduation exercises of the high school and necessary rehearsals therefor. The lessee was also required to let the hall, when not otherwise engaged in good faith, on the payment of running expenses for any public purpose upon application by the mayor, to any political body in the city at the request of the chairman of respective city committees, and to any established church in the city one day in each year to each such church. It appears that the opera house was subject to all these public uses free from any charge except the running expenses. These would have to be paid by some one, whether the city or the lessee was in control of the hall.

Our conclusion is that under section 4 of the charter which provides that the city council shall have "power to let or sell what may be legally let or sold," the first question should be answered in the affirmative. We need not look beyond the city charter for authority to exercise this power on the part of the city as the charter is an act of the legislature and the section under consideration violates no provision of the constitution.

Whether the city government could delegate authority to a committee to let city property, depends entirely upon whether the delegation of such authority invested the committee with judicial or ministerial powers. "Functions which are purely executive, administrative or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative or discretionary which cannot be delegated." A. & E. Encyc. of Law, Vol. 20, page 1218. These duties may be simplified by classing them under the head of ministerial and judicial functions as the act of every public official is either ministerial or judicial. *People* v. *Jerome*, 73 N. Y. Supp. 306. A purely ministerial duty is one as to which nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.

No question is raised as to the authority of the city council to appoint a committee on public property, and none could be raised, provided they invested the committee with ministerial powers only. Hence the issue here presented is: "Did the ordinances, under

which the committee acted, confer upon it ministerial authority only, or did it go further and clothe it with judicial powers?

To determine this issue, let us analyze the ordinance in question and discover just what powers it did confer upon the committee on public property. The legislature in granting the charter invested the committee with power to let "what may be legally let." The ordinance authorized the committee to lease any part of the building not already under lease or appropriated to the use of the city for any period not exceeding three years. It has already been determined that the lease embraced only what might be "legally let." So far the authority of the ordinance comports with that of the charter. The substance of the act conferred by the charter was the right to lease. The appointment of a committee by an ordinance was a proper and convenient way to carry out the details of the right conferred. Without any ordinance at all, the city council could have let the hall. The charter so provided. The ordinance therefore was made, as all ordinances are, for the purpose of prescribing a permanent method of transacting the particular business involved. Therefore the language of the ordinance that the committee may lease "upon such terms and conditions as they may deem expedient" involves simply those ministerial acts necessary to perform the act of leasing. In the light of the context which determines that a lease may be made, what shall be let and the term of the lease, this clause seems to have been used for the purpose of authorizing the committee to negotiate the various details which might arise in connection with the transaction involved. Those things which it would be impossible for an ordinance to prescribe in detail were left to the action of the committee. An illustration of this point is found in the present case where the specifications, submitted by the lessee prescribing various things which he stipulated to do, embrace three full pages, and from twenty to thirty different items.

This interpretation seems to be fully borne out in *Gillett* v. *Logan County et al.*, 67 Ill. 256. In this case the Board of Supervisors of the county authorized three of their own number, who had been appointed for the purpose of employing counsel to defend the interest of the county, "to use their discretion in employing such

further agents or assistants as might, to them, seem expedient, for the purpose of defending the interest of the county . . . . the committee being empowered to contract with such agents or assistants." The court say: "The first ground relied on in support of the bill is, that the foregoing resolution was illegal; the Board of Supervisors had no right to delegate to a committee such power as was given by the resolution," and in answer to this contention hold, "That the duties of a committee although they might include the making of contracts, were merely ministerial, which they might properly be appointed to perform as recognized in *City of Alton* v. *Mulledy*, 21 Ill. 76; *McClaughry* v. *Hancock County*, 46 Ill. 356. In speaking of the impracticability of the Board of County Commissioners sitting in session to carry out all the details of a contract, which applies with equal force to the action of a city council in a similar case, the court further add: "The position taken by the appellant involves the absurd consequence that this Board of Supervisors, composed of nineteen members, should have been kept in constant session during the progress of this protracted investigation, in order that they might, from day to day, as required, make bargains, as a body, for each item of service and expense incurred. It was unnecessary; they might act by a committee appointed, as in the present mode."

The right of the city council to delegate its authority to a committee to perform acts which the council itself might legally do, was raised in *Hitchcock* v. *Galveston*, 96 U. S. 341, in which the court hold: "If the city council had lawful authority to contract the sidewalks, involved in it was the right to direct the mayor, and the chairman on streets and alleys, to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true, the city council could not delegate all the power conferred upon it by the legislature, but like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case."

This case also clearly determines that when a city council is authorized to make a contract, it can appoint a committee to negotiate the details. To the same effect is *Han. & St. Jo. R. R. Co.*

v. *Marion County*, 36 Mo. 296, in which it was contended by the defendant that the county court was the only agent authorized by law to issue instruments in payment to subscribers for stock and that the instruments were not issued by the court, but by certain Justices appointed by the court and that their act was not binding on the defendant; that is, that the county court could not delegate its authority to the persons named. But the appellate court held otherwise, saying: "When the legislature empowered the county court to subscribe stock to the railroad company, it also clothed it with the means which might be convenient for making its action effectual. The substantive act was the taking of the stock."

To the same effect also is *Collins* v. *Holyoke*, 146 Mass. 298, where the court say: "It is true as contended by the petitioner that the mayor and aldermen could not delegate the authority given them by the public statutes, Ch. 50, sec. 1, to lay and make common sewers. But no suggestion is made that the sewer was not legally laid, and it is only objected that it was "built under the direction and supervision of a committee composed of four members of the common council and three aldermen." But this was done by the order of the mayor and aldermen. The statute which gave them authority to make the sewers did not preclude them from employing agents to supervise and direct the work." Hence it appears from this opinion that the substance of the thing which could not be delegated was the laying out of the sewer, and not the details involved in its construction, some of which must necessarily have embraced the negotiating of contracts.

The third objection raised by the plaintiff to the legality of the lease is based upon the fact that one city council made the lease to take effect, in futuro, under another.

But it must be observed that, while the personnel may have been different, the city council under which the lease took effect was precisely the same tribunal under the charter and the ordinances that executed the lease. The plaintiff, however, contends that the fact of an election between the execution of the lease and the beginning of its term, involving a possible change in the personnel of the new city council, made the attempt to execute a lease, to thus take effect,

an invasion of the prerogatives of the new board. But we are unable to discover any substantial reason in support of this contention. While the personnel of a city government may change, the tribunal itself is a continuous body. As was said in *Collins* v. *Holyoke*, supra: "The membership of the defendant board is not the same as when the assessment in question was made. But while its members change from time to time, the Board itself as a tribunal is continuously the same." See also *Fairbanks* v. *Fitchburg*, 132 Mass. 42. While one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government, composed of a different set of individuals, yet, what the individuals of different city governments might do, can in no way affect the right of the tribunal as a city government to act upon any measure properly before it. What the individuals may do, as a matter of opinion is one thing, but what the tribunal, a perpetual body is empowered to do as a matter of authority, is quite another thing. It appears to us that the logic of the plaintiff's contention tends to limit a city council to action with respect to such matters only as are to go into effect under its own administration. Such limitation would segregate a municipal government from all other corporations and business institutions, in the methods employed for the transaction of business, and might it seems to us prove highly detrimental. A municipal government represented by its city council should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter. When not limited to a prescribed method it should be permitted to act with the same business foresight that is accorded to other business institutions. A corporation or individual dealing in the letting of property might find it of the highest importance to make a lease today to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self evident.

We have seen that the city council itself was empowered to make the lease in question and could delegate authority to a committee

to negotiate its terms. We are therefore of the opinion that a lease thus legally executed is not void from the fact that it is made by one city council to take effect, in futuro, under another.

Judgment for the defendant.

EBEN K. WHITTAKER, Appellant,

vs.

HARRIET E. JORDAN, Executrix.

HARRIET E. JORDAN, Petitioner,

vs.

EBEN K. WHITTAKER.

Hancock. Opinion December 14, 1908.

Surviving Partner. Accounting. Profits. Revised Statutes, chapter 65, section 37

The surviving partner of a firm of contractors and builders, with the acquiesence of the executrix of the deceased partner's will, continued after such dissolution of the partnership to use the plant, materials and capital of the firm to prosecute and complete the work of reconstructing a cottage known as the Gurnee job commenced prior to the death of the testator, and also to make repairs upon another building known as the Doe job pursuant to an engagement made prior to the dissolution of the firm. By the decree of the Judge of Probate, the surviving partner was ordered to account for the entire net profits derived from the Gurnee and Doe contracts without any deduction for the services and money which he contributed to the earning of such profits. It also appeared that the surviving partner, who had given bond to settle the partnership affairs, omitted to charge himself in his account with the gain represented by the difference between the appraised value and the actual value of the personal property.

Held: (1) That inasmuch as the good faith of the surviving partner was not impeached, the most that the representatives of the deceased partner

can justly demand is that the profits should be divided according to the capital after deducting such share of them as is attributable to the skill and services of the surviving partner.

(2) That in this respect the decree of the Probate Court must be modified so as to require a division of the profits from the Gurnee and Doe contracts according to the capital contributed after deducting so much of them as may fairly be attributed to the services of the surviving partner for which he has not received adequate compensation in the commission of five per cent on $26,959.38 allowed him by the Judge of Probate.

(3) That in the absence of any agreement that the surviving partner should take over the personal property at the appraisal, he was not entitled to the benefit of any difference there might be between the appraised value and the actual value of the property, but should charge himself in his account with such increase in value.

On report. Appeal sustained. Petition dismissed.

Two cases involving a consideration of the same facts and circumstances. The first named case is an appeal by Eben K. Whittaker, surviving partner of the late firm of Jordan & Whittaker of Bar Harbor and who had given bond to settle the partnership affairs, from the decree of the Judge of Probate declining to allow his second account as surviving partner and directing an amendment of the same. The last named case is the petition of Harriet E. Jordan, widow, sole executrix and sole residuary legatee of Albion F. Jordan, the deceased member of the aforesaid partnership, for leave to enter an appeal from the decree allowing the first account of the surviving partner. The petitioner alleged "that through accident, mistake, defect of notice, and other reasons, without fault on her part, she omitted to claim her appeal within the twenty days provided for claiming appeals, and that justice requires a revision of said decree." This petition was filed in the Supreme Judicial Court, Hancock County, sitting as the Supreme Court of Probate.

Both cases were heard together at the April term, 1908, of said Supreme Judicial Court sitting as the Supreme Judicial Court of Probate. At the conclusion of the evidence both cases were reported to the Law Court with full power on the part of that court to make such decrees as the sitting Justice would have.

The cases are stated in the opinion.

Charles H. Wood, and John A. Peters, for Eben K. Whittaker.

Luere B. Deasy, and Bertrand E. Clark, for Harriet E. Jordan.

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

WHITEHOUSE, J. These two cases come up on report, the Law Court to have full power to make such orders and decrees as the sitting Justice would have. They involve a consideration of the same facts and circumstances and are to be determined upon the same evidence. The following facts appear from an agreed statement of the parties and evidence introduced.

Prior to March 14, 1906, Eben K. Whittaker and Albion F. Jordan were partners doing a building business at Bar Harbor. On that date Mr. Jordan died leaving a will, which has been duly probated, and a widow, Harriet E. Jordan, who is his executrix and sole legatee. Mr. Whittaker gave bond as surviving partner and proceeded to settle the partnership affairs. He has filed two accounts. In the first account which was allowed September 3, 1907, the surviving partner charged and was allowed commissions at 5 per cent on $26,959.38. Mrs. Jordan as executrix has petitioned the Supreme Court for leave to enter an appeal from the allowance of this first account on the ground that the commission charged and allowed was excessive and on the further ground that the surviving partner used the capital of the partnership in his own business after the dissolution of the partnership by death and that he has failed to account for the profits received by him for such use.

The surviving partner filed his second account in October, 1907, and in that account charged a commission of 5 per cent amounting to $413.26 on $8,265.22 received by him in cash subsequent to the first account and, as before, credited the estate with nothing for the use of the property formerly of the partnership. After hearing in the Probate Court a decree was entered by the Judge in which he found that all the items in the account, except the commission of $413.26 were just and true, and that as to that item a determination could not be made at that time and that it should be struck out without prejudice. The Judge further ordered that the account be amended and that the surviving partner should charge himself and give credit to the estate for the profits derived by the surviving

partner after March 14, 1906, on certain jobs of repairing and alteration known as the Gurnee job and the Doe job.

From this decree the surviving partner appealed claiming that he was not obliged to account for any profits received by him on these jobs after the death of his partner and that the commission charged was just and reasonable.

It appears that the firm owned a mill, shop, storehouse and stable with the land on which they stood, situated at Bar Harbor, suitably equipped with machinery, appliances and materials, to enable the firm to carry on a building and contracting business. Soon after the death of Mr. Jordan, this estate was appraised at $11,376, and the personal property (other than rights and credits) at $8,161.60.

With respect to the Gurnee job referred to in the decree of the judge of probate dated January 7, 1908, the case shows that at the death of Mr. Jordan the firm was engaged in altering and repairing Mr. Gurnee's cottage at Bar Harbor by virtue of a contract under which the firm was to furnish the necessary labor and materials, and Mr. Gurnee was to pay to the firm a profit on both. The entire job involved an expenditure of about thirty thousand dollars. In performing this work all of the assets and capital of the firm above described were employed and at the time of Mr. Jordan's death about one-third of the work had been completed. After his decease the prosecution of the work was continued by the surviving partner, substantially as before. The entire plant and establishment of the firm and all materials on hand suitable and necessary for the purpose were used by him to complete the work. All money received from this job up to the time of the death of Mr. Jordan was properly credited to the firm, but all money received from the job after his death was appropriated by the surviving partner under a claim of right and never accounted for by him.

The Doe job consisted of repairs made on the inside of a store at Bar Harbor, but the work had not been actually commenced at the time of the death of Mr. Jordan. The services of the firm had been engaged during the lifetime of Mr. Jordan. There was never any entire contract respecting the work either with the firm or the surviving partner, but Mr. Whittaker sold materials and furnished

labor to Mr. Doe to the amount of about $1300, charging a profit on both, and as in the case of the Gurnee job, he used the plant of the establishment and some of the materials belonging to the firm in performing the work.

It is contended by Mr. Whittaker that he was entitled to use and employ all of the assets of the firm in his hands as surviving partner, except the money, and appropriate to his own use all of the profits derived therefrom in connection with these two jobs and is not to be held accountable for such use either in the form of a portion of the profits or by way of rent or compensation. In his testimony respecting the Gurnee job after the death of Mr. Jordan, Mr. Whittaker says: "I carried the job right on just as it had been carried on, only I carried it on for myself." He further testifies that he told Mr. Clark that all the business done then, he considered to be his own, that he was doing business for himself, and that he understood that as surviving partner he had a right to sell the partnership property to himself.

On the other hand it is contended in behalf of the widow and appellee that since all the property of the firm including the good will of the business came into the hands of the surviving partner as trustee, and a trustee is not allowed to make a profit for himself out of the trust property, she is entitled at her option to demand that the surviving partner account for either profits on the one hand or rents or interest on the other, and she avers that she has elected and does elect to receive her share of the profits.

It is suggested in behalf of the surviving partner in the first place, that soon after the death of Mr. Jordan, negotiations were commenced between Mrs. Jordan and Mr. Whittaker with reference to a purchase of the property by the latter, that their negotiations were continued until the following September at the request of Mrs. Jordan who desired to wait for the arrival of her brother from California, and that Mrs. Jordan was consequently responsible for the delay in the settlement of the estate. But the evidence fails to show that Mr. Whittaker was ever requested by her to delay the performance of his duty to sell the property of the firm to the best advantage of the estate.

It is not in controversy that as a result of the meeting in September, it was agreed that Mr. Whittaker should take the partnership real estate at the appraisal, and Mrs. Jordan thereupon joined in a conveyance of this real estate through a third person to Mr. Whittaker, who charged himself with the value of it in his first account. But it is contended that although this deed was given and dated in September, it was orally agreed before it was executed that the purchase was made "as of March 14," the date of Mr. Jordan's death, and that for this reason Mr. Whittaker became entitled to all the profits derived from the Gurnee and Doe jobs and the use of the real estate between March and September. But whether there was any such oral agreement, and whether the expression "as of March 14" was used at all in connection with the purchase are questions upon which there is a conflict of testimony. It is not in dispute that Mrs. Jordan and her counsel constantly insisted after the meeting of the parties in July that she was entitled to a share of the profits from these jobs. The deed contains no relinquishment of her claim for a share of such profits, and it is not claimed that any express reference was made to this question of profits at the time of the alleged oral agreement that the purchase was to be made "as of March 14."

It is therefore the opinion of the court that the evidence is not sufficient to prove that Mrs. Jordan released her claim for a share of the profits in question by virtue of the alleged oral agreement or otherwise.

The rule of law applicable to such a situation is correctly stated in *Robinson* v. *Simmons*, 146 Mass. 177, as follows: "We think a just rule to be deduced from the authorities is, that, when there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner. When his good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand is, that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to

the services and skill of the surviving partners, and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their shares of the capital." See also *Chittenden* v. *Whitbeck*, 50 Mich. 401; *Jones* v. *Dexter*, 130 Mass. 380; *Freeman* v. *Freeman*, 136 Mass. 264, and 142 Mass. 98; *Moore* v. *Rawson*, 185 Mass. 274; *Hutchinson* v. *Nay*, 187 Mass. 262.

By the decree of the judge of probate dated January 7, 1908, the surviving partner was ordered to account for the entire net profits without any deduction for the services and money of the surviving partner which contributed to the earning of the profits. In this respect the decree must be modified so as to require a division of the profits from the Gurnee and Doe jobs according to the capital contributed, after deducting so much of them as may fairly be attributable to the services of the surviving partner for which he has not received adequate compensation in the commission of five per cent on $26,959.38 allowed him by the judge of probate in the first account.

But the appellee Mrs. Jordan further complains that Mr. Whittaker not only used the partnership real estate but also its equipment of partnership tools, appliances, horses, carts and building material. Mr. Whittaker claimed that he took over this personal property at the appraisal by virtue of an agreement with Mrs. Jordan. But the testimony does not satisfactorily show a mutual agreement to that effect, and in the absence of such an agreement, it is properly conceded by the counsel for the appellant that a surviving partner or other trust officer is not authorized to take over the personal property of an estate by charging himself with the appraised value. It is the duty of such officer to dispose of the property to the best advantage of all concerned and account for the proceeds. *Freeman* v. *Freeman*, 136 Mass. 264. Without an agreement therefor, the surviving partner is not entitled to the benefit of any difference there may be between the appraised value and the actual value of such property. The surviving partner should charge himself in his account with the gain on personal property.

With respect to the petition of Mrs. Jordan to enter an appeal from the decree allowing the first account of the surviving partner, the petitioner objects to the account, first, because nothing was allowed for profits on the Gurnee and Doe jobs, and second, because she claims that an excessive commission was allowed the surviving partner for services. But the petitioner is not aggrieved by the omission of these profits from that account, for the reason that the judge of probate ordered them included in the second account which has already been considered in the appeal of *Whittaker* against *Jordan, Executrix.*

With respect to the second objection, as already stated, a commission of five per cent on $26,959.38 was allowed to Mr. Whittaker. It is provided by section 37 of ch. 65, R. S., that administrators and surviving partners may be allowed a commission not exceeding five per cent on the personal assets "having regard to the nature, liability and difficulty attending their trusts." In this case after hearing the evidence in regard to the Gurnee and Doe jobs, the judge of probate said: "Considering the time he must have devoted to the completion of this work, I am of opinion that he should be allowed the full commission allowed by law, to wit, five per cent, as charged in his account." There is no evidence before this court to show that this was an excessive allowance, and it has been already observed on the appeal of *Whittaker* v. *Jordan, Executrix*, that in determining what part of the profits of the Gurnee and Doe jobs is attributable to the services of the surviving partner, the amount of commission allowed for his services may be considered.

It is accordingly the opinion of the court that justice does not require a revision of this decree, and the entry in *Jordan, petr.* v. *Whittaker*, must therefore be,

Petition dismissed.

In *Whittaker Apt.* against *Jordan, Ex'x* the entry is

Appeal sustained.

Case remanded to the Supreme Court of Probate for a modification of the decree and further proceedings in accordance with the opinion.

ERNEST ROBICHAUD *vs.* ALFRED MAHEUX.

Androscoggin. Opinion December 16, 1908.

Assault and Battery. Civil Action. Intoxication. Damages. Instructions.

In order to avail himself of an error in the instructions given by a presiding Justice, the excepting party must show that the error was prejudicial to him.

When in a civil action of assault and battery it appears that the assault was provoked by insulting language used by the plaintiff to the defendant, and it also appears that the insulting language used by the plaintiff was in consequence of his intoxication by liquors furnished him by the defendant, the defendant cannot shield himself by such provocation in mitigation of damages.

During the trial of a civil action of assault and battery, the presiding Justice, among other things, instructed the jury as follows: "If the defendant, by selling or giving to the plaintiff intoxicating liquors and getting him drunk put him in a condition so that he would be insulting or might be insulting, so that in his drunken condition he would be likely to make the talk he did make," and "if the defendant caused the condition which made the plaintiff talk as the defendant says he did, then the defendant cannot make complaint of the condition which he caused himself." *Held:* That these instructions were correct.

In the case at bar *Held:* That there was no prejudicial error in the charge and that the damages awarded by the jury were not excessive.

On motion and exceptions by defendant. Overruled.

Civil action of assault and battery brought by the plaintiff to recover damages for the breaking of his jaw which he alleged was done by the defendant kicking him. Plea, the general issue. Verdict for plaintiff for $443.50. The defendant excepted to certain instructions given by the presiding Justice in his charge to the jury, and also filed a general motion for a new trial.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

J. G. Chabot, for defendant.

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

PEABODY, J. This was a civil action of assault and battery.

The damages claimed by the plaintiff were for the breaking of his jaw which he alleges was done by the defendant kicking him. The defendant admitted the trespass, not by kicking but by striking the plaintiff with his fist, inflicting slight injuries, and he claimed in mitigation of damages that the plaintiff provoked him by using profane and insulting language both to him and his wife.

The verdict of the jury was for the plaintiff for $443.50.

The case comes before the Law Court on a general motion for a new trial and exceptions to that part of the charge of the presiding Justice which related to mitigation of damages, the language being as follows: "that if the defendant, by selling or giving to the plaintiff intoxicating liquors and getting him drunk put him in a condition so that he would be insulting or might be insulting, so that in his drunken condition he would be likely to make the talk he did make," and "if the defendant caused the condition which made the plaintiff talk as the defendant says he did, then the defendant cannot make complaint of the condition which he caused himself."

Exemplary damages should not be awarded if the acts of the defendant were not intentional, reckless, wanton or malicious. While insulting language might be a provocation sufficient to influence or occasion the conduct of persons of ordinary temperament, it would not excuse or justify an assault, but it might be shown in mitigation of damages. *Prentiss* v. *Shaw*, 56 Maine, 427; *Palmer* v. *Maine Central Railroad Company*, 92 Maine, 399.

The facts stated in the bill of exceptions would indicate that such a provocation was not relied upon by the defendant at the trial in defense or to diminish damages, although it appears that the plaintiff drank intoxicating liquors several times immediately before the assault and that he used insulting language; but he claims that the acts which he did caused no more than trifling damages, and that he did not kick the plaintiff nor break his jaw, but that this injury was the result of the plaintiff's own act.

The plaintiff does not deny that he used toward the defendant insulting language but claims that this did not justify the aggravated assault by which his jaw was broken.

The presiding Justice in view of the conflicting evidence presented to the jury by the plaintiff and the defendant, giving different versions of the assault, instructed them as to the law applicable to the undisputed facts and the claims of both parties; assuming that the jury might find that the defendant made a wanton and reckless assault upon the plaintiff he correctly gave the general rule of exemplary damages; assuming that they might find that the insulting language used by the plaintiff was a sufficient provocation to control his conduct so that he did the acts of violence claimed, he gave the rule which, under such circumstances would exclude an award of exemplary damages; and again assuming that they might find that the violence was done by the defendant in sudden anger excited by insulting language used at the time by the plaintiff while intoxicated by liquors furnished him by the defendant, the Justice properly ruled that he could not complain of what he had himself caused, nor shield himself by the provocation in mitigation of damages.

The charge was not only correct but necessary in order to cover all the phases of the case presented by the evidence.

To avail himself of any error in the instructions of the presiding Justice, which we fail to discover, the defendant must show that the error was prejudicial to him. It seems to us that the damages awarded were not excessive for the personal injuries which the jury might be justified by the evidence in finding the plaintiff actually received, and the pain and suffering he endured in consequences of the assault, and that therefore there was no prejudicial error in the charge, nor sufficient ground for a new trial.

Exceptions overruled.
Motion overruled.

WASHINGTON COUNTY RAILROAD COMPANY

vs.

CANADIAN COLORED COTTON MILLS COMPANY.

Washington. Opinion December 16, 1908.

Quitclaim Deed by Mortgagee. Trust Deed. Power of Sale. Conditions Authorizing Sale must be Observed. Actual Possession by Trustees. Trustees' Deed. Recitals Therein Prima Facie Evidence. Deeds Construed. "After Acquired Land."

1. A quitclaim deed by a mortgagee will release and extinguish his interest, when so intended.
2. While the power of sale given in a trust deed or mortgage must be strictly followed in all its details, the recitals in a trustees' deed to the effect that the conditions and terms of a sale prescribed in the instrument of trust have severally been complied with are to be taken as prima facie evidence of the facts recited, but not conclusive
3. The requirement that the trustees, before sale, shall take actual possession of the mortgaged property to be sold is sufficiently met, in the case of the mortgage of a railroad, and lots of land owned by the railroad company, but not a part of the railroad itself, if the trustees are in actual possession and operation of the railroad, whether they are in actual possession of the outside lots or not. It is not necessary for them in such case, to enter upon and take possession of the separate parcels of land, outside of the railroad location, but contiguous to, and connected with it.
4. *Held:* That the sale by the trustees of the Calais & Baring R. R. Company mortgage of 1852 to the plaintiff's predecessor in title was regular and valid, and conveyed such title as the trustees then had.
5. When a trust deed conferred upon the trustees an express power of sale, but precisely limited the occasions and conditions under which the power could be exercised, and prescribed the essential prerequisites of a valid sale, an attempted conveyance by the trustees, made in disregard of those prerequisites and conditions, and without compliance with any of them, was inoperative to pass any title to the grantee.
6. A mortgage deed of trust, by a railroad company to trustees of the "railroad and franchise of the company . . . as the same is now legally established, constructed and improved, or, as the same may be at any time hereafter legally established, constructed and improved . . . with all lands, buildings and fixtures of every kind thereto belonging, together with all real estate to said company belonging, also all locomotives . .

and all the personal property of the said company as the same is in use now, or as the same may be hereafter changed or renewed by said company," did not purport to include, and did not include, any after acquired land which might lie outside the railroad location, or which was not used or available for use, for the operation of the railroad; and no after acquired land passed under such deed, except such as appertained to the "railroad" itself, as distinguished from the railroad company.

On report. Judgment in accordance with opinion.

Writ of entry brought to recover certain land and flowage rights upon the St. Croix River in Calais. Plea, the general issue. The declaration in the plaintiff's writ is as follows:

"In a plea of land, wherein said plaintiff demands of said defendant certain real estate with its appurtenances in said Calais, to wit: the following described real estate situated in said Calais at Salmon Falls, so called, viz: all that part of shore lots numbers One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten (1, 2, 3, 4, 5, 6, 7, 8, 9, & 10) according to B. R. Jones survey and plan of said Calais, which lies between the River St. Croix and a line drawn eight feet from the shore rail of the main track of the Washington County Railroad towards said river, and parallel with said Shore rail. Also all rights of flowage at said Salmon Falls,—whereof the said defendant unjustly disseized the plaintiff within twenty years last past, whereupon the plaintiff says, it was seized of the premises as of fee within twenty years; and said defendant disseized it thereof and unjustly withheld the same."

The action came on for trial at the April term, 1908, Supreme Judicial Court, Washington County and was heard before the presiding Justice without a jury. At the conclusion of the testimony, it was agreed as follows:

"Under the pleading in this case and upon the foregoing report of evidence, documentary and otherwise, with the exhibits and legislative acts therein mentioned, the case is reported to the Law Court, said court to determine the rights of the parties to this writ of entry, and to render judgment therefor."

The case is stated in the opinion.

That portion of the mortgage deed of trust dated July 1, 1852, given by the Calais & Baring Railroad Company, containing the

description of the property thereby conveyed and the terms and conditions of the conveyance, is as follows:

"Now therefore be it remembered, that the Calais and Baring Railroad Company in consideration of the premises and of one dollar paid to them by the said John Wright, William Fiske and George Downes do hereby give, grant, sell, convey and mortgage to said John Wright, William Fiske and George Downes Trustees as aforesaid, and to their successors when appointed as hereinafter provided forever, the railroad and franchise of said Company in the City of Calais and Town of Baring in the county of Washington and State of Maine, as the same is now legally established, constructed and improved, or, as the same may be at any time hereafter, legally established, constructed and improved within those places from its commencement in Calais aforesaid to its termination in Baring aforesaid, with all lands, buildings and fixtures of every kind, thereto belonging, together with all real estate to said Company belonging. Also all the locomotives, engines, passenger, freight, dirt and hand cars, tools, fixtures and machinery in the mechanic shops and all the personal property of said Company as the same is in use now, by said Company, or as the same may be hereafter changed or renewed by said Company. And furthermore, the said Company hereby transfer and assign to the aforesaid Trustees all the privileges, benefits, profits and emoluments accruing to them from a lease of the St. Stephen Railroad situated in the Parish of St. Stephen County of Charlotte and Province of New Brunswick made to them the said Calais and Baring Railroad Company. To have and to hold the said Railroad franchise, and estate aforesaid, whether real or personal with all the privileges and appurtenances, legislative grants, rights and privileges now granted or hereafter to be granted, and thereto in anyway pertaining to them the said John Wright, William Fiske and George Downes or their successors as Trustees, forever in Trust, for whomsoever, now are, or may hereafter become the lawful holder of said bonds or any of them.

"Provided, Nevertheless, and the foregoing deed is made upon the following terms and conditions.

"First. The said Railroad Company shall never issue or have secured under this deed of Trust and of mortgage a greater sum in bonds as aforesaid than one hundred thousand dollars, said bonds are to be dated July first, A. D. 1852 and payable in twelve years at the aforesaid bank, with interest payable semi-annually at the same place, and they shall be signed by the president and treasurer, of said Company and have the certificate of one or more of the Trustees, aforesaid, that the same is secured by this deed of trust, and of mortgage.

"Second. It shall be the duty of the said Railroad Company to pay the interest and principal of said bonds issued as aforesaid as the same shall become due and payable. And, so long as said Company shall make no default of such payment, said Company may retain the actual possession of all said property to be used in the proper business and management of said Road and the Directors of said Company, notwithstanding this mortgage deed shall have the power and authority to change or renew from time to time any of the personal property hereby mortgaged, as they may deem necessary; and the property so received in exchange or renewal shall be holden by said Trustees under this mortgage in the same manner, as if the same had been owned by said Company at the time of the execution hereof, and included specifically in this mortgage deed.

"Third. In case said Company shall fail to fulfil all or any of the obligations in said bond, or shall commit any strip or waste of the property of the said Company or shall dispose of, or apply the same to any use or purpose inconsistent with its proper use in the operation of said Road, the Trustees aforesaid or their successors, or a majority of the same may take possession of all the property aforesaid, and manage the same for the purpose of said Road, at their discretion and apply the net avails thereof to the payment or satisfaction of such as said bonds or may be outstanding against said Company or the interest thereon in full, or in such equal proportions to all as said avails may enable them to do.

"Fourth. And in case said Company shall fail for six months to pay the interest or principal of said bonds as the same become due it shall be the duty of said Trustees, or their successors on the writ-

ten application of the lawful holders of a majority in amount of said bonds, then outstanding, to take actual possession of said property and make sale of the same at public auction on giving reasonable notice of such sale, in one newspaper at least published in Boston and one in said Calais, and after deducting all expenses of such sale and of this Trust, to pay over to the holders of said bonds, the whole or a ratable and equal proportion thereof, and the balance, if any, pay over to said Company and the said Trustees and their successors are hereby fully authorized and empowered irrevocably to make such sale, and make and execute conveyances passing all the rights, of this Company in the premises accordingly.

"Fifth. In case a vacancy or vacancies shall happen in the Board of Trustees by death, resignation or otherwise, the Directors of said Company may fill all such vacancies by an appointment in writing to be attached to this deed, and such person or persons so appointed and accepting, shall have all the powers and be subjected to all the duties required of the original Trustees.

"Sixth. And on the full performance of all obligations, conditions and stipulations in this deed, and the bonds referred to in the same by said Railroad Company to be done and performed then this deed to be void, otherwise in force."

The deed dated August 1, 1898, given to Frank E. Randall, and referred to in the opinion, is as follows:

"This Indenture, made this first day of August in the year one thousand eight hundred and ninety eight, between George A. Curran James Murchie and George A. Lowell, Trustees, parties of the first part and Frank E. Randall, of the City of New York in the State of New York party of the second part: Whereas, the Calais and Baring Railroad Company, a corporation of the State of Maine, did, on or about the first day of July in the year one thousand eight hundred and fifty two, by its certain mortgage or deed of trust dated on that day and recorded in the Registry of Deeds for the County of Washington in the State of Maine, in volume 75 pages 66 to 70 inclusive, grant, bargain, sell convey and mortgage to John Wright, William Fiske and George Downes, their successors and assigns all the property, rights and franchises

therein and hereafter described or mentioned, in trust, for the payment and security of whomsoever then were or might thereafter become the lawful holders of any of a series of bonds then issued, or about to be issued, by said Railroad Company, under authority of An Act of the Legislature of the State of Maine, approved January 30, 1852 entitled "An Act in relation to Bonds issued by Railroad Corporations," each of said bonds being dated July 1, A. D. 1852 payable July 1, A. D. 1864, and bearing interest at the rate of six per cent, per annum, payable semi-annually; and Whereas pursuant to and in compliance with the provisions of said mortgage or deed of trust, the undersigned George A. Curran, James Murchie and George A. Lowell, thereafter became and now are the successors of said John Wright William Fiske and George Downes in the trusts created by said mortgage or deed of trust; and Whereas, default having been made in the payment of the principal of said bonds, and such default having continued more than six months, and the condition of said mortgage or deed of trust having been broken, and the lawful holders and owners of all said bonds now outstanding to wit, bonds for the principal sum, in the aggregate of thirty-three thousand dollars ($33,000) having made written application to the undersigned, as such trustees to take actual possession of said property, rights and franchises and make sale of the same, as provided in and by said mortgage or deed of trust, the said parties of the first part as such Trustees did take actual possession of said property, rights and franchises, and on the first day of August A. D. 1898, at ten o'clock in the forenoon at the Post Office in the City of Calais, in the State of Maine, did sell the same at public auction by W. H. Tyler a duly licensed auctioneer to the party hereto of the second part, he being the highest bidder for cash, for the sum of forty thousand dollars ($40,000) having first given reasonable notice of such sale and the terms thereof, by publishing such notice in the "Calais Times" a newspaper published in said City of Calais, Maine, on the seventh, fourteenth, twenty-first and twenty-eighth days of July A. D. 1898, and also in the "Boston Daily Journal" a newspaper published in the city of Boston, in the State of Massachusetts on the eighth, ninth, twelfth, fifteenth, nineteenth, twenty-

second, twenty-sixth and twenty-ninth days of July A. D. 1898, and by mailing a copy of such notice to each stockholder of record in said Company and also to each stockholder of record in the St. Croix and Penobscot Railroad Company, on the 9th day of July A. D. 1898, postage prepaid; such notice being given and such sale being conducted in all respects in accordance with the provisions of said mortgage or deed of trust. Now, Therefore, This Indenture Witnesseth: that in consideration of the premises and of the sum of forty thousand dollars ($40,000) to said parties of the first part by said party of the second part paid, the receipt whereof is hereby acknowledged and in pursuance of the power and authority vested in them in and by said mortgage or deed of trust, the said parties of the first part, as Trustees aforesaid, have granted, bargained and sold and do by these presents grant, bargain and sell, remise, release, convey and confirm unto the said party of the second part his heirs and assigns forever, the railroad and other property rights and franchises described in and covered by the mortgage or deed of trust aforesaid, namely, the railroad and franchises now or formerly of the Calais and Baring Railroad Company in the City of Calais and town of Baring in the County of Washington, in the State of Maine, from its commencement at or near J. E. Eaton's planing mill, in Calais aforesaid, to its termination at or near Vance's Boom, in Baring aforesaid, with all lands buildings and fixtures of every kind thereto belonging, together with all real estate to said Company now or formerly belonging, and all locomotive engines, passenger, dirt, freight and hand cars, tools, fixtures and machinery in the machine shops, and all personal property now or formerly of said Company; and also all the privileges, benefits profits and emoluments accruing, or to accrue from a lease of the St. Stephen railroad situated in the Parish of St. Stephen, County of Charlotte and Province of New Brunswick, heretofore made to said Calais and Baring Railroad Company; meaning and intending hereby to convey all the property, rights and franchises of every description covered by said mortgage or deed of trust or by virtue thereof conveyed to or vested in said Trustees.

To Have and to Hold the same unto the said Frank E. Randall, party hereto of the second part his heirs and assigns forever.

In Witness Whereof, the said parties of the first part, as Trustees, as aforesaid, have hereto set their hands and seals this fifteenth day of August in the year one thousand eight hundred and ninety-eight.

Executed and delivered	GEO. A. CURRAN (seal)	Trustees
in presence of	JAMES MURCHIE (seal)	as
George Downes for all.	GEO. A. LOWELL (seal)	aforesaid.

This deed was duly acknowledged by the grantors.

The material parts of the deed dated August 16, 1881, given to St. Croix Cotton Mill, and referred to in the opinion, are as follows:

"Know All Men By These Presents, that the St. Croix and Penobscot Railroad Company a corporation established by law and having its principal office or place of business at Calais Washington County State of Maine, Zachriah Chipman George M. Porter and Lemuel G. Downes trustees under a certain mortgage given by the Calais and Baring Railroad Company dated July 1st A. D. 1852, ... Zachriah Chipman, Edward A. Barnard and Ephraim C. Gates, Trustees under a certain mortgage given by the Calais and Baring Railroad Company dated July 1st A. D. 1854, ... said St. Croix and Penobscot Railroad Company being the legal successors of said Calais and Baring Railroad Company. The City of Calais a Municipal Corporation in said Washington County mortgagees under certain mortgages given by said St. Croix and Penobscot Railroad Company dated August 11, A. D. 1870 and December 2d A. D. 1875, ... In consideration of one dollar and other valuable considerations paid by the St. Croix Cotton Mill a corporation established by the laws of the Province of New Brunswick Dominion of Canada and doing business at Milltown Charlotte County in said Province of New Brunswick the receipt whereof is hereby acknowledged do hereby remise release and forever quitclaim with the said St. Croix Cotton Mill their successors and assigns the following described real estate situate in

said Calais at Salmon Falls so called viz: All that part of shore lots numbers One Two Three Four Five Six Seven Eight Nine and Ten (1, 2, 3, 4, 5, 6, 7, 8, 9, & 10) according to B. R. Jones survey and plan of said Calais which lies between the St. Croix and a line drawn eight feet from the shore rail of the main track of said railroad towards said river and parallel with said shore rail. Also all rights of flowage at said Salmon Falls reserving all side tracks switches wood sheds machine shops machinery and other buildings on the premises hereby conveyed and the bridge across said river and the right to maintain them as now maintained without any rent charge. It is intended by this conveyance only to convey the soil and the water rights, and the right to erect and maintain dam or dams without damage expense or inconvenience to said Railroad Company upon condition that said Cotton Mill shall maintain such dam or dams as may be necessary to furnish said Railway Company with all the water power it may need in connection with the machine shop force pump and other properties at Salmon Falls . . . . It being expressly understood and agreed between all the parties to this deed that the buildings and machinery and rights reserved in this conveyance or any newly acquired property real or personal or mixed obtained by virtue of any of the provisions of this deed shall be held by said Railroad Company subject to the conditions of the existing mortgages on their property and the joining of the mortgagees in this conveyance shall not be construed to release from said mortgages any property other than the soil water rights and dam privileges hereby conveyed. . . . . .

"To Have And To Hold the above released premises with all the privileges and appurtenances to the same belonging to the said St. Croix Cotton Mill their successors and assigns to their use and behoof forever upon the conditions above named."

This deed was duly signed, sealed and acknowledged by the grantors.

Curran & Curran, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SAVAGE, J. Writ of entry to recover so much of lots one to ten inclusive according to the B. R. Jones survey and plan of Calais as lies between the St. Croix river and a line drawn eight feet from the shore rail of the plaintiff company; also certain flowage rights. The plea is the general issue. The case comes up on report. The following facts appear. In 1852, the Calais & Baring R. R. Co. was the owner of a railroad in Calais and Baring, and of said lots 1, 5, 6, 9 and 10 and of an undivided half of lots 3, 7 and 8. In that year, by corporate vote, the directors of the Calais & Baring R. R. Co. were authorized and directed to execute a mortgage of the franchise of the company and all the property personal and real, and all the rights and privileges held by said company to trustees, to secure an issue of $100,000 of bonds. Under this vote the directors later in the year executed a mortgage deed of trust to certain trustees of the railroad and franchise of the company in Calais and Baring "as the same is now legally established, constructed and improved, or, as the same may be at any time hereafter legally established, constructed and improved within those places . . . . with all lands, buildings and fixtures of every kind thereto belonging, together with all real estate to said company belonging, also all locomotives . . . . and all the personal property of the said company as the same is in use now, or as the same may be hereafter changed or renewed by said company." And in this mortgage it was provided that "in case the said company shall fail for six months to pay the interest and principal of said bonds as the same become due it shall be the duty of the trustees or their successors on the written application of the lawful holders of a majority in amount of said bonds then outstanding to take actual possession of said property and make sale of the same at public auction," and so forth. Provision was made for filling vacancies among the trustees. This mortgage covered the lots of the demanded premises which the company then owned, if no more.

In 1854, under a similar corporate vote, the directors executed a second mortgage deed of trust to trustees of the same property and with the same terms and conditions as expressed in the first mortgage, to secure an issue of $50,000 of bonds. It does not appear whether any of these have been paid or not.

In 1856 the Lewy's Island R. R. Co., owning a railroad running through Baileyville, Maine, and St. Stephen, New Brunswick, mortgaged all the property and franchises which it then held, or which it might thereafter acquire, to the city of Calais, to secure the city for financial aid advanced. In 1870, the Lewy's Island railroad having been acquired by the St. Croix & Penobscot R. R. Co., which was the Calais & Baring R. R. Co. under a new name, Calais conveyed all its interest in the Lewy's Island railroad property for $135,000 to the St. Croix & Penobscot R. R. Co., which on the same day mortgaged it back to Calais to secure the payment of the purchase price, and the performance of certain agreements. In 1875 the St. Croix & Penobscot R. R. Co. made a second mortgage to Calais, covering not only the Lewy's Island R. R. property but its other railroad property formerly known as the Calais & Baring railroad, "together with all and singular the real estate . . . . and all property and privileges appurtenant to said St. Croix & Penobscot R. R. Co." This mortgage seems to have been given as additional security for a part at least of the liability secured by the mortgage of 1870, between the same parties.

In the meantime the Calais & Baring R. R. Co. in 1862 had acquired the title, it seems, of lot 4, an undivided half of lot 7 and 8, and a part, limited by bounds, of lots 2 and 3 of the demanded premises, and in 1874, the St. Croix & Penobscot R. R. Co. took a release deed of lots 3, 4, 5, 7 and 8. These lots, therefore, as well as the lots originally owned by the Calais & Baring R. R. Co. were covered by the last mortgage to Calais. In this connection it is to be remembered that the Calais and Baring R. R. Co. and the St. Croix & Penobscot R. R. Co. were one and the same corporation, the name of the former having been changed by the legislature in 1870.

In 1881, the St. Croix & Penobscot R. R. Co. which owned an equity of redemption in all these lots, the trustees of the first and second mortgages given in 1852 and 1854, respectively, and the city of Calais, which was the mortgagee in the 1875 mortgage covering these lots, all joined in a quitclaim deed of them to the St. Croix Cotton Mill, the predecessor in title of the defendant.

But it further appears that in May, 1898, Moore & Schley claiming to be "the holders of $43,000 of the first and second mortgage bonds of the Calais & Baring road" made written application to the persons who had then become trustees under the 1852 mortgage requesting them to institute proceedings for the foreclosure of the mortgage and the sale of the property. Accordingly the trustees gave notice, July 6, 1898, as provided in the mortgage, of their intention to sell the mortgaged property, and did sell it at public auction, August 1, 1898, to one Frank E. Randall. In the deed of the trustees to Randall it is stated that default for more than six months had been made in the payment of the principal of the bonds secured, that the applicants for the foreclosure and sale were the lawful holders and owners of all the bonds then outstanding, and that they, the trustees, took actual possession of the mortgaged property August 1, 1898. On August 15, 1898, Randall gave a deed of the same property to the plaintiff.

It further appears that on June 2, 1898, the city of Calais assigned to the J. P. McDonald Company its two mortgages from the St. Croix and Penobscot R. R. Co., given as already stated in 1870 and 1875 respectively. The McDonald Company assigned them to the plaintiff in 1899, and they have been foreclosed by proceedings in court. But it should be said that these assignments and this foreclosure do not affect the title to the lots in question. These assignments may have been effective as to the other mortgaged property, but, the city of Calais by joining in the deed of 1881 to the St. Croix Cotton Mill had released all its title to these lots. That was a quitclaim deed. But a quitclaim deed by a mortgagee may even convey his interest, if so intended, *Johnson* v. *Leonards*, 68 Maine, 237. Much more will a quitclaim deed by a mortgagee release or extinguish his interest when so intended.

Such was the undoubted purpose of the mortgagee in this instance, and such was the effect of its deed. These lots were no longer under the mortgage.

Upon the whole case, then, the plaintiff's title depends in the first place upon the validity and effect of the sale by the trustees in 1898, while the defendant rests on the title conveyed by the deed of 1881 to the St. Croix Cotton Mill. By that deed, it should be observed, the Cotton Mill acquired, at least, the title to the equity of redemption under the mortgage of 1852.

In order to prevail the plaintiff must show a better title than that of the defendant, and it can do this only by sustaining the sale by the trustees to Randall under the 1852 mortgage, for, so far as this case is concerned, the defendant's title is good against all persons except those claiming under that mortgage. Several objections are urged against the validity of the trustees' sale in 1898. First, that it does not appear that the interest on the bonds was six months overdue at the time application for a sale was made; secondly that it does not appear that the written application for sale was made by holders of a majority of the bonds then outstanding; and lastly, that the trustees did not take actual possession before sale, as directed in the trust deed. As to the first objection, it may be said in passing that the trust deed authorized a sale, when the principal should be six months in default, whether the interest was in default or not. But we do not think any of these objections are tenable.

It is a general rule, as stated in 2 Perry on Trusts, 2nd Ed. sect. 602, that "the power of sale given in the deed or mortgage must be strictly followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally and precisely. . . . . If the power contains the details, the parties have made them important. . . . . If the power is not executed as it is given in all particulars, it is not executed at all, and the mortgagor still has his equity of redemption." And again in section 783,—"A power of sale, like all other powers, can be exercised only in the mode, and upon the exact conditions, terms and occasions prescribed in the instrument of trust.

But there are recitals in the trust deed which state in effect that all of the essential conditions prerequisite to a sale, existed at the time of the sale, namely, that the principal of the bonds was six months in default, that the application for sale was made by the holders of all the outstanding bonds, and that the trustees took actual possession before sale. We think these recitals are to be taken as prima facie proof of the facts. The rule is stated in 4 Ency. of Evidence, 183, as follows: "The recitals contained in a deed executed by virtue of a power of sale contained in a trust deed or mortgage that proper notice of the sale was given, and that other steps preliminary to a valid sale were complied with, are prima facie evidence against parties and privies to the instrument containing the power." The learned editor of the American State Reports closes a long note to *Tyler* v. *Herring*, 19 Am. St. Rep. 263, by saying: "The recitals made by a trustee surely must be taken as at least prima facie evidence of the matters therein stated." If such is not the rule, the title of purchasers would be exceedingly unstable, and purchasers or their grantees would be in an unfortunate predicament if compelled to make proof of title, after all means of proof outside the deed have disappeared. There is no such method of perpetuating proof of the facts as exists in case of official or statutory sales, where the officer making the sale is required to make some return or record of his doings aliunde his deed. In such case the recitals in the deed are not evidence, since the law has provided other means of proof.

But the recitals are only prima facie proof. They may be rebutted. In this case, the testimony of one of the trustees is reported on the question whether the trustees took actual possession before they made sale. The defendant contends that this testimony shows that they did not take actual possession of the demanded premises. We need not decide whether this is so or not. The case shows that the trustees at the time were in actual possession of the railroad and were running it. The distinctively railroad property of which they were in possession constituted apparently by far the larger and more important part of the mortgaged property, and covered some part of the lots in question. We think that that possession was sufficient.

The trustees being in possession of the railroad, it was not necessary for them to enter upon and take possession of the separate parcels of land, outside of the railroad location, but contiguous to, and connected with it. We hold, therefore, that the sale by the trustees in 1898 was regular and valid, and conveyed such title as the trustees then held.

Hereupon the defendant claims that by the deed of 1881, in which the then trustees joined, the entire legal title passed to the defendant; that the trustees thereby divested themselves and their successors of the power to make any future sale of the legal title; and, therefore, that the trustees' deed in 1898, if it had any effect, conveyed at the most only an equitable interest, and not a title which will sustain this action at law. We think this contention cannot be sustained. It is true that a conveyance of a trust estate by a trustee may pass the legal title to the grantee, even though the conveyance is not made in execution of the trust, and is made in violation of its purpose. Such a result will generally follow when the instrument creating the trust contains no restrictions either upon the power of sale, or upon the manner of exercising the power. But here the case is different. While the trust deed of 1852 conferred an express power of sale upon the trustees, it precisely limited the occasions and conditions under which the power could be exercised, and prescribed the essential prerequisites of a valid sale. Unless there was a default in payment of principal or interest of the bonds secured, and an application for sale by holders of a majority of the outstanding bonds, the trustees had no power to sell. Their want of power appeared upon the face of the instrument. Unless the trustees in making sale followed the requirements of the trust deed as to taking possession, giving notice and so forth, their deed was ipso facto void, and conveyed no title whatever. "The powers of trustees . . . . depend entirely upon the terms of the deeds. Such powers are created by and exist in the deeds, and, of course, they exist in the terms in which they are created, and in no others. . . . . They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. . . . . It follows that the purchaser must look carefully to

the intention and purpose of the power as well as to its extent, for if it is executed . . . not in the manner in which it is provided that it should be executed, the purchaser will take no title." Perry on Trusts, sects. 602, g. and 602, t. "When a power has not been executed in accordance with essential conditions, the sale and deed will be held entirely void, both at law and in equity." See note to *Tyler* v. *Herring*, 19 Am. St. Rep. 263. It follows that the attempted conveyance by the trustees in 1881 was ineffectual to pass the title to the trust estate. The conditions necessary to authorize a sale did not exist, and the steps necessary to make a sale valid were not taken. Through the 1898 deed, then, the plaintiff has obtained title to all the land covered by the trust deed of 1852, notwithstanding the 1881 deed to the defendant.

The last question to be decided is whether any, and if any, how much, of the demanded premises were subject to the trust deed of 1852. That lots 1, 5, 6, 9 and 10, and an undivided half of lots 3, 7 and 8 according to the Jones survey were covered by the 1852 deed is not in dispute. The railroad company owned these lots in 1852. They were a part of "the real estate to the company belonging," all of which was covered by the deed. But the remainder of the demanded premises was not then owned by the company and was not covered by the deed and has not come to the plaintiff, unless it was such after acquired property as the 1852 deed purported to convey. It is contended, indeed, that the directors had no authority to mortgage after acquired property. The directors of the railroad company were authorized by a corporate vote to mortgage the franchise and property "held by said company." This vote clearly related to property then held by the company, and not to after acquired property. And without considering at all whether the directors had independent power to mortgage, when it appears, as in this case, that the directors act under the special authority of a corporate vote, and the terms and limitations of that authority are disclosed in the mortgage itself, we think it may well be doubted whether their mortgage of property not included in the vote has any effect whatever as to that property.

But we think that the trust deed properly construed does not purport to include any after acquired land which might lie outside the railroad location, or which was not used or available for use, for the operation of the railroad. The words of such a deed "are to be strictly construed, and no land or property is included unless clearly within the meaning of the words of the instrument." 3 Cook on Corporations, sect. 856. The deed speaks of two classes of real estate, that appertaining to the "railroad," and that belonging to the company. It uses different language as to each. In one case, it is the "railroad and franchise . . . . as the same is now established, constructed or improved, or as the same may be at any time hereafter legally established, constructed and improved . . . . with all lands, buildings and fixtures of every kind thereto belonging." The other description is "all real estate to said company belonging." We think we should not disregard this difference. The provision relating to after acquired property is in terms confined to the "railroad" and franchise, and the lands belonging "thereto," "that is, to the "railroad." The words "established, constructed and improved," seem clearly to apply to the railroad itself, as distinguished from other land of the company. They are not appropriate to real estate owned by the company, but not a part of the "railroad" itself. Besides, unless it was intended by the deed to make a distinction between lands belonging to the "railroad," and other real estate belonging to the company, there was no occasion for inserting the clause "all real estate to said company belonging." We conclude that this latter clause related only to real estate then held or owned by the company, which was not a part of the railroad itself, and that no after acquired property was intended to pass, or did pass, by the 1852 deed, except such as appertained to the "railroad" itself. See *Eldridge* v. *Smith*, 34 Vt. 484; *Walsh* v. *Barton*, 24 Ohio St. 28; *Boston &c. R. R.* v. *Coffin*, 50 Conn. 150; *Morgan* v. *Donavon*, 58 Ala. 241; *Randolph* v. *New Jersey &c. R. R.*, 28 N. J. Eg. 49; *Dinsmore* v. *Racine &c. R. R.*, 12 Wis. 649; *Shamokin Valley R. R.* v. *Livermore*, 47 Pa. St. 465.

It follows that of the demanded premises the plaintiff has title to lots 1, 5, 6, 9 and 10, and an undivided half of lots 3, 7 and 8, and only to so much of the after acquired lots, if any, as lies within the railroad location, or as was acquired for and was used in connection with the operation of the railroad. But the case fails to show that any part of these latter lots, within the limits of the premises demanded in the writ, were a part of the "railroad," as hereinbefore defined. The plaintiff therefore is entitled to judgment for so much of lots 1, 5, 6, 9 and 10, and of an undivided half of lots 3, 7 and 8, as lies between the St. Croix River and a line drawn eight feet from the shore rail of the plaintiff's railroad, and no more; and also for the flowage rights appurtenant thereto.

Judgment accordingly.

EDGAR E. RING, Land Agent,

Petitioner for Location of Public Lots in Elliotsville.

Piscataquis. Opinion December 18, 1908.

Reserved Lands. Public Lots. State Land Agent. State Deeds. Burden of Proof. Evidence. Historical Works. Articles of Separation, section 1, paragraph 7. Resolves (Mass.) 1788, March 26; 1810, Feb. 10; 1813, Feb. 27; 1813, March 2; 1814, Jan. 25; 1829, Oct. 28. Statutes (Mass.) 1784, July 9; 1794, May 1. Private & Special Laws, 1830, chapter 176. Statute 1821, chapter 41; 1824, chapter 280, section 8; 1835, chapter 170; 1850, chapter 196, section 3. Revised Statutes, 1841, chapter 122, section 1; 1903, chapter 7, section 20.

The Land Agent in his official capacity, under the provisions of Revised Statutes, chapter 7, section 20, is charged with the duty of instituting proceedings to locate lots reserved in grants of lands made by the State which have not been located or which, if located, have not been lawfully located, for the purposes expressed in the grants.

Where land has been granted by the State with a reservation of public lots in the deed thereof, to be thereafterwards located, such lots must be located within the limits of the land specifically granted.

Although a tract of land has been granted by the State without any reservation of public lots in the deed thereof, yet the grantee takes such deed subject to the reservation of such lots and the right to locate the same when the statute in force at the time the grant was made, required such reservation to be made.

Where different portions of a tract of land known as the "State Tract" were conveyed by the State at different times to different grantees without any reservation of public lots therein, and the statute in force at the time such grants were made required such reservation to be made, *Held:* That the location of the public lots should be made in the portion last conveyed by the State.

A grant of land was made by the Commonwealth of Massachusetts containing the following provision: "Conditioned, however, that said grantees, their successors and assigns, shall lay out and reserve three lots of fifty-six acres each for the following purposes, viz: 1 lot for the use of the ministry, 1 lot for the first settled minister his heirs and assigns, and 1 lot for the use of the schools within the township, said lots to average in situation and quality with the lands in said tract." The evidence seemed to show that these lots had been located by the proprietors within the water area of Onaway Lake. *Held:* That even if the action of the proprietors was bona fide, the conditions of the grant were not performed by laying out and allotting water areas in Onaway Lake, which as public waters could not pass by the grant to them, instead of land of average quality with residue of lands therein.

Where the Land Agent by petition instituted proceedings for the appointment of a committee to locate public lots in Elliottsville Plantation, alleging that the reserved lots described in the petition had not been located in severalty for the purposes expressed in the grants, *Held:* (1) That though the allegation was negative in form yet it was in substance the affirmation of his authority and the burden rested upon him to prove this fact. (2) That the reservations and conditions subsequent in the grants of land comprising the plantation showed prima facie the petitioner's authority to institute the proceedings, and the duty of producing evidence to rebut it devolved upon the land owners.

Where there was no primary or record evidence to show that public lots had been located in the "Vaughan Tract," so called, in Elliottsville Plantation, *Held:* That certain words and recitals in deeds of land within the territorial limits of said tract, certain marks on an old plan known as the "Bodfish Plan," certain statements in Loring's History of Piscataquis County, and certain statements in the School Reports, were admissible as secondary evidence that such lots had been located in said tract.

Elliottsville Plantation is composed of a certain "mile strip" of land granted by Massachusetts to the Massachusetts Medical Society, containing 3,000 acres, the Vaughan Tract, so called, containing 11,520 acres, the Saco Free Bridge Fund Grant, containing 4,044 acres and the State Tract, so called, containing 2,626 acres and which includes the Leavitt Grant, so called, of

1,250 acres. On the petition of the Land Agent for the appointment of a committee to locate public lots in said plantation, *Held:* That a committee should be appointed to locate public lots as follows, viz: in the one mile strip of the Massachusetts Medical Society, 3,000 acres, one lot of 125 acres, in the Saco Free Bridge Fund Grant, 4, 044 acres, three lots of 56 acres each, and in the Leavitt Grant, 1,250 acres, being part of the State Tract, 2,626 acres, last conveyed, a lot or lots containing in the aggregate 113.9 acres, of average quality with the residue of lands in each tract, and to designate the use for which each lot is so reserved and located.

On report. Petition granted. Remanded for proceedings at nisi prius according to opinion.

Petition by Edgar E. Ring, Land Agent of the State of Maine, for the appointment of a committee to locate public lots in the Plantation of Elliottsville, Piscataquis County.

The following named owners of lands in Elliottsville appeared and filed an answer to the petition: Cilla B. Hale, Ship Pond Company, J. G. Dunning, C. W. Coffin, Thomas Gilbert, A. S. Garland, Samuel Sterns, Ezra L. Sterns, S. & J. Adams, F. H. Drummond, William Engel, J. F. Sprague, Enos Sawyer, Jr., Sterns Lumber Company, R. A. Young, and R. A. Buxton. The answer, among other things, denied that the lands reserved for the public uses in Elliottsville had not been lawfully located in severalty, and also asserted that the petitioner as Land Agent had no authority under the laws of the State to maintain the petition.

A hearing was had on the petition and at the conclusion of the evidence the case was reported to the Law Court for determination, with the stipulation that "if the petition is sustained, the Law Court to appoint commissioners."

The case appears in the opinion.

J. S. Williams, and Warren C. Philbrook, Assistant Attorney General, for petitioner.

Hudson & Hudson, for Ship Pond Co.,
Sterns Lumber Co.,
S. & J. Adams,
F. H. Drummond,
and William Engel.

J. F. Sprague, for himself, Enos Sawyer and Sterns Lumber Co.

Charles H. Bartlett, for Cilla B. Hale.

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

PEABODY, J. This is a petition presented by the Land Agent for the appointment of a committee to locate public lots in the Plantation of Elliottsville in Piscataquis County.

Under a public act of the Commonwealth of Massachusetts May 1st, 1794, Samuel Weston was authorized and directed to survey three ranges of townships between Penobscot River and the Million Acre Purchase north of Waldo Patent, which subsequently became a part of the State of Maine.

The survey located Ranges Seven, Eight and Nine and divided them into townships six miles square. The plantation known as Elliottsville was Township Eight, Range Nine, according to Weston's survey. By an act of the General Court of Massachusetts, approved July 9, 1784, the Committee for the sale of Eastern Lands were directed in the conveyance of each township to appropriate two hundred acres for the use of the ministry, two hundred acres for the first settled minister, two hundred acres for the use of the Grammar School, and two hundred acres for the future disposition of the General Court, and by an act, approved March 26th, 1788, the previous act was modified so as to require thereafter in the conveyance of every township of six miles square a reservation of four lots of three hundred and twenty acres each, one for the first settled minister, one for the use of the ministry, one for the use of schools and one for the future appropriation of the General Court.

This act continued in force until the separation of Maine from Massachusetts, when its provisions in regard to school and ministerial lots were incorporated in paragraph seven, section one of the Articles of Separation adopted June 19th, 1819.

The first conveyance of lands within Township Eight, Range Nine, was the grant by the Commonwealth of Massachusetts to the Trustees of the Massachusetts Medical Society dated March 2nd, 1813, by virtue of a resolve passed February 10th, 1810, and by a resolve passed February 27th, 1813. The appropriation was of one township of land to contain six miles square and in order to obtain

the full township of six miles square the conveyance was of all of township Nine, Range Nine, north of Waldo Patent, except three thousand acres in the north west corner which had been conveyed to William C. Whitney, and to make up for the three thousand acres conveyed to Whitney the grant included a strip of land on the west side of Township Eight, Range Nine, one mile in width upon the north end and two hundred and eighty-six rods in width upon the south end.

In this grant it was provided that the Trustees of the Massachusetts Medical Society should lay out in the township three lots of three hundred and twenty acres each for the following uses, namely, one lot for the use of the ministry, one lot for the first settled minister his heirs and assigns, and one lot for the use of the schools.

By chapter 176 of the Private Laws of 1830, Township Nine, Range Nine, was incorporated as the Town of Wilson. The public lots within this town were located by proceedings authorized by the Act of March 15th, 1821, chapter 41, upon a petition filed by the officers of that town. These proceedings could legally embrace only the lots which had been reserved in the part of the tract above mentioned granted by the Commonwealth to the Massachusetts Medical Society which was within the Wilson Township, so the territory included in the tract on the west side of Township Eight, Range Nine, being in the Plantation of Elliottsville, is involved in the pending petition.

The second conveyance of lands within Township Eight, Range Nine, was a grant by the Commonwealth of Massachusetts to the heirs of William Vaughan dated January 25th, 1814, of one-half township of land containing eleven thousand five hundred twenty acres, which grant contained the following provision:

"Conditioned, however, that said grantees their heirs and assigns shall lay out in said tracts four lots of one hundred sixty acres each for the following uses, 1 lot for the first settled minister; 1 lot for the use of the ministry; 1 lot for the use of the schools; and one lot for the future appropriation of the General Court, said lots to average in situation and quality with the other land in said tract."

The third conveyance of lands within Township Eight, Range

Nine, was the grant by the Commonwealth of Massachusetts to the Trustees of the Saco Free Bridge Fund dated October 28th, 1829, of a tract of land surveyed by Tristiam Johnson containing four thousand forty-four acres, in which was the following provision:

"Conditioned, however, that said grantees, their successors and assigns, shall lay out and reserve three lots of fifty-six acres each for the following purposes, viz; 1 lot for the use of the ministry, 1 lot for the first settled minister his heirs and assigns, and 1 lot for the use of the schools within the township, said lots to average in situation and quality with the lands in said tract."

Township Eight, Range Nine, was thus composed of the tract of land comprising a part of the grant of the Commonwealth to the Massachusetts Medical Society, situated on the west side of the township, the tract of land conveyed to heirs of William Vaughan, the tract of land conveyed to the Saco Free Bridge Fund, and a tract of land lying directly south of the Saco Free Bridge Grant of sufficient width to make the township contain six square miles or twenty-three thousand forty acres, known as the State Tract, which was acquired by the State of Maine from the Commonwealth of Massachusetts under the Separation Act. The State Tract was surveyed by Caleb Leavitt in 1830 and according to his plan contained two thousand six hundred and twenty-six acres. It is apparently the portion of the division and allotment of lands between Maine and Massachusetts made on the 28th of December 1822, described in the first Division as follows: "Also that part of lot number eight in said ninth range which had not been conveyed, containing four thousand four hundred and seventy-six acres," but the actual survey made subsequent to this division we may assume is more correct as to the number of acres in the tract though leaving a deficiency in the acreage of the township of one thousand eight hundred and fifty acres. This may have resulted from the exclusion from the Leavitt survey of the part of the State Tract covered by great ponds within its boundaries.

All the lands embraced in this township were granted while the resolve of 1788 was the law governing the reservation of lands for public uses, except the State Tract. The law providing for the

reservation of one thousand acres of land in every township suitable for settlement was enacted by chapter 280, section 8, of the Public Laws of Maine 1824, and could not apply to prior grants nor to those previously provided for because controlled by the language of paragraph seven of the Articles of Separation, which provides, "All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located, which have been made or may be made by the said Commonwealth, before the separation of said District shall take place, having or to have effect within the said District, shall continue in full force, after the said District shall become a separate state;" but it did apply to the State Tract.

It therefore appears that of this township, the mile strip on the west side assumed to contain three thousand acres which was part of the grant to the Massachusetts Medical Society, the tract of eleven thousand five hundred and twenty acres granted to the Heirs of William Vaughan, and the tract of four thousand forty-four acres granted to the Saco Free Bridge Fund, were subject to the resolve of March 26th, 1788, providing for a reservation in the conveyance of every township of six miles square of four lots of three hundred and twenty acres each. These lots being reserved in the deeds must be located within the limits of the land specifically granted.

The State Tract of two thousand six hundred and twenty-six acres would be subject under the requirement of chapter 280, section 8, of the Public Laws of 1824, to a reservation of $\frac{2626}{23040}$ of one thousand acres or one hundred thirteen and nine-tenths acres, "to be appropriated to such public uses for the exclusive benefit of such town as the legislature may hereafter direct."

By an act approved March 15th, 1821, chapter 41, the Circuit Court of Common Pleas was authorized on application of the assessors of a town wherever in the grant thereof there were lots reserved for the use of the township and for public uses and not located by the grantees, to cause them to be located; and by an act approved March 13, 1835, chapter 170, the assessors of organized plantations

were authorized to obtain in like manner the location of lots received within them for public lots.

In Revised Statutes of 1841, chapter 122, section 1, the District Court in the county in which a plantation was situated, on the application of the assessors were authorized to appoint a committee to locate in separate lots the proportions reserved for the use of such township or for public uses when not located in severalty by the grantee.

By the Public Laws of 1850, chapter 196, section 3, the duty of instituting proceedings for the location of lots reserved for public uses devolved upon the Land Agent and the provision relating to the location of reserved lots was incorporated in the subsequent revisions of the statutes including the Revised Statutes of 1903, and is now chapter 7, section 20, which is as follows:

"Sec. 20. When in the grant of townships or parts thereof, certain portions of them are reserved for such townships, or for public uses, and they have not been lawfully located in severalty by the grantee for the purposes expressed in the grant, the supreme judicial court in the county where the land lies on application of the land agent, may appoint three disinterested persons, and issue to them a warrant, under the seal of the court, requiring them, as soon as may be, to locate in separate lots, the portions reserved for such purposes, and to designate the use for which each lot is so reserved and located, such lots to be of average quality with the residue of lands therein."

The petitioner in his official capacity is therefore charged with the duty of instituting proceedings to locate lots reserved in grants of lands embracing the Plantation of Elliottsville and not lawfully located in severalty by the grantees or by proceedings invoked by the assessors of the plantation, or of the town during its corporate existence from February, 1835 to May 25th, 1858. In his petition he alleges that the reserved lots in the land therein described have not been located in severalty for the purposes expressed in the grants. This allegation is denied by the defendants in their answer. The petition can be granted only in case a legal location has not been made and the burden rests upon the petitioner to prove this

fact. Although negative in form it is in substance the affirmation of the petitioner's statutory authority to apply for the appointment of a committee for the location of the lots in question. 1 Greenleaf on Evidence, sections 74 and 78, 4 Wigmore on Evidence, 2486.

The reservations and conditions subsequent in the grants of land comprising the plantation introduced in evidence by the Land Agent show prima facie his authority to institute the proceeding, and thereupon the duty of producing competent evidence to rebut it devolves upon the defendant. 16 Cyc. 932.

Primary evidence would be sought in the records of the Registry of Deeds in the county in which the land lies, in the records of the plantation and town of Elliottsville and of the courts having jurisdiction. If the allotment has been made by any legal procedure, except of lots reserved in the tract granted to the Saco Free Bridge Fund no such record of evidence has been discovered.

Secondary evidence is offered by the respondents of certain words and recitals in deeds of land within the territorial limits of the Vaughan tract which imply an allotment, also marks on an old plan of Elliottsville known as the Bodfish Plan, the statements in Loring's History of Piscataquis County, and School Reports are introduced which are consistent with the claim of the defendants that the conditions in this grant have been performed in reference to that part of the plantation. Objection to the admission of the Bodfish Plan as evidence is made by the petitioner because not clearly shown to have been in existence thirty years and because it has upon it marks not originally a part of the plan, but we think it is within the rule admitting ancient documents as evidence. Objection is also made to the admission of Loring's History, but there is no indication that the writer had any interest to incorporate in his history any statements inconsistent with the original sources of the information upon which they are founded, and under the circumstances we think it competent evidence upon a question of this nature. *State* v. *Wagner*, 61 Maine, 178.

But there appears to be no evidence of an allotment of reserved land within the limits of the one mile strip of three thousand acres,

or of the State Tract of two thousand six hundred and twenty-six acres. The only clearly proven action in locating any of the land reserved is that of the Trustees of the Saco Free Bridge Fund; but this has the appearance of being a pseudo allotment and should be treated as void. Even if the action of the proprietors was bona fide the conditions of the grant were not performed by laying out and allotting water areas in Onaway Lake which as public waters could not pass by the grant to them, instead of land of average quality with the residue of lands therein.

It is conceded by the petitioner that the deeds offered in evidence by him show the conveyance of the entire State Tract without the reservation of lots which the statute of 1824 required; but he contends that the grantees took the deeds subject to public rights and the existing laws which they were presumed to know. The decision in *Blake* v. *Bangor Savings Bank*, 76 Maine, 377, upon which the land owners rely, holds that the burden of the reservation of public lots passed to the portion last conveyed by the State. The last conveyance by the State of land in this tract was one thousand two hundred and fifty acres to Dudley F. Leavitt, September 1, 1866, and out of this portion the location of the public lots must be made.

Our conclusion is that a committee should be appointed to locate public lots as follows, viz: in the one mile strip of the Massachusetts Medical Society, 3,000 acres, one lot of 125 acres, in the Saco Free Bridge Fund Grant, 4,044 acres, three lots of 56 acres each, and in the Leavitt grant, 1,250 acres, being part of the State Tract, 2,626 acres, last conveyed, a lot or lots containing in the aggregate 113.9 acres, of average quality with the residue of lands in each tract, and to designate the use for which each lot is so reserved and located.

Petition granted.
Proceedings at nisi prius according to this opinion.

CHARLES L. MACURDA *vs.* LEWISTON JOURNAL COMPANY.

SAME *vs.* SAME.

Androscoggin. Opinion December 16, 1908.

Pleading. Declarations. Disjunctive Allegations. Demurrer.

It is a general rule of pleading that the declaration must allege the gravamen — the grievance complained of, with such precision, certainty and definiteness that the defendant may know what to answer by his pleading and proof.

When material facts are stated in the alternative, so that it cannot be determined upon which of several equally substantial averments the pleader relies for the maintenance of his action, the pleading is bad for uncertainty.

A disjunctive allegation as to the essence of the cause of action is as pure an example of uncertainty as can well be found, for it completely conceals from the defendant the ground upon which a recovery is claimed.

The disjunctive form of allegation as to the essence of the cause of action has been uniformly regarded as fatally defective.

If from the declaration the cause of action does not sufficiently appear the pleading is defective in substance.

When a declaration is defective because of the disjunctive form of allegation used, the defect can be reached by general demurrer.

The plaintiff brought two actions against the defendant to recover damages for alleged libels. In one action the publication of the alleged libelous matter was stated as follows: "Said defendant did . . . falsely and maliciously compose, print, publish and circulate, *or* cause to be composed, printed, published and circulated in a certain public newspaper . . . . a certain scandalous and malicious libel of and concerning the plaintiff.' In the other action the publication was stated as follows: "Said defendant did . . . falsely and maliciously compose and publish, *or* cause and prepare to be composed and published . . . . in a certain newspaper . . . a certain malicious libel of and concerning the plaintiff." The defendant filed a general demurrer in each action. *Held:* That the declaration in each case was defective because of the disjunctive form of allegation used.

On exceptions by defendant. Sustained.

Two actions on the case brought by the plaintiff against the defendant company, to recover damages for alleged libels published

by the defendant company, "of and concerning the plaintiff." The defendant company filed a general demurrer to each declaration. The presiding Justice, pro forma, overruled the demurrers, and the defendant excepted.

The cases are sufficiently stated in the opinion.

Arthur S. Littlefield, George C. Wing, and George C. Wing, Jr., for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

KING, J. Each action is to recover damages for an alleged libel and is before the Law Court on a general demurrer to the declaration. In the first action the publication of the alleged libelous matter is stated in this form:

"Said defendant did . . . . falsely and maliciously compose, print, publish and circulate, *or* cause to be composed, printed, published and circulated in a certain public newspaper . . . . a certain scandalous and malicious libel of and concerning the plaintiff."

In the other action the publication is stated in this form:

"Said defendant did . . . . falsely and maliciously compose and publish *or* cause and prepare to be composed and published . . . . in a certain newspaper . . . . a certain scandalous and malicious libel of and concerning the plaintiff."

It is a general rule of pleading, too well settled to need the citation of authorities, that the declaration must allege the gravamen—the grievance complained of with such precision, certainty and definiteness that the defendant may know what to answer by his pleading and proof.

A disjunctive allegation as to the essence of the cause of action is as pure an example of uncertainty and indefiniteness in pleading as can well be found, for it completely conceals from the defendant the ground upon which a recovery is claimed.

Such form of allegation has been uniformly regarded as fatally defective.

"A pleading is bad under any system of practice when it states material facts in the alternative, so that it is impossible to determine upon which of several equally substantive averments the pleader relies for the maintenance of his action or defense." 6 Ency. Pl. & Pr., page 268; Chitty on Pl. 16th Am. Ed., star page 260; Stephen on Pl. 340; *State* v. *Singer*, 101 Maine, 299.

In the last case cited this court recently decided that such form of charging, in the disjunctive, in an indictment for libel, violates the rule of certainty in criminal pleading and is fatal on general demurrer. It is there said:

"To be charged with printing and publishing a libel is one thing and to defend against it, evidence of one kind may be required, while to meet the charge of having caused a libel to be printed and published may require evidence of another and entirely different character. This distinction goes to the essence of the charge."

Applying the same rule of certainty to the declarations in the cases before us, with like discriminating reasoning, and they are found defective because of the disjunctive form in which the publication is alleged.

But it is suggested by plaintiff that such defect is not reached by a general demurrer. We think it is. It is not a defect in form, but in substance. The question to be answered by the declaration is: What act of defendant is relied upon? The answer is uncertain; either that he *did* an act complained of, or *caused* it to be done. This uncertainty of allegation goes to the very essence of the cause of action—to the act of defendant from which the cause of action springs.

If from the declaration the cause of action does not sufficiently appear the pleading is defective in matter of substance.

Here the plaintiff has alleged in each declaration that the defendant did either one or the other of two substantive acts, but he has not disclosed upon which of those acts he relies as the cause of action.

It is the opinion of the court that the declaration in each case is

defective because of the disjunctive form of allegation used, and that the defect is reached by general demurrer.

This conclusion makes it unnecessary to consider the other particulars in which it is claimed the declarations are defective. The entry in each case must be,

Exceptions sustained.

JULIUS MUSKIN *vs.* LEWIS W. MOULTON.

Cumberland. Opinion December 18, 1908.

Replevin Writ. Officer's Authority. Trespass.

The plaintiff had a mortgage on certain goods and chattels given to him by one Tatilbum. This mortgage was duly recorded. One Abraham Lazarovitch, claiming to be the owner of the chattels, sued out a writ of replevin against Tatilbum to recover possession of the goods and chattels. This writ was placed in the hands of the defendant Moulton, a deputy sheriff, for service. By virtue of this writ, the defendant officer took the goods and chattels from Tatilbum and delivered the same to Lazarovitch. The plaintiff gave the defendant officer notice in writing that he claimed the goods and chattels as mortgagee but this notice was not received by the defendant officer until after he had taken the goods and chattels and delivered the same to Lazarovitch. The plaintiff then brought an action of trespass against the defendant officer for taking and carrying away the goods and chattels. The replevin writ under which the goods and chattels were taken contained the following direction. "We command you, that you replevin the goods and chattels following, viz: . . . . and them deliver unto the said plaintiff, provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of such plaintiff," etc. *Held:* (1) That the defendant officer did precisely what the writ enjoined him to do. (2) That the defendant officer was not liable in trespass to the plaintiff.

On exceptions by plaintiff. Overruled.

Action of trespass brought in the Superior Court, Cumberland County, against the defendant, a deputy sheriff, for taking and carrying away by virtue of a replevin writ sued out by one Abraham

Lazarovitch against one H. Tatilbum, certain goods and chattels on which the plaintiff had a mortgage given to him by said Tatilbum. This mortgage was duly recorded. Plea, the general issue with a brief statement alleging, in substance, that whatever was done by the defendant in the premises, was done under and by virtue of the aforesaid replevin writ.

Tried at the April term, 1908, of said Superior Court. At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit and the plaintiff excepted. The plaintiff also excepted to certain other rulings made during the trial.

The case is stated in the opinion.

Note. The aforesaid action of replevin, *Lazarovitch* v. *Tatilbum*, was tried at the April term, 1907, of said Superior Court. The verdict was for the plaintiff and the defendant took the case to the Law Court on motion and exceptions and the same were overruled. See *Lazarovitch* v. *Tatilbum*, 103 Maine, 285.

Dennis Meaher, for plaintiff.

J. A. Connellan, *W. A. Connellan*, *and George S. Murphy*, for defendant.

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

SPEAR, J. This is an action of trespass. After the evidence was presented, a nonsuit was ordered. The plaintiff had a mortgage on certain personal property dated January 7, 1907. On the 14th of February, 1907, the defendant, a deputy sheriff, replevied the property in question from the mortgagor who then had it in possession. On the same day notice in writing by leaving at the last and usual place of abode was served on the defendant by the plaintiff claiming the property under his mortgage. On the 7th of March the present suit was brought against the officer who had taken the property on the replevin writ. It appears from the evidence that the notice of the plaintiff claiming the property replevied as mortgagee was not received by the defendant until after he had delivered the replevied property into the hands of the plaintiff in the replevin writ. The writ under which the property was taken

contained the following positive direction: "We command you, That you replevin the goods and chattels following, viz: . . . and them deliver unto the said plaintiff, provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of such plaintiff," etc. It appears from the evidence and the command of the writ, under which the officer was acting, that he did precisely what the writ enjoined him to do, namely, to replevy the goods and them deliver to the plaintiff. We think the ruling laid down in *State* v. *Swett*, 87 Maine, page 114, that "the law will not compel a man to act, and then punish him for acting," is clearly applicable to the case at bar.

In *Yott* v. *The People*, ex rel., 91 Ill. 11, the court say: "The theory of the statute under which writs of replevin are issued would seem to require the officer who holds the writ, whenever the property can be found, to take it and deliver it over to the plaintiff . . . The officer is authorized by the writ, and it is his imperative duty, to seize the property if it can be found, and deliver it as commanded by the writ." The nonsuit was properly ordered.

The conclusion that the officer is protected by his writ in this particular case is not intended to introduce any innovation upon the well established law governing this class of cases. It is not our purpose to disturb the well settled rule that replevin will not lie against any person not in possession of the goods, either in person or by some agent, when the writ is served. *Ramsdell* v. *Buswell*, 54 Maine, 546. His precept limits him to the goods "now taken and detained" by the defendant. It then follows that he has no authority to take them from the possession of any one else. See *State* v. *Jennings*, 14 Ohio State, 73; *Sexton* v. *McDowd*, 38 Mich. 148; *Welter* v. *Jacobson*, 7 N. Dak. 32 N. W. 65.

Nor is the conclusion in this case to be regarded as intending in any way to interfere with or modify the relation of the mortgagee to the property mortgaged. The mortgagee's rights rest in contract. It is hardly necessary to say that, neither a replevin suit nor any other form of action, in the end, can operate to impair the obligation of a contract.

If the plaintiff in replevin owned the goods, he had a right to

their possession, no statutory obstacle intervening. The plaintiff claims, however, that the relation of mortgagee, alone, regardless of actual title or right to possession, is sufficient to inhibit replevin by the lawful owner against the mortgagor in possession.

This contention is calculated to lead to the absurd position that A may obtain lawful possession of a chattel belonging to B mortgage it to C who has the mortgage recorded, and thereby prevent an action of replevin to A to secure the possession of his own property. But the actual owner of a chattel, which has been thus mortgaged, has a right to possession of it and can maintain an action of replevin to gain possession. If the actual owner has a right to replevy, then it follows that a party claiming to be owner can pursue the same process, for in neither case can the question of title or right to possession be determined except upon judicial procedure subsequent to the act of replevin. Therefore we hold that the officer who served the writ, under the facts disclosed in the case at bar, is not liable in trespass to the plaintiff, and this is the only question we undertake to decide.

Several exceptions were taken during the trial to the admission and exclusion of testimony, but it is unnecessary to consider them as the evidence offered, excluded or admitted, was entirely immaterial to the decision of the case at bar.

Exceptions overruled.

ANGELE PODVIN *vs.* PEPPERELL MANUFACTURING COMPANY.

York. Opinion December 22, 1908.

Master and Servant. Obvious Dangers. Assumption of Risk. Negligence. Set-Screws.

1. If the employer furnishes the operative a machine, strong, in good repair and without dangerous features not visible to an observing operator or made known to him and such as the employer should have known, he, the employer, discharges his full legal duty to the operative in that respect. He can otherwise use machines of such pattern, detail of construction, and roughness of finish as he prefers, leaving to the operative free choice to operate the machine or not as he prefers.
2. The employer of an operative upon a machine is not legally obliged to have the set-screws upon the machine so countersunk or otherwise fixed so as to remove all danger from them, provided they are plainly visible to an observing operative.
3. An operative undertaking to operate a particular machine, without stipulation to the contrary assumes the risk of injury not only from those features of the machine called to his attention, but also those open to observation. It is the duty of the operative to acquaint himself with, at least, all the visible features of the machine before undertaking its operation.
4. An operative's ignorance of set-screws in the machine does not relieve him of the risk of danger from them where they are plainly visible and easily seen.
5. In this case the set-screws projecting five-eighths of an inch above the surface of the collar on the small shaft, were plainly visible to an observing operative being near and in front of a window. The female operative of mature years had operated the machine in that condition for nineteen years during which time she cleaned the machine about the set-screws and the floor under them at least twice a week. *Held:* That she was chargeable with knowledge of the set-screws and not having stipulated to the contrary, had assumed the risk of danger from them.
6. Although the female operative had the duty to pick up articles as they fell to the floor under the shaft bearing the set-screws, she nevertheless, under the circumstances above stated, assumed the risk of her hair becoming entangled in the set-screws and cannot recover for any injury resulting therefrom. Being chargeable with knowledge of the screws, she is also chargeable with knowledge of the obvious danger of injury if she allowed her hair to become entangled in them.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff while operating a spinning machine in the defendant's mill, and which said machine the plaintiff alleged to be "unsafe, unsuitable, inconvenient, out of repair and dangerous in that there projected from a shaft upon or connected with said machine a set-screw nut or bolt, the same projecting a certain distance, to wit one inch," and that the set-screw caught in her hair and "stripped her scalp from neck to eyebrow." Plea, the general issue with brief statement as follows: "That any and all the risks, dangers and conditions of which the plaintiff complains in her writ and declaration were assumed by the plaintiff prior to the injuries alleged to have been received by the plaintiff."

The plaintiff recovered a verdict for $2500, and the defendant filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

Nathaniel B. Walker, and George F. & Leroy Haley, for defendant.

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

EMERY, C. J. This case is one of that class now come to be known as "set-screw cases." The evidence for the plaintiff and the uncontradicted and credible evidence for the defendant establishes the following as the version to be taken as true. The plaintiff was a woman fifty-nine years of age in the employ of the defendant company in its cotton mill, and had charge of and operated a somewhat complex spinning machine known as an "intermediate." Two revolving metal cones, one above the other, ran lengthwise this machine under the spindles. The lower cone was within two inches of the floor. The upper cone was twenty-four and one-half inches above and directly over the lower cone. The small end of the upper cone was connected with the end of a shaft by a metal collar held and tightened in place by set-screws projecting five-eighths of an

inch above the surface of the collar. The diameter of the collar and cone at this end was two and one-half inches. When in operation, this cone revolved at a speed of two hundred and eighty revolutions a minute. When at rest, the collar and set-screws were plainly visible, being opposite a large window with plenty of light and with nothing to conceal them from any one looking the machine over. The whole machine, including the cones and set-screws, was of standard pattern and in common use in cotton mills.

The plaintiff had operated a similar machine for eight or ten years, and this particular machine for fifteen years, during which time no change had been made in the cone or set-screws. In addition to tending the machine in its operation, she, as was her duty, cleaned it as often as twice a week and oftener of the dirt and cotton waste that accumulated on its various parts including the cones and set-screws. She cleaned all around the gears and wheels and also the ends of the cones and the set-screws, getting out with a short handled brush the cotton accumulating there. She also washed the floor under the cones and machine at least twice a week.

By the vibration of the machine while in operation, empty bobbins would at times be shaken from their shelf or creel and fall upon the floor under the machine. It was the duty of the plaintiff to pick these fallen bobbins from the floor as they fell and restore them to their places. Frequently, to do this, she would need to reach her hand and arm in between the two cones to reach the fallen bobbins where they lay on the floor. She usually did so while the cones were revolving, and this practice was well known to the defendant's superintendent and overseers in that room. Her attention was never called by them or any one to the set-screws, or to any danger from set-screws.

At last, after fifteen years of such work by the plaintiff on and about this machine, as she was one day reaching down between the two revolving cones to pick up a fallen bobbin from the floor her woman's hair became entangled in the set-screws on the upper cone and her scalp torn from her head. There was of course a danger that while so picking up fallen bobbins from the floor the plaintiff

might be hurt by the revolving set-screws. Was that danger a risk cast upon the defendant, or a risk assumed by the plaintiff?

The plaintiff claims that the risk was upon the defendant, because it did not have the set-screws so countersunk or otherwise fixed as to remove all danger of injury from them. This claim is not well founded. It is not the legal duty of an employer of labor upon machines to provide and use the safest possible, or even safest, known machines. There must be no weakness, no want of repair, no dangerous feature not visible to an observing operative or made known to him, and such as the employer should have known. If such a machine be provided the employer has done his full legal duty in that respect. He can otherwise use machines of such pattern, detail of construction, and roughness of finish as he prefers, leaving to the operative free choice to operate it or not as he prefers. *Wormell* v. *Maine Central R. R. Co.*, 79 Maine, 397; *Bryant* v. *Paper Co.*, 100 Maine, 171; *Rooney* v. *Sewall, &c., Cordage Co.*, 161 Mass. 153; *Neats* v. *National Heeling Machine Co.*, 65 Fed. Rep. 940; *Richards* v. *Rough*, 53 Mich. 212.

But the plaintiff further claims that the risk was upon the defendant and had not been assumed by her because her attention had not been called to the set-screws and to the danger of injury from them. This claim also is without foundation. An operative by agreeing to operate and operating a particular machine, without stipulation to the contrary, assumes the risk of injury not only from those features of the machine called to his attention but also from those open to observation. The law is well stated by the Massachusetts court in *Rooney* v. *Sewall, &c., Cordage Co.*, 161 Mass. 153, a case where an operative was injured by a projecting set-screw of which he did not know and had never heard. The court said: "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, 'I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case,

he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage. A projecting set-screw is a common device for holding the collar on a shaft, although there is a safer kind of set-screw in common use. Under its contract with the plaintiff the defendant owed him no duty to box the pulley or shaft, or to change the set-screw for a safer one."

In the case at bar the set-screws were open and exposed to observation, and plainly visible to anyone making the most cursory examination of the machine and its operation. They were not in any obscurity, being well lighted from a window but a few feet away. They were directly visible to an operative washing the floor under them or cleaning cotton waste from them. It is urged, however, that they were not visible while the collar was revolving two hundred and eighty times a minute. There is no evidence to that effect and we do not find it self-evident that a collar only two and one-half inches in diameter bearing set-screws projecting five-eighths of an inch, and revolving at that speed would show a smooth surface. But, however that may be, there is no evidence that the collar was always revolving at that or any speed. It undoubtedly was often at rest when the set-screws could be plainly seen. There is no suggestion of immaturity, or want of experience, or want of intelligence on the part of the plaintiff. It was her duty to acquaint herself with the machine she was to operate, and, in the absence of stipulation to the contrary, she assumed not only the risks pointed out to her but those open and visible. If she did not observe them she none the less assumed the risk of them. *Ragon* v. *Toledo, &c., Ring Co.*, 97 Mich. 265, and cases infra.

It has been held in several decided cases that ignorance of set-screws in machinery does not relieve the operative of the risk of danger from them, where they are open to observation. *Rooney* v. *Sewall, &c., Cordage Co.*, 161 Mass. 153; *Ford* v. *Mt. Tom Sulphite Co.*, 172 Mass. 544; *Archibald* v. *Cygolf Shoe Co.*,

186 Mass. 213; *Kennedy* v. *Merrimack Paving Co.*, 185 Mass. 442; *Mutter* v. *Lawrence Mfg. Co.*, 195 Mass. 517.

The danger to a woman from allowing her hair to become entangled in set-screws revolving as these were is too obvious for comment.

Under the law and the facts of the case, the plaintiff must be held to have assumed the risk of the injury she received.

Verdict set aside.

MERRILL TRUST COMPANY, Appellant from Decree of Judge of Probate,

vs.

HATTIE M. HARTFORD.

Hancock. Opinion December 22, 1908.

Probate Court. Appeal. Findings of Fact. Annulment of Decree. Will. Same Probated. Decree Admitting to Probate may be Annulled. Estoppel. Laches. Record of Probate Court. Death of Executor and Residuary Legatee.

1. The Supreme Court of Probate upon an appeal from the probate court cannot consider questions not raised by proper allegations in the reasons of appeal.
2. If the findings of fact by the probate court are not assigned as error in the reasons of appeal, such findings cannot be questioned in the appellate court.
3. The probate court has the power upon subsequent petition, notice and hearing, to vacate and annul a prior decree, even a decree probating a will, clearly shown to be without foundation in law or fact and in derogation of legal right.
4. If after the probate of a will, it is made to appear upon proper proceedings that the supposed will was not in fact signed by the supposed testator or by some person for him at his request and in his presence, or was not in fact subscribed in his presence by three credible attesting witnesses not beneficially interested, or was probated without legal evidence of such facts, the decree probating the will should be vacated and annulled.

5. The fact that no appeal was taken from the original decree probating the will, does not bar a subsequent petition for annulment, when it is not shown that the petitioner for annulment had knowledge of the original proceedings within the time allowed for appeal.

6. The fact that the petitioner received a legacy under the instrument probated as the will of the decedent does not bar a petition for annulment when the petitioner was ignorant of the facts and returned the legacy into court with his petition.

7. The fact that the petitioner had presented a prior petition for annulment of a decree of probate which petition was denied because of insufficiency of allegation, and no appeal taken, does not bar a new petition for annulment setting for the other, different and sufficient grounds.

8. A petition for the annulment of a decree of probate of a will is not barred for laches when it does not appear that the petitioner after knowledge of the facts constituting his rights, delayed without reasonable excuse, and during the delay the condition of the other party became so changed that he cannot make the defense that but for the delay he might have made.

9. The record of the probate court is not necessarily knowledge of any facts constituting grounds for the annulment of a decree of the probate of a will.

10. The death of the person named as executor and residuary legatee in the will does not deprive the estate of an essential witness in proceedings for annulment of the probate of the will.

11. The fact that such deceased executor and residuary legatee under the supposed will had mingled the estate of his decedent with his own does not bar a petition for the annulment of the probate of the will.

12. Upon a petition for the annulment of a decree probating a will, the decree should be simply that the former decree be vacated and annulled, even though the petition was also for a decree that the instrument probated is not the will of the decedent and that the decedent died intestate. Of these latter questions, the first is not to be determined until the instrument is again presented for probate, and the second is not to be determined until a petition for the appointment of an administrator is presented.

On report. Remitted to Supreme Court of Probate for decree according to opinion.

Appeal by Merrill Trust Company from decree of Judge of Probate, Hancock County.

Mrs. Frankie M. Jordan, late of Orland in said county, died December 7, 1897, leaving an instrument purporting to be her last will and testament and in which her husband, Andrew J. Jordan, was named as sole executor, and also as the residuary legatee. This instrument was duly presented by the said Andrew J. Jordan for probate, and at the February term, 1898, of the Probate Court in

said county, was allowed as the last will and testament of the deceased, and letters testamentary were issued to the said Andrew J. Jordan as executor thereof.

The said Andrew J. Jordan died January 6, 1907, leaving a will in which the Merrill Trust Company, a corporation, was named as the executor and also creating a certain trust and naming the said Merrill Trust Company as the trustee. This will was duly probated and allowed at the March term, 1907, of the aforesaid Probate Court, and letters testamentary were issued to the said Merrill Trust Company as executor thereof.

At the December term, 1907, of the aforesaid Probate Court, Hattie M. Hartford, an heir at law of the aforesaid Frankie M. Jordan, presented to the aforesaid Probate Court a petition praying for annulment of the probate decree whereby the first aforesaid instrument purporting to be the last will and testament of the said Frankie M. Jordan was allowed as her last will and testament, alleging in her said petition as follows:

"That said Frankie M. Jordan, at the time of the alleged making of said instrument, was of unsound mind.

"That said alleged will was not signed by said Frankie M. Jordan or by any person for her at her request and in her presence.

"That said alleged will was not subscribed in her presence by three credible attesting witnesses not beneficially interested under said alleged will.

"That none of the witnesses to said alleged will signed the same in the presence of said Frankie M. Jordan.

"That said Frankie M. Jordan never declared in the presence of said witnesses that said instrument was her will.

"That it appears by said alleged will that there are four witnesses, One witness signed her name to said alleged will in two forms, to wit, Mrs. F. Marks and Louise F. Marks.

"That one of said witnesses to said alleged will was beneficially interested under said alleged will and was named in said alleged will as legatee, to wit, Louise F. Marks.

"That at the time of the signing and witnessing said alleged will only that portion containing the signatures was present and signed.

"That the witnessing of said alleged will was done down stairs in the sitting room of the house where said Frankie M. Jordan then lived and the said Frankie M. Jordan, at the time, was up stairs from said witnesses, in bed, and neither in the presence or hearing said witnesses; and the said Frankie M. Jordan had no knowledge of the witnessing of said instrument.

"That the testimony before the Probate Court for said County of Hancock to prove said alleged will was that of Mrs. Lizzie Gott, one of the witnesses to said alleged will. Said evidence was taken before the Judge of Probate in vacation.

"That said Judge of Probate says that the witness, Mrs. Lizzie Gott testified that Mrs. F. Marks and Louise F. Marks were two separate and distinct persons and that said alleged will was signed in the presence of said Frankie M. Jordan by said witnesses and in the presence of each other; and the said Mrs. Lizzie Gott says she did not so testify and was not asked to so testify.

"That your petitioner was a legatee under said alleged will: that all that your petitioner received under said will was two hundred dollars in money; that your petitioner now brings the same amount of money, to wit, two hundred dollars into this court.

"That Andrew J. Jordan was the Executor named in said alleged will that Andrew J. Jordan was the husband of the said Frankie M. Jordan; that said alleged will was in the handwriting of the said Andrew J. Jordan and the said Andrew J. Jordan was the principal legatee named in said alleged will; that undue influence was used upon the said Frankie M. Jordan to induce her to sign said instrument purporting to be a will; that the signing of said instrument purporting to be the last will and testament of said Frankie M. Jordan was obtained by fraud; that the execution and witnessing of said instrument purporting to be the last will and testament of said Frankie M. Jordan was obtained by fraud, collusion, accident, or mistake; that the probating of said instrument purporting to be the last will and testament of said Frankie M. Jordan was obtained by collusion, accident, mistake and fraud; that the decree admitting said instrument of said Frankie M. Jordan to probate was obtained by fraud; that the said decree admitting

said instrument to probate was null and void; that the ground upon which this petitioner asks the Court to grant her prayer is that the evidence of the fraud, accident and mistake and other irregularities in this petition alleged as to the making, signing and probating of said instrument purporting to be the last will and testament of the said Frankie M. Jordan has recently been discovered by your petitioner and that said evidence could never have been known to her before."

A hearing was had on the aforesaid petition and the Judge of Probate made the following decree:

"Upon the foregoing petition, notice thereon having been given to all persons interested, pursuant to law and the order of court, and a hearing having been had and the evidence presented at said hearing and the arguments of counsel there made having been fully considered and it appearing that the allegations of said petition are true, and that there was fraud in the making, signing, witnessing and probating the instrument mentioned in said petition and which the Probate Court for said Hancock County by its decree dated the first day of February, A. D. 1898, approved and allowed as the last will and testament of F. M. Jordan, and it further appearing that the petitioner has returned into this court two hundred dollars ($200) which by her testimony was all the money or property received by her as a legatee named in the instrument above referred to and it further appearing that said petitioner is not guilty of laches in presenting the foregoing petition.

"It is Ordered Adjudged and Decreed, that said decree of this Court rendered on the first day of February, A. D. 1898, be and the same is hereby revoked, annulled, vacated and declared void and said instrument is declared not to be the will and testament of said F. M. Jordan, to wit, Frankie M. Jordan."

From this decree, the said Merrill Trust Company appealed to the Supreme Judicial Court in said county, sitting as the Supreme Court of Probate. A hearing was then had in the Supreme Court of Probate and at the conclusion of the evidence the case was withdrawn from the jury and reported to the Law Court for decision, with the stipulation that upon so much of the evidence as was legally

admissible the Law Court should render such judgment as the rights of the parties required.

The case is stated in the opinion.

O. P. Cunningham, F. H. Appleton, and John A. Peters, for Merrill Trust Company.

Oscar F. Fellows, for Hattie M. Hartford.

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

EMERY, C. J. The case is this:—After the death of Mrs. Frankie M. Jordan of Orland, Hancock County, her husband, Andrew J. Jordan, presented to the probate court for that county at the January term, 1898, an instrument purporting to be the last will of his deceased wife, with a petition that it be probated and allowed as such. After due notice the probate court at the next February term by decree allowed and probated the instrument as the last will of Mrs. Frankie M. Jordan deceased. Letters testamentary were issued to Andrew J. Jordan named in said instrument as executor and also named as residuary legatee.

At the December term, 1907, of the probate court, and after the death of Andrew J. Jordan, Hattie M. Hartford an heir of Mrs. Jordan presented to the court a petition for annulment of the probate decree of the Feb'y, term, 1898, allowing as the will of Mrs. Jordan the instrument presented as above stated by Mr. Jordan. In this petition the petitioner alleged, among other matters, that the instrument was not signed by Mrs. Jordan nor by any one for her at her request; that the instrument was not signed by three credible witnesses not beneficially interested; that none of the witnesses to the instrument signed or attested it in the presence of Mrs. Jordan; that Mrs. Jordan had no knowledge of the witnessing of the instrument; that while four names appear on the instrument as witnesses there were in fact only three persons subscribing, one of whom was beneficially interested and subscribed a second time under another name; that the only evidence to support the probate of the instrument was the testimony of one of the subscrib-

ing witnesses, Mrs. Gott, given, not in court during term time, but to the Judge in vacation. After due public notice and personal notice to the appellant, the Merrill Trust Company, the executor of the will of Andrew J. Jordan, the matter of the petition was heard at the next January term, 1898, and the probate court passed a decree in which it declared that "the allegations of said petition are true and that there was fraud in the making, signing, witnessing and probating the instrument named in the petition" as the will of Mrs. Jordan,—and that the former decree of the court made at the February term, 1898, allowing and probating the instrument of Mrs. Jordan, "be and the same hereby is revoked, annulled and declared void." From this decree the Merrill Trust Co. appealed to the Supreme Court of Probate. In that court the case was again heard and reported to the Law Court for determination.

In its "reasons of appeal," the appellant did not allege, or assign as a reason for appeal, that the probate court erred in any finding of facts alleged in the petition so far as essential to the decree; hence the correctness of such findings cannot now be questioned. We are here concerned only with the allegations of other facts in the "reasons of appeal" and with the questions of law involved. *Prescott* v. *Tarbell*, 1 Mass. 204; *Boynton* v. *Dyer*, 18 Pick. 1; *Gilman* v. *Gilman*, 53 Maine, 184.

It is well settled that a probate court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, even a decree of probate of a will, clearly shown to be without foundation in law or fact, and in derogation of legal right. *Cousens* v. *Advent Church*, 93 Maine, 292; *Hotchkiss* v. *Ladd's Estate*, 62 Vt. 209; *Waters* v. *Stickney*, 12 Allen, 1. In the last case cited the question is discussed and settled in a very learned, exhaustive and convincing opinion.

The first real question in this case, therefore, is whether the allegations of fact in the petition for annulment, found to be true by the probate court and not questioned in the reasons of appeal, and nothing else appearing, show cause for the annulment of the decree complained of. Of this there can be no reasonable doubt.

The supposed will was not signed by the supposed testatrix nor by any person for her at her request; nor was it subscribed in her presence by three credible witnesses not beneficially interested; nor was there any evidence in support given in court, the only evidence being from the statement of one witness made to the Judge in vacation. The decree of the probate court should not have been made upon the statement of one witness made, not in court but only to the Judge in vacation, at least unless by consent of all parties interested. The probate court is not always open. It has regular terms. It may of course adjourn a term from one day to another, and special terms may be appointed upon notice, but in the interims between such terms and such days the Judge, while perhaps he may lawfully perform mere ministerial acts, cannot lawfully perform any judicial act, except such as are authorized by statute to be done in vacation. No power is conferred upon him to hear out of court statements or testimony as evidence for the decision of cases pending in court. Such action by the Judge in this case was not the judicial action of the court. *White* v. *Riggs*, 27 Maine, 114; *State* v. *Hall*, 49 Maine, 412.

From all the above it must be evident that upon the allegations in the petition, nothing else appearing, the instrument probated in the decree of February, 1898 was not entitled to probate, and further there was no legal evidence before the court that it was so entitled, and hence that the decree of probate should be annulled.

We now come to the consideration of the matters set forth in the reasons of appeal as reasons why, nevertheless, the decree of probate should not be annulled. We notice only those pressed in argument, the others not being relied upon by the appellant.

1. Because all the legacies under the instrument probated have been duly paid together with all outstanding bills and claims against the estate of Mrs. Jordan. It does not appear that Andrew J. Jordan, as executor of the instrument, or his executor, the appellant, has ever settled or even filed any account as such executor, or even filed any inventory of the estate of Mrs. Jordan; nor was it proved aliunde that all the legacies and outstanding bills and claims have been paid. This alleged reason, therefore, cannot be sustained.

2. Because no appeal was taken from the decree now sought to be annulled. It is not shown that Mrs. Hartford, the petitioner here, appeared at any hearing upon the matter of the decree, or had any actual notice of the proceedings at the time, or during the time allowed for appeal. Under such circumstances the fact that the decree was not appealed from by her does not make it invulnerable, when it is made clearly to appear that the decree was without foundation in law, fact or evidence, and was wrongfully obtained without legal evidence produced in court. There are many decided cases where decrees of probate courts not appealed from have, nevertheless, afterward been annulled. This reason of appeal cannot be sustained.

3. Because the petitioner elected to receive the legacy of $200 bequeathed her in the instrument allowed, and did receive it and did not make any claim as heir. The petitioner did receive from Andrew J. Jordan claiming to be executor the sum of $200 named as her legacy, but upon filing her petition in this case she deposited in court the sum of $200 for the use of the estate of Mrs. Jordan. She did not pay in, or account for, any earnings of, or interest upon the $200 while in her possession, but there is no evidence and we cannot assume that she ever made any use of the money by way of investment or expenditure. She was under no obligation to do so. It does not appear that when she received the $200 or that before she offered to return it, she was aware of the facts set forth in her petition as cause for annulment of the probate. She having returned the money, we do not think that her original reception of it under the circumstances bars her petition.

4. Because the petitioner once before, viz:—at the June term of the probate court, 1907, presented a petition for annulment of the probate of the instrument, which petition after notice and hearing was dismissed and no appeal taken. It appears that she did file a petition as stated, in which, however, the only fact alleged was that "she had recently discovered evidence as to the making and signing of the alleged instrument purporting to be the last will and testament of said Frankie M. Jordan which could never have been known to her before." No facts which the newly discovered evi-

dence would prove were stated, nor was any of the evidence stated. It is apparent that the petition should have been dismissed for insufficiency of allegation, and it is difficult to see how the mere dismissal of such a petition is an adjudication upon all the allegations of fact in the present petition. At the most, it could be so only upon the allegations as to the making and signing the instrument. It cannot include the allegations as to the witnessing and probating the instrument. Further, the decree dismissing that petition was by its terms placed solely on the ground that the petitioner had not returned the money received by her as a legacy under the instrument. There is no finding of any other fact in the decree. None of the allegations in this present petition appear to be res adjudicata.

5. Because of the laches of the petitioner in that she did not file her present petition until Dec. 7, 1907, though she had knowledge nearly ten years previously of the death of Mrs. Jordan and of the claim of Andrew J. Jordan that there was a will in which $200 was bequeathed to her. Something more than lapse of time, however, must be shown. To make out a case of laches, it must appear, both, that the delay was without reasonable excuse and that during the delay the condition of the other party in good faith became so changed that he cannot make the defence that, but for the delay, he might have made. There is no laches when the party did not know his rights, or at least the facts constituting his rights, and was not negligent in not knowing them. In this case the petitioner seasonably knew of the death of Mrs. Jordan, and of Mr. Jordan's assuming to act as executor of a will of the deceased. She is also presumed to know that an instrument had been probated as the will of Mrs. Jordan, and also its contents. She is not presumed to know whether the instrument probated as a will was legally signed, witnessed and probated. She testified without contradiction that she did not know of the facts set forth in her petition until June, 1907. We do not think that under the circumstances she can be held negligent for not earlier knowing them. She lived in another State. She was no nearer relative than cousin. She had not been in Orland since 1892. While she was bound to know all

that appeared on the records of the court, she was not bound to know nor suspect that the instrument appearing to have been probated had not been signed nor witnessed as required by law to constitute a valid will, nor that the probate of it had been obtained without legal evidence of the necessary requisites.

There is one matter relied upon to charge the petitioner with laches which should be noticed. It appears that other heirs of Mrs. Jordan at the October term, 1898, of the Supreme Court of Probate petitioned for leave to enter an appeal from the decree of Feb'y, 1898, (the decree now sought to be annulled) and in their petition alleged several facts alleged in the petition before us, but not the fact that no evidence was heard by the Judge in court. That petition was later dismissed by consent. Mr. Jordan purchasing his peace of those petitioners by extra payments. Mrs. Hartford was asked by them if she would join in an effort to get more than the will gave them, and she expressed her willingness to do so, but she did not become a party to the petition, and it does not appear that she received anything from it, or knew its contents or what was done with it. It is evident that these facts do not show her then to have knowledge of the facts now alleged, or to be negligent in not knowing them. She filed her first petition for annulment in June, 1907, when she first had notice of the matters alleged, and her second, the present, petition in Dec., 1907, as soon as her first was disposed of. Andrew J. Jordan had died the January before and there is no evidence that her delay from June to December, 1907, made any change in the condition of the other party.

Under this head of laches the appellant also urges that by the death in January, 1907, of Andrew J. Jordan the executor and residuary legatee of Mrs. Jordan, it has become impracticable to determine what of the property left by him came to him from the estate of Mrs. Jordan, she having died nine years before. That matter must be adjusted or tried out in proceedings between the administrator of Mrs. Jordan, if one be appointed, and the appellant as executor of the will of Andrew. It does not appear but that the estate of Andrew is intact, no payments out of it

having been shown. No loss will fall upon the appellant but only on the estate of Andrew who did the wrong.

Under this same head it is further urged that by the death of Andrew J. Jordan, the appellant, his executor, is deprived of evidence that might have supported the decree of Feb'y, 1898, and shown cause against its annullment, and that by waiting till after the death of Andrew, the petitioner has placed his estate and his executor at such a disadvantage that the court should not now grant her petition. Granting, arguendo only, that such a disadvantage would be cause for denying the petition, we do not think it is shown to exist. It does not appear that Andrew alone may have known of material facts. So far as appears the witnesses to the instrument and the then Judge of Probate are all living and within our jurisdiction and competent to testify, and all material facts can be shown by them.

No other reasons of appeal are argued and it is not claimed that those not argued show cause against the petition. It follows that the decree appealed from should be affirmed with costs of appeal so far as it annuls the prior decree of Feb'y, 1898, probating as the will of Mrs. Jordan the instrument therein described. The probate court, however, went further and undertook to decree that the instrument was not the will of Mrs. Jordan and that she died intestate. The probate court had no occasion to make any decree upon either of those questions, though asked for in the petition. There is no occasion yet to decide either question, and will not be until the instrument is again offered for probate, or until application is made for the appointment of an administrator upon the estate of Mrs. Jordan as having died intestate. That part of the decree should be eliminated.

The case is remitted to the Supreme Court of Probate sitting for Hancock County to make and enter decrees in accordance with this opinion.

So ordered.

DAVID D. STEWART *vs.* TICONIC NATIONAL BANK.

Somerset. Opinion December 22, 1908.

Mistake of Law. Mistake of Fact. Mutual Mistake. Contracts. Guaranty and Subrogation. Implied Warranty.

If parties knowing all the facts of a transaction, come to an erroneous conclusion as to the legal effect of such facts, such conclusion is the result of a mistake of law.

A mistake, to entitle a party to relief on account thereof, must be material to the transaction, and affecting its substance, and not merely its incidents.

The defendant bank had brought suit against the estate of one Napoleon B. Turner, deceased testate, and recovered judgment against the same and execution was issued thereon. In that suit the plaintiff had acted as attorney for the Turner estate. Certain real estate was seized on the aforesaid execution and sold to the defendant bank in satisfaction of the execution. Immediately thereafter the bank began three actions to recover possession of the real estate sold, one against the executor, one against the heirs, and one against the widow of said Turner. Thereupon the plaintiff under the date of December 13, 1898, and in behalf of the executor of the Turner estate, wrote the president of the defendant bank as follows: "If the bank will stop their suits, and make him & the heirs and the widow no further expense, but let everything remain as it now stands until the first day of next November, a month and five days before the year's redemption would expire, I will guaranty that he shall pay the whole amount due on the Exn. and take an assignment of it, and of the sale; and in case he fails to do this by Nov. 1, 1899, I will pay the bank and take the assignment myself within fifteen days after Nov. 1, 1899." This guaranty was accepted by the defendant bank and the writs were not entered. October 16, 1899, the plaintiff wrote the president of the defendant bank inclosing a check for $2291 and an agreement to be executed by the defendant bank whereby the defendant bank agreed to assign to the plaintiff the aforesaid judgment and also to convey to him "all the right, title and interest" which the defendant bank had acquired in and to the real estate of said Turner by virtue of the aforesaid sale on execution, and also giving the plaintiff "full power and authority to avail himself of any rights and remedies that said bank may have at law, or in equity, touching said real estate, in the name of said bank, but without expense to said bank & saving them from all expense," and which said agreement was

duly executed by the defendant bank and returned to the plaintiff. The plaintiff then brought a real action in the name of the defendant bank against the widow of said Turner to recover a part of the real estate sold on the aforesaid execution. The defendant bank had no knowledge that this suit was commenced and pending until the president of the defendant bank was notified that it was in order for trial and he might be needed as a witness. The plaintiff also notified the defendant bank that he should expect the defendant bank to reimburse him for all expenses and loss in case the sale was held void. The defendant bank promptly repudiated any such liability. Eventually the action was reported to the Law Court and it was held that the aforesaid judgment obtained by the defendant had been erroneously entered up and that the execution issued thereon and the aforesaid sale on the execution were both invalid. Then, upon petition presented by the plaintiff in the name of the defendant bank, the record in the aforesaid suit brought by the defendant bank against the Turner estate was amended, proper judgment entered up and execution issued on which the same real estate was seized and sold to parties other than the defendant bank, for $2613, which said sum was received by the plaintiff. The plaintiff then brought an action against the defendant bank to recover, as for money had and received, the $2291 paid by him to the defendant bank for the aforesaid judgment obtained by it against said Turner estate, with interest, together with $490.59 for his costs, disbursements and services in the aforesaid suit brought against the aforesaid widow, and in subsequent proceedings to have the aforesaid judgment corrected and the real estate resold, less the amount he received from said sale and interest, that difference being $617.33.

Held: (1) That the agreement of December 13, 1898, when accepted by the defendant bank became a binding agreement between the parties for the payment by the plaintiff of the claim of the defendant bank against the Turner estate with right of subrogation to that claim.

(2) That the payment of the $2291 by the plaintiff to the defendant bank was made under the agreement of guaranty and subrogation and not as a consideration of a sale from the defendant bank to the plaintiff of its claim against the Turner estate.

(3) That there was no implied warranty to the plaintiff by the defendant bank of the correctness and consequent validity of the steps taken in the proceedings to enforce its claim against the Turner estate.

(4) That under all the circumstances of the case if the plaintiff in the payment of the money to the defendant bank and the defendant bank in receiving the same, were mutually ignorant of the fact that the aforesaid judgment was erroneously entered up and an invalid execution issued thereon, which invalidated the sale, but which judgment could be corrected, such mistake was not so material to the transaction, as the parties then regarded it, as is necessary to support an action at law to recover back the money paid by the plaintiff.

On report. Judgment for defendant.

Action of assumpsit upon an alleged written contract between the plaintiff and the defendant bank. The writ also contained a count for money had and received. Plea, the general issue. Also the defendant filed an account in set-off.

Tried at the March term, 1906, Supreme Judicial Court, Somerset County. At the conclusion of the evidence, the case was reported to the Law Court for "such decision as the rights of the parties may require."

The case is stated in the opinion.

David D. Stewart, for plaintiff.

Charles F. Johnson, for defendant.

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

KING, J. This case comes to the Law Court upon report. The facts from which it has arisen are as follows: The defendant bank, having a suit pending in the Supreme Judicial Court for Somerset County, against the estate of Napoleon B. Turner, at the September term, 1898, of said court, took a judgment and one execution for $2251.20 debt and $15.26 costs of suit against the goods and estate of the testator. George K. Boutelle, president of the bank, acted as its attorney, and Mr. Stewart, the plaintiff in this suit, acted as attorney for the Turner estate. Certain real estate was seized on said execution and sold December 5, 1898 to the bank for $2182, in satisfaction of the execution.

Immediately thereafter the bank began three actions to recover possession of the real estate sold, one against the executor, one against the heirs, and one against the widow, of Turner.

Thereupon the plaintiff wrote Mr. Boutelle: "If the bank will stop these suits, and make him and the heirs and the widow no further expense, but let everything remain as it now stands until the first day of next November, a month and five days before the year's redemption would expire, I will guaranty that he shall pay the whole amount due on the exn and take an assignment of it, and

of the sale; and in case he fails to do this by Nov. 1, 1899, I will pay the bank and take the assignment myself within fifteen days after Nov. 1, 1899."

This guaranty was accepted and the writs not entered. Oct. 16, 1899, the plaintiff wrote Boutelle "Enclosed is check and agreement as per our interview of Saturday. Your signature as President of the Bank will be all right." The agreement was signed and returned, and is as follows:

"Received of D. D. Stewart twenty-two hundred and ninety-one dollars, and in consideration of that sum the Ticonic National Bank of Waterville hereby agrees to assign to him a judgment recovered by said bank in the Supreme Judicial Court for the County of Somerset at its September Term A. D. 1898, against Napoleon B. Turner as executor of the estate of his father, Napoleon B. Turner, late of St. Albans in said County of Somerset, deceased; and said Ticonic National Bank also further agrees to convey to said D. D. Stewart, for the consideration aforesaid, by good and sufficient deed, without expense to him, all the right, title and interest which said bank acquired to the estate of the said Napoleon B. Turner, Senior, and of the said Napoleon B. Turner, Jr. by virtue of a sale upon Dec'r 5, 1898, on the execution issued upon the judgment aforesaid, said bank having been the purchaser at the officer's sale of the real estate aforesaid, and received a deed of the same from the officer making said sale, which deed was duly recorded in the Registry of Deeds for said County of Somerset, and is to be referred to in the description of the property to be conveyed to said Stewart. Said assignment of said judgment, and said deed of said real estate to be made to him within thirty days after his request for the same. In the meantime he is to have full power and authority to avail himself of any rights or remedies that said bank may have at law, or in equity, touching said real estate, in the name of said bank, but without expense to said bank & saving them from all expense.

The Ticonic National Bank of Waterville.

By GEORGE K. BOUTELLE, President.

Waterville, Oct. 16, 1899."

At the December term of said court 1899, the plaintiff entered an action in the name of the bank against Mary C. Turner, widow of, and devisee under the will of, Napoleon B. Turner, to recover a part of the real estate sold on the execution.

The defendant had no knowledge that this suit was commenced and pending till September of the following year when Mr. Boutelle was notified that the action was in order for trial, and he might be needed as a witness. To this action defense was made, that judgment and execution for both debt and costs had been entered and issued against the goods and estate of the testator contrary to the statute, and that the several parcels of land seized on the execution were sold in solido, of which defense this defendant was notified, and that the plaintiff would expect the bank to reimburse him for all expenses and loss in case the sale was held void. The defendant promptly repudiated any such liability. The case was reported to the Law Court and a decision in favor of the defendant was announced April 14, 1902 (*Bank* v. *Turner*, 96 Maine, 380).

Upon petition to the court at the September term 1902, presented by the plaintiff in the name of the bank, the record in the original suit was amended, proper judgment entered up, and execution issued on which the same real estate was seized and sold to other parties, Dec. 22, 1902, for $2613, which the plaintiff received.

The plaintiff claims to recover, as for money had and received, the amount he paid the bank on Oct. 16, 1899, with interest, together with $490.59 for his costs, disbursements and services in the suit against the widow, and in the subsequent proceedings to have the judgment corrected and the property resold, less the amount he received from said sale and interest, that difference being $617.33.

There is no evidence whatever that the defendant made any express representation to the plaintiff in respect to its judgment and execution against the Turner estate, or the sale of real estate thereon. If the defendant is under any liability to the plaintiff in the premises it must arise by operation of law from his payment to it of the amount due on the execution and its agreement to make the assignment and conveyance to him as specified in its written instrument of Oct. 16, 1899.

The plaintiff claims that the case falls within the well settled rule that in the sale of a chattel there is an implied warranty that it exists, unless it clearly appears that the parties intended the contrary.

His position is that the defendant sold to him, and he bought of it, a judgment of court against the Turner estate, together with the interest in certain real estate acquired by the defendant as purchaser at an officer's sale under said judgment, and that consequently the defendant must be held to an implied warranty that there was at the time of the sale such a subsisting valid judgment, and sufficient for the basis of a valid seizure and sale of said real estate; that in fact no such judgment existed, whereby the defendant is liable to him for his resulting damages.

The learned plaintiff in his brief directs the attention of the court to a great number of cases where the principle is applied, that a mutual mistake of fact may authorize the rescinding of a contract, and that in the sale of a chattel there is usually an implied warranty that it exists. These principles are well settled. But what shall be deemed such a mutual mistake, and under what circumstances and conditions the law will imply such warranty, may not be easily determined in every case.

Although the plaintiff's theoretical claim is twofold—an implied warranty by defendant that the thing sold existed, and a mutual mistake of the parties as to the existence of the subject matter of the contract, yet, when practically considered, it is all embraced in the one broad equitable proposition that the defendant received the plaintiff's money under such circumstances and conditions that reason and justice dictate it ought to be restored.

Is this claim sustainable? The question brings us directly to the necessity of correctly perceiving the true relation, conduct, and circumstances of the parties in the premises, from which it is to be determined if any unexpressed obligation must be implied by law as having been assumed by the defendant; and also to determine the real purpose and consideration for the payment, which actuated the parties, and whether there was a mutual mistake materially affecting the substance of that purpose and consideration.

On December 13, 1898, the plaintiff made an express guaranty in writing that the executor would pay the amount due on the execution "and take an assignment of it, and of the sale; and in case he fails to do this by Nov. 1, 1899, I will pay the bank and take the assignment myself within fifteen days after Nov. 1, 1899."

It has been noted that this guaranty was in consideration that the defendant would drop the suits commenced for the real estate sold. The guaranty was accepted and became a binding agreement between the parties for payment by the plaintiff of the defendant's claim against the Turner estate, with the right of subrogation to that claim, if the executor did not pay it.

On Oct. 16, 1899, the plaintiff paid the bank the full amount due on the execution "which Mr. Boutelle figured up . . . . including the officer's fees for making the sale and recording the deed to the bank," as the plaintiff states in his brief.

That payment was made, we think, under the agreement of guaranty and subrogation, and not as the consideration of a sale from defendant to the plaintiff of its claim against the Turner estate. The plaintiff suggests that from his statement in the letter of Oct. 16, 1899, "enclosed is check and agreement as per our interview of Saturday," the court should find that a new agreement was made at that interview in place of the existing one for payment and subrogation. We think not. There is no evidence of such new agreement, and no reason is perceived why the defendant should make a new agreement, since the full payment of its debt was secured by guaranty.

The written agreement of Oct. 16, 1899, added nothing materially to the defendant's obligations arising from the conventional subrogation; it only specified in explicit terms how and when the bank should make the necessary transfers, which were deferred evidently for the plaintiff's accommodation. The fact that the transfers were deferred, the stipulation for the conveyance of "all the right, title and interest" acquired by the bank under the sale of the real estate, and the provisions that the plaintiff in the meantime could "avail himself of any rights and remedies that said bank may have . . . . in the name of the bank, but without expense to said

bank & saving them from all expense," are more indicative of subrogation than of a sale. But there is another and more important fact to be noted. In a letter from the plaintiff to Mr. Boutelle, dated Dec. 20, 1898, disapproving the suggestion of the latter that the costs of the three suits to be dropped should be covered by the guaranty, he said: "If this is not satisfactory to the bank, I should withdraw the proposition. I have doubt as to the validity of the sale, & should fight it, if necessary, before paying any costs in the three suits or advising the heirs to pay them. As a new sale could eventually be made, if necessary, the heirs I presume would raise no question about the one already made unless an attempt is made to sustain suits under it. Please advise me of the conclusion the bank reaches."

To this Mr. Boutelle replied: "I dislike exceedingly your suggestion that my client's position is an improper and untenable one. I am sorely tempted to join issue with you on both these points and let the court decide which one of us is right; but of course the interests of my client call for practical results far more than anything else; and as the bank can well afford to sacrifice the small amount of costs on the three suits for the sake of the guaranty which resulted from them we will let the agreement stand."

This correspondence, disclosing so clearly the relation and circumstances of the parties under which the payment of Oct. 16, 1899, must have been made and received, together with the other facts disclosed, leaves no doubt in our mind that such payment was but the fulfillment of the guaranty, and entitled the plaintiff only to the right to be substituted in place of the defendant in respect to its full claim against the Turner estate with all its rights, remedies and securities incident thereto.

And we are of opinion, that the law does not imply, in the absence of agreement, and under the relation and circumstances of the parties as disclosed in this case, a warranty to the plaintiff by the defendant of the correctness and consequent validity of the steps taken in proceedings to enforce that claim, and especially in view of the fact that the plaintiff in connection with his guaranty expressly

notified the defendant that he regarded such steps as invalid, but inconsequential, however, since they could eventually be retaken.

The plaintiff further claims that, whether the transaction of Oct. 16, 1899, be regarded as a sale or payment with the right of subrogation, there was a mutual mistake of fact as to the subject matter of the contract and that in consequence the consideration wholly failed.

It does not, perhaps, sufficiently appear that there was any mutual mistake of fact, unless the assumption of the parties that the judgment recovered was valid, not knowing all the facts on which that assumption was based, be a mistake of fact.

If knowing all the facts they came to an erroneous conclusion as to their legal effect, such conclusion would be the result of a mistake of law.

But assuming that they did not know, as a fact, the form and manner in which the judgment was entered up, and both supposed, as they evidently did, that it had been correctly done in accordance with law, still we are of opinion that such mistake is not such a mistake of fact, measured in the light of all the facts and circumstances disclosed, as would entitle the plaintiff to maintain this action.

A mistake, to entitle a party to relief on account thereof, must be material to the transaction, and affecting its substance, and not merely its incidents. *Baker* v. *Fitzgerald*, 204 Ill. 325; *Hecht* v. *Batcheller*, 147 Mass. 335, 338; *Bridgewater Iron Co.* v. *Enterprise Ins. Co.*, 134 Mass. 433, 436; *McCobb* v. *Richardson*, 24 Maine, page 83.

The plaintiff claims that there was no judgment existing as mentioned in the agreement to be assigned; that there was "nothing which the defendant could assign to the plaintiff," and that "the failure of the consideration was total." In this we think he is mistaken. There was a judgment as described in the agreement. It proved to be erroneous, but not void. It needed only to be corrected which could be, and was, done on application to the court.

The real subject matter of the transaction between the parties, the thing of value for which the plaintiff paid his money, and that was to be transferred to him, was the bank's debt which, as he states in one of his letters "became fastened upon the estate." That the plaintiff so considered admits of no doubt. His correspondence shows that he regarded the steps taken to enforce that debt upon the real estate not comparable in value to a few dollars for costs, but his guaranty shows that he regarded the debt itself at its full face value.

And on the part of the defendant, in this connection, it must be noted that while Mr. Boutelle believed the instrumentalities he had used, and the steps he had taken, to enforce his claim, were not valueless, yet, he acted under the expressed sense of duty that he should accept the guaranty and thereby secure practical results without imposing upon his client any risks or obligations.

We are therefore also of opinion, under all the circumstances of this case, that if the plaintiff in the payment of the money, and the defendant in receiving it, were mutually ignorant of the fact that the judgment had been erroneously entered up, and an invalid execution issued thereon, which invalidated the sale but which judgment could be corrected, such mistake was not so material to the substance of the transaction, as the parties then regarded it, as is necessary to be established to support this action at law to recover back the money paid.

It follows then that the judgment of the court is that the plaintiff's action is not maintained, and accordingly the entry must be,

Judgment for defendant.

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"Give me an index or give me death."

Josephus.

ARBITRATION AND AWARD.

See INSURANCE.

A general stipulation in a contract of insurance or similar contract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damages, will not be sanctioned or enforced so as to divest the courts of their established jurisdiction.

Dunton v. *Insurance Co.*, 372.

While parties may impose, as a condition precedent to application to the courts, that they shall have first settled the amount to be recovered by an agreed mode, yet they cannot entirely close access to the courts of law.

Dunton v. *Insurance Co.*, 372.

ARREST.

See FALSE IMPRISONMENT.

ASSAULT AND BATTERY.

When in a civil action of assault and battery it appears that the assault was provoked by insulting language used by the plaintiff to the defendant, and it also appears that the insulting language used by the plaintiff was in consequence of his intoxication by liquors furnished him by the defendant, the defendant cannot shield himself by such provocation in mitigation of damages.

Robichaud v. *Maheux*, 524.

During the trial of a civil action of assault and battery, the presiding Justice among other things, instructed the jury as follows: "If the defendant by selling or giving to the plaintiff intoxicating liquors and getting him drunk put him in a condition so that he would be insulting or might be insulting, so that in his drunken condition he would be likely to make the talk he did make," and "if the defendant caused the condition which made the plaintiff talk as the defendant says he did, then the defendant cannot make complaint of the condition which he caused himself." *Held:* That these instructions were correct. *Robichaud* v. *Maheux*, 524.

In a civil action of assault and battery, *held* that a verdict of $443.50 was not excessive. *Robichaud* v. *Maheux*, 524.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

When an assignor makes a common law assignment of all his property, not exempt from attachment and execution, for the benefit of such of his creditors as may, after notice of the assignment, assent thereto, and a reasonable time is provided in the assignment for such assent, and the assignee accepts the trust, then such assignment, if bona fide, is lawful, and until assailed by some one claiming rights against it under the provisions of the United States Bankruptcy Law it stands as a valid transfer of the property described as conveyed therein. *Thompson* v. *Shaw*, 85.

that prior to the service of the original trustee writ upon him, he had lawfully discharged himself of all the property received by him from the assignor except $182.66 and for that sum only the plaintiff should have judgment.
Thompson v. *Shaw*, 85.

ASSOCIATIONS.

See BUILDING AND LOAN ASSOCIATIONS. INSURANCE (BENEFIT).

ASSUMPSIT.

See ACTION ON THE CASE.

ASSUMPTION OF RISK.

See MASTER AND SERVANT.

AUTREFOIS ACQUIT.

See CRIMINAL LAW.

BANKRUPTCY.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

A common law assignment for the benefit of creditors, if bona fide, is lawful, and until assailed by some one claiming rights against it under the provisions of the United States Bankruptcy Law, it stands as a valid transfer of the property described as conveyed therein. *Thompson* v. *Shaw*, 85.

BANKS AND BANKING.

See GUARANTY. INTEREST.

By the charter of a Maine corporation the shareholders were made "individually liable equally and ratably, and not one for another, for all contracts, debts and engagements of the corporation to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

Held: (1) The liability imposed by the statute upon the shareholders was not an asset of the corporation and could not be enforced by the corporation nor by its receiver but only by the creditors of the corporation in their own behalf.

(2) The shareholders were not subject to suit by the creditors of the corporation to enforce such statutory liability until in proceedings, against the corporation its assets were fully administered and the fact and amount of deficiency of assets judicially ascertained. Such suit begun within six years after such judicial ascertainment is not barred by the six years statute of limitations.

(3) When in proceedings against the corporation the final account of the receiver, showing a full administration of the assets and no balance in his hands, is by decree approved and allowed and the report of the commissioners

BENEFICIAL ASSOCIATIONS.

See BUILDING AND LOAN ASSOCIATIONS. INSURANCE (BENEFIT).

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF SALE.

See CHATTEL MORTGAGES.

BILLS AND NOTES.

See GUARANTY. PAYMENT.

BOUNDARIES.

When lines established by partition proceedings are referred to in the declaration in a real action as the boundaries of one or more sides of the demanded premises, the returns of the partition commissioners are admissible, as against the plaintiff, to show the length of the lines, and the consequent dimensions of the land divided, and of the separate parcels bounded by these lines. *Hudson* v. *Webber*, 429.

BROKERS.

See CONTRACTS.

A defendant placed real estate in the plaintiff's hands for sale under a written contract in which he agreed to pay the plaintiff who was a real estate broker "a commission of one hundred dollars in case of sale." *Held:* That this did not limit the broker to a commission only in case of actual sale by himself, that it was not necessary that he should complete the entire negotiations, but if he had placed a purchaser in communication with the owner and subsequent negotiations resulted in a sale by the owner, then the broker was entitled to recover. *Hutchins* v. *Lewis*, 27.

Where in an action on a written contract to recover a broker's commission on a sale of real estate, and the defendant alleged fraud in the inception and execution of the contract and the plaintiff recovered a verdict of only $20.00, *Held:* (1) That the proof fell far short of substantiating the fraud alleged by the defendant. (2) That the evidence showed good faith rather than fraud on the part of the plaintiff. (3) That the verdict was so glaringly wrong that it must be set aside. *Strout* v. *Lewis*, 65.

A defendant placed his farm in the plaintiff's agency, for sale, and agreed that if it was sold to any party through the plaintiff's influence, by an advertisement or otherwise, he would pay a commission of all that was obtained in excess of eighteen hundred dollars. He further agreed that in case he should sell the property to the plaintiff's customer for less than two thousand dollars, he would pay a commission of two hundred dollars. In case the defendant withdrew the farm from plaintiff's agency before sale, the defendant agreed to pay twenty dollars, and if the farm should be sold, either

before or after withdrawal, to a customer to whom the plaintiff recommended it, or who had learned that it was for sale, directly or indirectly, through the plaintiff, he would pay a commission of two hundred dollars. The defendant withdrew his farm from the plaintiff's agency, and afterward sold it.

Held: (1) That it would have been competent for the jury to find from the evidence that the purchaser was the plaintiff's customer, and that the farm was sold to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, indirectly at least, through the plaintiff's advertisements.

(2) That a requested instruction to the effect that "if the listed place was sold, either before or after withdrawal, to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of two hundred dollars, whether such sale was effected in whole or in part by reason of such recommendation or not" was correct and should have been given.

(3) That an instruction to the jury to the effect that it was for the plaintiff to satisfy them that the same was by reason of the plaintiff's influence in some way and in some degree, and without which it would not have been sold to the purchaser, injected into the contract an element which the parties did not put into it. It was not necessary for the plaintiff to show that the purchaser was influenced by the plaintiff or its agents in making the purchase, if in fact he was the plaintiff's customer. *Strout Company* v. *Hubbard*, 366.

BUILDING AND LOAN ASSOCIATIONS.

A borrowing member of a loan and building association has assumed more obligations to the association than those of a mere borrower to a lender of money. He is bound to make such payments of dues, interest and fines as are imposed by the statutes and by-laws and his contract made in pursuance thereof. *Tibbetts* v. *Building Association*, 404.

When a borrowing member of a loan and building association contracts with the association for a specific loan and executes a note and mortgage therefore in which he stipulates in accordance with the statutes and by-laws, to pay specific sums as interest, premiums and fines, at specific times, he must make such payments and does not perform his obligations by merely paying interest and premiums on the different installments advanced him on the loan from the time he received them. *Tibbetts* v. *Building Association*, 404.

The fact that a loan and building association does not advance to a borrowing member the whole amount of the agreed loan at the time of making the contract therefor, but only advances it in installments from time to time as the security justifies in the opinion of the directors, does not excuse the borrowing member from paying interest and premiums on the whole loan according to the terms of the contract; nor does the further fact that the association did not set apart as a special fund the amount of the loan.
Tibbetts v. *Building Association*, 404.

CASES CITED, EXAMINED, ETC.

"CASH SALES."

See SALES.

CHANCERY.

See EQUITY.

CHARITIES.

A testator's will contained the following residuary clause:

"The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned to constitute a fund which when it shall have amounted to seventy-five thousand dollars the income from which to be and for the maintenance of a Free Hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment.

"If a Hospital shall not have been built when the above Hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for it maintenance.

"The above fund to be a memorial to my beloved wife, Eliza P. Webber."

Stella F. Ripley was named as one of the executors in the will without bond "leaving the other executor to the discretion of the Judge of Probate." The said Stella F. Ripley duly qualified as executrix under the will but no co-executor was appointed, and the said Stella F. Ripley settled the estate as sole executrix. No trustee being named in the will, the said Stella F. Ripley upon her own petition was then appointed trustee by the Probate Court, and afterwards having married one McKenzie she surrendered her former letters of trusteeship and was appointed trustee anew under the name of Stella R. McKenzie. Two Biddeford corporations, the Trull Hospital and the Webber Hospital Association were claimants for the benefit of the alleged trust fund created by the aforesaid residuary clause. These corporations were not in existence at the time of the execution of the will or at the death of the testator.

Held: (1) That a valid trust was created by the will and although no trustee was named in the will yet a trustee has already been appointed by the Probate Court.

(2) That the word "free" in the residuary clause is used in the sense of thrown open or made accessable to all, open for the public use. It does not prohibit receiving compensation from those able to pay, and at the same time, no charge is to be made against those unable to pay.

(3) That the Trull Hospital is not entitled to the benefit of the trust fund. It is a private enterprise organized with a captial stock under Revised Statutes, chapter 47, governing business corporations, all of the stock being held by the physician in charge and three other members of his family. It is neither a public nor a charitable institution and does not meet the requirements of the will. Such an institution is not a public charity even if indirectly it serves charitable ends.

(4) That the Webber Hospital Association is entitled to the benefit of the trust fund. It was organized under Revised Statutes, chapter 57, governing charitable and benevolent organizations for the admitted purpose of carrying out the provisions of this will. It has a membership of about three hundred and fifty. It is treating patients gratuitously. It comes within the letter and spirit of a charitable corporation whose distinctive feature is that it has no capital stock and no provisions for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution.

(5) That when the principal of the trust estate amounts with its accumulations to $75,000, the trustee is authorized and directed to pay over semi-annually to the treasurer of the Webber Hospital Association for its use, the income of the trust fund. When that time arrives the Association may have already built a hospital. If not the trustee may use $25,000 of the principal for that purpose, if a sufficient sum is guaranteed by other parties, so that with the income from the remaining $50,000 its maintenance is assured. If in the future the principal can be properly paid to the Association, to be held in trust, appropriate proceedings can be had therefor.

Hospital Association v. *McKenzie*, 320.

CHATTEL MORTGAGES.

Where a bill of sale was given as security for the mortgagee's "liability upon certain notes" indorsed by him for the mortgagors but did not state the amount of the notes to secure which it was given, and it appearing that the amount of the notes indorsed by the mortgagee and outstanding at the date of the bill of sale was $1100, and also that the mortgagee after the date of the bill of sale indorsed other notes for the mortgagors, *Held:* (1) That the bill of sale did not cover liability for future indorsements but was limited to the notes indorsed and outstanding at the date of the bill of sale. (2) That when the indorsed notes outstanding at the date of the bill of sale, were paid, all the mortgagee's right under the bill of sale ceased.

National Bank v. *Manser*, 70.

When a mortgage of personal property has been given by a mortgagor residing in an unorganized place, and no town or organized plantation adjoins such unorganized place, and therefore there is no place designated by the statute, R. S., chapter 93, section 1, where the mortgage can be lawfully recorded, the mortgagee must take and keep possession of the mortgaged property in order to preserve his rights as against attaching creditors. *Peaks* v. *Smith*, 315.

That part of Revised Statutes, chapter 93, section 1, relating to possession of mortgaged personal property by the mortgagee is simply declaratory of the common law, while that part relating to record provides an equivalent for possession not previously authorized. The mortgagee is given his option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties, and the mortgagee must employ one method or the other to preserve his rights as against third parties, and it matters not in what section of the State the mortgagor may reside. *Peaks* v. *Smith*, 315.

The plaintiffs brought an action of trover against the defendant, who was sheriff of Somerset county, to recover the value of certain personal property attached on a writ by one of the defendant's deputies. The plaintiffs claimed the attached property under a chattel mortgage given to them, previous to the attachment, by a mortgagor who resided in an unorganized place in Somerset county when the mortgage was given. The mortgage was not recorded as there is no town or organized plantation adjoining the place in which the mortgagor resided and therefore no place where the mortgage could have been legally recorded. Neither did the plaintiffs ever take possession of the mortgaged property but permitted the mortgagor to remain in possession of the same. Previous to bringing the action, the plaintiffs gave the defendant written notice of their claim and the true amount thereof as required by R. S., chapter 83, section 45. *Held:* That the action was not maintainable. *Peaks* v. *Smith*, 315.

CITIES.

See MUNICIPAL CORPORATIONS.

COLLECTOR OF TAXES.

See TAXATION.

COMMERCE.

By the Act of Congress known as the "Wilson Act," intoxicating liquors are to a great extent withdrawn from the protection of the Commerce Clause of the United States Constitution and made subject to the police powers of the States. Since the Act, a State in the exercise of its police power may lawfully prohibit the advertising within the State of intoxicating liquors sold or kept for sale without the State. *State* v. *J. P. Bass Co.*, 288.

The rule is well established that a constructive delivery of goods by a carrier can be effected only by an agreement between the carrier or middle man and the buyer or person claiming under him whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage to and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in

his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent.

State v. *Intox. Liquors*, 463.

The relation of carrier to the shipper, the consignee and the goods is originally fixed by law and by a contract between the parties, which is that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract once existing can be changed only by the operation of law or by an agreement between the parties. When the goods arrive at their journey's end, it is the duty of the carrier to store them. This duty is imposed by law. When stored they are still in the possession and custody of the carrier and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery or by a new contract with the consignee in the place of the contract of carriage.

State v. *Intox. Liquors*, 463.

Certain intoxicating liquors were shipped from different points without the State, arriving at different times by way of the Maine Central Railroad at its freight station in the city of Lewiston. All the liquors were shipped in the names of local firms who did not order nor claim them, or to fictitious names, persons to the railroad company unknown. The various liquors upon their arrival were placed in the freight shed of the railroad company and from time to time thereafter were seized upon proper warrants charging the liquors to be deposited within the State for the purpose of illegal sale. The longest time any package was in the custody of the railroad company after its arrival at Lewiston, before seizure, was a period of 24 days.

Held: (1) That the evidence was not adequate to establish proof of constructive delivery. (2) That the liquors at the time of their seizure were in transit as interstate commerce in the hands of the carrier.

State v. *Intox. Liquors*, 463.

By the Act of Congress known as the "Pure Food Law," approved June 30, 1906, misbranded and adulterated intoxicating liquors are forbidden transportation into any State from another State or foreign country, and hence are removed from the protection of the "Commerce Clause" of the Federal Constitution. *State* v. *Intox. Liquors*, 502.

Misbranded and adulterated intoxicating liquors brought into the State in violation of the Act of Congress known as the "Pure Food Law," approved June 30, 1906, become subject to the police power of the State immediately upon arrival within the territory and can be seized under such power before delivery to a consignee. *State* v. *Intox. Liquors*, 502.

COMMISSION.

See BROKERS.

COMMON CARRIERS.

See COMMERCE.

COMMON LAW ASSIGNMENT.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

COMPLAINT AND WARRANT.

See CRIMINAL LAW. INTOXICATING LIQUORS.

COMPROMISE AND SETTLEMENT.

See ARBITRATION AND AWARD.

CONDEMNATION.

See EMINENT DOMAIN.

CONSIDERATION.

See DEEDS. EVIDENCE.

CONSTITUTIONAL GUARANTY.

See SEARCH AND SEIZURE.

CONSTITUTIONAL LAW.

See CRIMINAL LAW. STATUTES.

CONSTRUCTION.

See CONTRACTS. DEATH. DEEDS. EVIDENCE. STATUTES. WILLS.

CONSTRUCTIVE DELIVERY.

See COMMERCE.

CONTINUANCE.

Revised Statutes, chapter 79, section 46, relating to cases which may come before the Law Court, provides, among other things, as follows: "They shall be marked 'law' on the docket of the county where they are pending, and there continued until their determination is certified by the clerk of the law court to the clerk of courts of the county, and the court shall immediately after the decision of the question submitted to it, make such order, direction, judgment or decree, as is fit and proper for the disposal of the case, and cause a rescript in all civil suits, briefly stating the points therein decided, to be filed therein, which rescript shall be certified by the clerk of the law court to the clerk of courts of the county where the action is pending," etc. *Held:* (1) That when an action is marked "law" it is con-

tinued by the express command of the statute and no other entry on the docket is required. Such entry ipso facto operates effectually as a continuance of the action until its determination by the Law Court is certified as provided by the statute. (2) That this rule applies to an action commenced by trustee process. *Savings Bank* v. *Alden*, 416.

An action commenced by trustee process was entered at a January term, 1906, and after an entry on the docket "trustee to disclose next term as of this," the action was continued to the next April term when the following entry was made: "Trustee to disclose at the next term as of first; principal defendants defaulted; continued for judgment." At the following September term, the trustee's disclosure as to one Alden, who was one of the principal defendants, was filed and the action was continued for judgment, and marked "Law on report as to liability of trustee."

There was no entry on the docket at the January, April or September terms, 1907. November 29, 1907, a rescript was received from the Law Court discharging the trustee as to the defendant Alden. There was no disclosure or entry effecting the trustee as to the other principal defendant. At the January term, 1908, the principal defendants filed a written motion that judgment be entered in the action as of the January term, 1907, contending that the action against them had gone to judgment at that time and that it should be entered as of that term. *Held:* That after the action was marked "law" it was continued by operation of the statute until its determination by the Law Court, and that judgment could not be entered against the principal defendants as of the January term, 1907.

Savings Bank v. *Alden*, 416.

CONTRACTS.

See ACTIONS. BROKERS. BUILDING AND LOAN ASSOCIATIONS. CHATTEL MORTGAGES. DEEDS. EVIDENCE. GUARANTY. INSURANCE. INSURANCE (BENEFIT). LOGS AND LUMBER. MORTGAGES. MUNICIPAL CORPORATIONS. REFORMATION OF INSTRUMENTS. RELEASE. SALES. SUBROGATION. WATERS AND WATERCOURSES.

All written contracts are to be read in the light of surrounding circumstances. The relations of the parties and the subject matter are always to be taken into consideration. *Hutchins* v. *Lewis*, 27.

When in an action on a written contract the defendant alleges fraud in the inception and execution of the contract, the burden is on the defendant to establish the allegation of fraud by clear and convincing proof.

Strout v. *Lewis*, 65.

When a plaintiff attempts to establish an oral agreement as collateral to a written one, the scales of proof at the start are materially borne down against the plaintiff by the presumption that the written contract contains the whole agreement, and the plaintiff should be required to adduce clear, strong and convincing evidence to outweigh such presumption, otherwise the stability of written contracts will be impaired and resulting confidence therein destroyed. *Chaplin* v. *Gerald*, 187.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT. STREET RAILWAYS.

CONVERSION.

See TROVER.

COPIES OF RECORDS OF DEEDS.

See EVIDENCE.

CORPORATIONS.

See BUILDING AND LOAN ASSOCIATIONS. CHARITIES. MUNICIPAL CORPORATIONS. RAILROADS. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES.

COSTS.

COUNSEL FEES.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

COURTS.

See ARBITRATION AND AWARD. JUDGES. MUNICIPAL CORPORATIONS. PROBATE COURTS.

CRIMINAL LAW.

See INTOXICATING LIQUORS.

DAMAGES.

See EXCEPTIONS. MUNICIPAL CORPORATIONS. RAILROADS. SEARCH AND SEIZURE.

DATE.

See CRIMINAL LAW.

DEATH.

See WILLS.

tion 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." *Held:* That this statute was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial.

Perkins v. *Paper Co.*, 109.

The plaintiff's intestate was employed as an engineer in the defendant's mill and had been so employed for about five years prior to his death. In attempting to pass under a large and rapidly moving belt shackled with "Jackson Hooks," so called, the nuts and bolts of which projected about one inch from the surface of the belt, he was struck on the head by the hooks and knocked to the floor in an unconscious condition and remained unconscious until his death seventy-five hours later. The plaintiff administrator then brought an action against the defendant under the provisions of Revised Statutes, chapter 89, section 9. The defendant contended (1) That this form of action could not be maintained as a matter of law, because the death was not immediate; (2) That the plaintiff's intestate was guilty of contributory negligence.

Held: (1) That the action was properly brought under the statute although the plaintiff's intestate survived the accident seventy-five hours. (2) That the plaintiff's intestate was guilty of contributory negligence as there was no necessity for his passing under the belt at a point where he was liable to be struck by it. *Perkins* v. *Paper Co.*, 109.

DECLARATION.

See PLEADING. TROVER.

DECREES.

See JUDGES. WILLS.

DEDICATION.

Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of owner of the soil exists in fact and is clearly manifest either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

Campmeeting Ass'n v. *Andrews*, 342.

DEEDS.

EMINENT DOMAIN.

The compensation awarded when a street is originally laid out is presumed to have been full and just, and it covers all damages, and for all time, including such damages as might be occasioned later than the taking, by an extension of the easement by operation of law. *State* v. *Yates*, 360.

EQUITY.

See COURTS. REPLEVIN. SPECIFIC PERFORMANCE.

A bill in equity for an injunction may be amended in matters of mere form without an affidavit to the amendment. An amendment inserting the words "and therefore alleges" after the words "is informed and believes" in such a bill is allowable without affidavit. *Farnsworth* v. *Whiting*, 488.

If the case stated in a bill in equity is one within the equitable jurisdiction of the court whether by the general principles of equity jurisdiction or by statute, there is no need to allege that there is no plain, adequate and complete remedy at law. *Farnsworth* v. *Whiting*, 488.

EQUITABLE REPLEVIN.

See REPLEVIN.

ERROR.

See EXCEPTIONS. INSTRUCTIONS. VERDICT.

ESTATES.

See EXECUTORS AND ADMINISTRATORS. WILLS.

ESTOPPEL.

See EVIDENCE. INSURANCE (BENEFIT). PAUPERS. RAILROADS.

When a grantor conveys land without consideration, and the grantee at the same time, without consideration, and as a part of the same transaction whereby the grantor conveyed the land to him, reconveys the land to the grantor, a momentary seizin only vests in the first grantee and he does not become invested with any title which enures to the benefit of one to whom he has made a prior conveyance of the same land by mortgage deed of warranty. *Haslam* v. *Jordan*, 49.

EVIDENCE.

See BROKERS. CONTRACTS. CRIMINAL LAW. EXCEPTIONS. EXECUTION. INTOXICATING LIQUORS. MASTER AND SERVANT. MORTGAGES. NEW TRIAL. PUBLIC LANDS. RAILROADS. REFORMATION OF INSTRUMENTS. RELEASE. TROVER. WAYS. WITNESSES.

In an action involving the title to real estate, the record in the registry of deeds of what purports to be a deed of conveyance of the land is no evidence that

EXCEPTIONS.

See CRIMINAL LAW. INSTRUCTIONS.

EXECUTION.

The recitals by the officer in his official deed to the purchaser of land at execution sale are evidence of his doings in advertising and making the sale. *Cutting* v. *Harrington*, 96.

A recital by an officer in his official deed to the purchaser of land at execution sale that he "sent a notice (to the judgment debtor) by mail" fairly and sufficiently imports that he prepaid the postage as required by the statute, R. S., chapter 78, section 33. *Cutting* v. *Harrington*, 96.

When a levy of execution upon land is made by sale instead of by extent, a return of such upon the execution itself is not required by the statute and is not essential to the purchaser's title. *Cutting* v. *Harrington*, 96.

EXECUTION CREDITOR.

See FALSE IMPRISONMENT.

EXECUTORS AND ADMINISTRATORS.

See WILLS.

A bill in equity by an administrator to compel the delivery of chattels, notes bonds, etc., belonging to the estate is not a bill for discovery and can be sustained without first citing the defendant for examination under R. S., chapter 66, section 70. *Farnsworth* v. *Whiting*, 488.

FACTORS.

See BROKERS.

FALSE IMPRISONMENT.

When a disclosure commissioner does not act within the limits of his jurisdiction, he is answerable in law for what he does without those limits and wholly outside of his powers and duties. *Stuart* v. *Chapman*, 17.

When a disclosure commissioner, acting in a disclosure matter, without jurisdiction, refuses the execution debtor the benefit of the oath provided by Revised Statutes, chapter 114, section 55, and indorses upon the execution the certificate required by Revised Statutes, chapter 114, section 38, and annexes to the execution the capias required by said section 38, and such debtor is arrested and committed to jail on such capias and execution such disclosure commissioner is liable in an action for false imprisonment. *Stuart* v. *Chapman*, 17.

When an execution debtor has been committed to jail on a capias annexed to an execution by a disclosure commissioner who acted without jurisdiction in the matter, and the execution creditor sends to the keeper of the jail money to pay for the support of the execution debtor while in jail and states to

such keeper that more money will be sent for that purpose, if necessary, it is an approval, adoption and ratification of the unlawful acts of the disclosure commissioner and makes such execution creditor liable in an action for false imprisonment. *Stuart* v. *Chapman*, 17.

FENCES.

See NUISANCE.

FINDING LOST GOODS.

Treasure-trove is a name given by the early common law to any gold or silver in coin, plate or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. *Weeks* v. *Hackett*, 264.

The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many States, but the provisions of Revised Statutes, chapter 100, section 10, and those following, have no reference to the law of treasure-trove. *Weeks* v. *Hackett*, 264.

In the absence of legislation upon the subject, the title to treasure-trove belongs to the finder as against all the world except the true owner, and ordinarily the place where it is found is immaterial. *Weeks* v. *Hackett*, 264.

The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. *Weeks* v. *Hackett*, 264.

When several persons are joint finders of treasure-trove consisting of coin, each such finder is entitled to the possession of an equal share of such coin and is charged with the duty of holding it for the true owner, if he can be ascertained, and is under obligation to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he may appear, and is therefore authorized to maintain such action as may be necessary to retain or recover possession of such share, and if one such joint finder having possession of all the coin, refuses to surrender to the other joint finders their respective shares thereof it is a conversion of their shares as tenants in common and each such other joint finder may maintain an action of trover, for his share, against the co-tenant who having possession of all the coin, refuses to surrender such share. *Weeks* v. *Hackett*, 264.

The plaintiffs each brought an action of trover against the defendant for the alleged conversion of their respective shares of certain silver coins contained in three metallic cans found buried in the ground. The defendant contended, among other things, that he found the coins under circumstances which made him the sole owner of them as against the plaintiffs. *Held:* That the evidence warranted the jury in finding that the discovery of the three cans should be deemed one transaction and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant. *Weeks* v. *Hackett*, 264.

FIRES.

See WATERS AND WATERCOURSES.

FORECLOSURE.

See MORTGAGES.

FORMER ACQUITAL.

See CRIMINAL LAW.

FRAUD.

See CONTRACTS. REFORMATION OF INSTRUMENTS.

GARNISHMENT.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS. EXCEPTIONS. TRUSTEE PROCESS.

GUARANTY.

See BANKS AND BANKING. JUDGMENT. PAYMENT. SUBROGATION.

If a corporation has guaranteed the payment of the notes of others "when due and payable without notice of any neglect on the part of the payors thereof," the corporation becomes liable and interest begins to run upon such notes against the corporation from the default of the payors, without demand upon, or notice to, the corporation. *Flynn* v. *Banking & Trust Co.*, 141.

In an action upon a written guaranty given to the plaintiffs by defendant's intestate to cover all debts for merchandise to be subsequently sold to one V. C. Bowman, "whether such debts be on book account by note, draft or otherwise, and also any and all renewals of such debt," *Held:* (1) That the subsequent acceptance by the plaintiffs of three notes aggregating the amount of the bill, and signed by both Bowman and his wife, was a discharge neither of the debt nor of the guaranty.

(2) That even if the taking of the notes had discharged the debt, it did not discharge the guaranty, for the guarantor bound himself in express terms to pay all notes given by Bowman to the plaintiffs up to a stated amount and the notes in suit fell within that limit. *Spitz* v. *Morse*, 447.

GUARDIAN AND WARD.

See JUDGES.

HEIRS.

See WILLS.

HIGHWAYS.

See EMINENT DOMAIN. MUNICIPAL CORPORATIONS. NAVIGABLE WATERS. WAYS.

HORSE.

See NUISANCE. WAYS.

HOSPITALS.

See CHARITIES.

HUSBAND AND WIFE.

See STREET RAILWAYS.

ILLEGITIMATE CHILDREN.

See PAUPERS.

"IMMEDIATE DEATH STATUTE."

See DEATH.

INDICTMENT.

See CRIMINAL LAW. INTOXICATING LIQUORS.

INFANTS.

See PARENT AND CHILD.

INSTRUCTIONS.

See ASSAULT AND BATTERY. BROKERS. EXCEPTIONS.

Where a defendant landlord requested the presiding Justice to instruct the jury "that if there was any understanding that the landlord should make repairs for the tenant, if there were any defects, he would not be liable until he got notice from the tenant," and the presiding Justice declined to give this instruction except as previously explained, *Held:* That the case did not show that there was any understanding that the tenants were to have any care over the exterior of the building, or even to report to the defendant any defects which they might observe therein, and that the requested instruction was properly refused. *Smith* v. *Preston*, 156.

When in an action of tort it is apparent that the jury were not misled by the instructions of the presiding Justice in reaching the conclusion that certain articles of personal property belonging to the plaintiff, were intentionally abandoned by the plaintiff, and that the defendant was not chargeable with any violent act of dominion over them, exceptions to the instructions will be overruled. *Young* v. *Chandler*, 184.

INSURANCE.

A complaint for keeping and depositing intoxicating liquors intended for unlawful sale, in which it is alleged that they had been first seized by the complainant without a warrant, and in which there is further averment respecting the complainant, "being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor issued in conformity with the provisions of law" is not bad for duplicity, or uncertainty. This language is not descriptive of the offense. It is merely the necessary averment of the officer's authority to seize without a warrant.

State v. *Holland*, 391.

JEOPARDY.

See CRIMINAL LAW.

JOINT TENANCY.

See TENANCY IN COMMON.

JUDGES.

See PROBATE COURTS.

A Judge of Probate has authority under the provisions of Revised Statutes, chapter 65, section 16, to sign and authenticate decrees which, through inadvertence, his predecessor left unsigned or unauthenticated.

Ryan v. *Sanborn*, 458.

The plaintiff filed in the Supreme Judicial Court, Androscoggin County, a petition for partition of certain real estate. It was admitted the plaintiff at the time of filing the petition was the owner of one undivided eighth part of the premises described in the petition unless he had been divested of title by the action of the Probate Court in said county. In 1902 at a Probate Court held in said county, upon proper petition and notice and the filing of a legal bond, the guardian of the plaintiff was granted license to sell said eighth part of said real estate and a guardian's deed of conveyance of said eighth part was executed and delivered to one Parker Carson who had previously acquired title to the remaining seven-eighths. Carson then conveyed the whole of the real estate to the defendant. The Judge of Probate, then in office, through inadvertence failed to sign the decree granting the license or to approve the bond. After the expiration of his term of office, his successor, some three years later, signed the decree and approved the bond, upon the ground that the decree was not signed and the bond not approved through the inadvertence of his predecessor. But before the Judge of Probate signed the decree and approved the bond, a petition was filed for the removal of the guardian and a decree of removal was signed by the Judge upon the back of which was entered the minute, "Do not docket." Nothing further was done with the decree of removal.

Held: (1) That the action of the Judge of Probate in signing the decree left unsigned and in approving the bond left unapproved by his predecessor, was authorized by the statute, R. S., chapter 65, section 16. (2) That the action of the Judge of Probate under the statute, independent of any question affecting the guardianship of the plaintiff, related back to the act of his predecessor in office and is to be determined solely with reference to what his predecessor had done. (3) That it was unnecessary to decide whether the decree for the removal of the guardian was effective or not. *Ryan* v. *Sanborn*, 458.

JUDGMENT.

See TRUSTEE PROCESS.

Where the issue raised by a plea in abatement was whether the name "Mount Battie Manufacturing Company" and the name "Mt. Battie Mfg. Co." were legally identical, and such issue was decided in the affirmative, *Held:* That it then became res judicata that the "Mount Battie Manufacturing Company" named in the writ and Mt. Battie Mfg. Co." were one and the same defendant and that the defendant's admission that the "Mt. Battie Mfg. Co." was indebted to the plaintiffs was an admission that the Mount Battie Manufacturing Company" was indebted to the plaintiffs.

Brown v. *Mfg. Co.*, 456.

Under an agreement that, if a judgment creditor of an estate would drop suits for real estate sold under an execution, the other party would guarantee that the executor would pay the execution, and take an assignment, the law *held* not to imply a warranty by the judgment creditor of the correctness of the steps taken to enforce the judgment.

Stewart v. *National Bank*, 578.

JUDICIAL NOTICE.

See EVIDENCE.

JURISDICTION.

See EQUITY. FALSE IMPRISONMENT.

JURY.

See APPEAL. STATUTES.

LACHES.

See WILLS.

LANDLORD AND TENANT.

When an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenant, is liable to a third person for damages arising from a neglect to repair. *Smith* v. *Preston*, 156.

LANDS RESERVED BY THE STATE.

See PUBLIC LANDS.

LARCENY.

See CRIMINAL LAW.

LEASE.

See MUNICIPAL CORPORATIONS.

LIQUOR ADVERTISEMENTS.

See COMMERCE. INTOXICATING LIQUORS.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LOGGING "PERMIT."

See TROVER.

LOGS AND LUMBER.

See TROVER.

The defendants by deed of warranty dated May 2, 1904, conveyed certain land to the plaintiff. The deed contained the following clause: "Excepting and reserving, however, from the above described premises all the pine trees now growing on the same, with the right for the same to remain for a period of two years from date of this deed and not longer." In December, 1907, the defendant entered the premises conveyed by them as aforesaid to the plaintiff and cut and carried away certain of the pine trees standing and growing thereon.

Held: That the clause permitting the removal of the pine trees was an executory contract, the performance of which was to be consummated within two years from the date of the deed and that at the expiration of the two years the right of the defendants to remove the trees had expired.

Noyes v. *Goding*, 453.

LOST PROPERTY.

See FINDING LOST GOODS.

MAGISTRATE.

See APPEAL.

MASTER AND SERVANT.

When there is a comparatively safe and likewise a more dangerous way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method and he thereby assumes the risk of injury which its use entails.

Perkins v. *Paper Co.*, 109.

His fellow servant then struck the bull-set with a steel striking hammer and a small piece of steel chipped off one corner of the face of the hammer and flew into the plaintiff's left eye, resulting eventually in the loss of both eyes. The plaintiff was employed by the defendants primarily as a blacksmith to sharpen tools and when not engaged in that capacity he was to work "elsewhere as an all-round" man. His experience as a tool sharpener comprised a period of fifteen years and he had learned from his experience that steel implements were rendered brittle by overheating and overhardening in the process of manufacture of sharpening and that in the use of such tools, pieces of steel were liable to be broken off and fly from a hammer as well as from other tools. Prior to the accident he had noticed numerous fire cracks or checks on the face of the hammer used by his fellow servant and knew that it had been burned and was brittle and that it was liable to break and chip whenever used, but he never made any complaint in regard to the defective condition of the hammer and never made any request or suggestion that it should not be used in connection with any work that he was required to perform. He had never received from the defendants any request to continue in their service until another and suitable hammer should be supplied or any assurance that any other or different hammers would be used in connection with his work. He was not placed in a position where he was exposed by the nature of his duties to any undisclosed or unknown dangers. The precise condition of the defective hammer was not concealed from him nor the danger of using it unknown to him. *Held:* (1) That as the plaintiff fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of the overhardened hammer in connection with any branch of his work, he must be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the hammer used in connection with the service which he was required to perform. (2) That a nonsuit was properly ordered. *Golden* v. *Ellis*, 177.

When a person is employed in a mill to tend and operate a machine and the relation of master and servant exists between him and his employer, it is the primary duty of the master to use all ordinary care to provide a reasonably safe place in which the servant is required to work, and to provide and maintain reasonably safe and suitable machinery for the servant to operate, so that by the exercise of ordinary care on his part the servant can perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents.

Lebrecque v. *Hill Mfg. Co.*, 380.

The plaintiff was employed as an operative in the picker room of the defendant's cotton mill, and while so engaged he received a severe personal injury causing a fracture of his right arm at three different points and resulting in the amputation of the arm near the shoulder. The plaintiff contended that the injury was caused by the breaking of a defective leather belt connecting two of the pulleys of the machine called an "opener" which he was employed to tend and operate, and that there was a failure of duty

MOTIONS.

See NEW TRIAL.

MOTION IN ARREST OF JUDGMENT.

See CRIMINAL LAW.

MOTION TO DISMISS.

See REPLEVIN.

A motion to dismiss does not lie when to support it or resist it, proof is necessary dehors the writ. *Littlefield* v. *Railroad Co.*, 126.

At common law a motion to dismiss can be used to abate the action only when it is apparent from the record that the court has no jurisdiction; and when an order of dismissal is made the action ends.
Littlefield v. *Railroad Co.*, 126.

In statutory proceedings, where the jurisdiction of the court rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears, assuming the allegations to be true, that the court has no jurisdiction.
Littlefield v. *Railroad Co.*, 126.

An action at common law is not to be dismissed for mere defects in pleading that are amendable or which may be cured by verdict, if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action. The defendant should demur if he wishes to raise objections to such defects.
Littlefield v. *Railroad Co.*, 126.

MUNICIPAL CORPORATIONS.

See DEDICATION. EMINENT DOMAIN. PAUPERS. STREET RAILWAYS. TAXATION. TELEGRAPHS AND TELEPHONES. WATERS AND WATERCOURSES.

A village corporation being a creature of the statute, has only such powers as are conferred by statute or by necessary implication.
Village Corporation v. *Water Co.*, 103.

When a village corporation is only invested with power "to raise such sums of money as may be sufficient for the support of a suitable number of hydrants, in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hooks and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department," and has no power to raise money for any other purpose, such corporation has no authority to enter into a contract with a water company providing that after the expiration of a term of years the corporation should have the right to purchase the water company's entire plant, at an appraised value to be fixed by three appraisers, chosen one by the corporation, one by the water company, the third by these two, and on payment of the price so determined, that the water company should transfer to the corporation its entire plant, and if such corporation does enter into such a contract it is ultra vires.
Village Corporation v. *Water Co.*, 103.

The plaintiff having received a bodily injury through an alleged defect or want of repair in a certain sidewalk in the defendant city, seasonably gave to the mayor and aldermen of the defendant city the following written notice signed by her. "You are hereby notified that on Monday, the fifth day of August nineteen hundred and seven, while walking along Seavey Street in said City, on the sidewalk on the easterly side of the street, and myself being in the exercise of due care, I sustained an injury to my person by falling into a hole in the sidewalk nearly opposite the premises of Albion Senter, badly bruising myself and sustaining other bodily injury of a serious nature. I hereby give notice that it is my intention to hold the city of Westbrook responsible for the injury I have sustained, in damages."

Held: That this notice failed to specify upon what part of the body the bruises were received, whether upon the head or back, the arms or legs or to state in what manner and to what extent the bruises affected the plaintiff and therefore failed to specify the nature of her injuries and consequently was fatally defective. *Spear* v. *Westbrook*, 496.

While the personnel of a city government may change, yet the tribunal itself is a continuous body. *Biddeford* v. *Yates*, 506.

While one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government composed of a different set of individuals, yet, what the individuals of different city governments might do, can in no way effect the right of the tribunal as a city government, to act upon any measure properly before it.
Biddeford v. *Yates*, 506.

A municipal government represented by its city council should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter, and when not limited to a prescribed method it should be permitted to act with the same business foresight that is accorded to other business institutions. *Biddeford* v. *Yates*, 506.

Whether a city government can delegate authority to a committee to let city property, depends entirely upon whether the delegation of such authority invests the committee with judicial or ministerial powers.
Biddeford v. *Yates*, 506.

Functions which are purely executive, administrative or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative or discretionary which cannot be delegated.
Biddeford v. *Yates*, 506.

A purely ministerial duty is one as to which nothing is left, to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.
Biddeford v. *Yates*, 506.

The plaintiff city, on May 24, 1904, was the owner of a certain city building containing a hall known as the opera house. On the same day the city council by its committee on public property made and delivered to the defendant an instrument, purporting to be a lease of the hall, expiring June first, 1907. On February 20, 1907, another city council by the same committee made a second instrument purporting to be a lease of the same hall to the defendant to take effect, in futuro, at the expiration of the first lease, to wit, June 1, 1907, for a term of three years from the latter date. Between February 20, 1907, the date of the second lease, and June first, 1907, when it was to take effect, the term of office of the city officials, under whom this latter lease was made, had expired, and on the third Monday of March, a new city government had been inaugurated. *Held:* (1) That the city council had authority to authorize a lease of the hall. (2) That the city council had authority to execute and deliver a lease under one city government to take effect in futuro, under another city government. (3) That the city council could delegate authority to its committee on public property to make and execute such lease.

Biddeford v. *Yates*, 506.

MUNICIPAL COURTS.

See APPEAL.

NAVIGABLE WATERS.

The terminus of a street laid out at Old Orchard in 1871 was "high water mark." Since 1871 high water mark at this point in Old Orchard has been moved by accretions about eighty-eight feet seaward.

Held: That when high water mark changed, and the land above high water mark gradually extended seaward by accretions, the public easement which was attached to it originally at high water mark, went with it, and the street had ended at all times at high water mark, wherever it has been.

State v. *Yates*, 360.

NEGLIGENCE.

See MASTER AND SERVANT. MUNICIPAL CORPORATIONS. STREET RAILWAYS.

In a declaration, in an action for negligence, an allegation of duty alone is not sufficient, but there must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective.

Hone v. *Water Co.*, 217.

NEW TRIAL.

See VERDICT.

The rule governing a motion to have a verdict set aside on the ground of newly discovered evidence is that before the court will grant a new trial upon this ground, the newly discovered testimony must be of such character, weight

NUISANCE.

See MUNICIPAL CORPORATIONS. TELEGRAPHS AND TELEPHONES.

One may erect upon his own land a fence as much higher than six feet as may be necessary to protect himself, his family and his property from annoyances inflicted or threatened by his neighbor. But if he build the fence still higher for the malicious purpose of annoying his neighbor in turn, such extra height is unlawful and a private nuisance under the statute, R. S., chapter 22, section 6. *Healey* v. *Spaulding*, 122.

In determining whether a fence is a private nuisance under Revised Statutes, chapter 22, section 6, it is not necessary to show that the purpose of annoyance was the sole purpose. It is enough to show that it was the dominant one. *Healey* v. *Spaulding*, 122.

One who suffers special injury from a common nuisance may recover damage, in an action at law from the person creating it. *Smith* v. *Preston*, 156.

When a municipality has given authority to a telephone company to erect and maintain telephone poles and wires on its streets, suitable appliances for such erection and maintenance used at needful places on the streets, though they are likely to frighten well broken horses carefully driven, are not nuisances per se. *Simonds* v. *Me. T. & T. Co.*, 440.

A reel three feet long and four feet in diameter with lead pipe coiled upon it and placed next the side walk in the line of telephone poles for the present purpose of stringing the pipe on the poles to enclose telephone wires, and leaving ample room for the travel along the street, is not shown to be an unsuitable appliance or in needless place, and so is not a nuisance, though so placed it is likely to frighten well broken horses carefully driven. *Simonds* v. *Me. T. & T. Co.*, 440.

OFFICERS.

See EXECUTION. SEARCH AND SEIZURE. TAXATION.

The plaintiff had a mortgage on certain goods and chattels given to him by one Tatilbum. This mortgage was duly recorded. One Abraham Lazarovitch, claiming to be the owner of the chattels, sued out a writ of replevin against Tatilbum to recover possession of the goods and chattels. This writ was placed in the hands of the defendant a deputy sheriff, for service. By virtue of this writ, the defendant officer took the goods and chattels from Tatilbum and delivered the same to Lazarovitch. The plaintiff gave the defendant officer notice in writing that he claimed the goods and chattels as mortgagee but this notice was not received by the defendant officer until after he had taken the goods and chattels and delivered the same to Lazarovitch. The plaintiff then brought an action of trespass against the defendant officer for taking and carrying away the goods and chattels. The replevin writ under which the goods and chattels were taken contained the following direction. "We command you, that you replevin the goods and chattels following, viz: . . . and them deliver unto the said plaintiff, provided the same are not

net profits derived from the Gurnee and Doe contracts without any deduction for the services and money which he contributed to the earning of such profits. It also appeared that the surviving partner, who had given bond to settle the partnership affairs, omitted to charge himself in his account with the gain represented by the difference between the appraised value and the actual value of the personal property.

Held: (1) That inasmuch as the good faith of the surviving partner was not impeached, the most that the representatives of the deceased partner can justly demand is that the profits should be divided according to the capital after deducting such share of them as is attributable to the skill and services of the surviving partner.

(2) That in this respect the decree of the Probate Court must be modified so as to require a division of the profits from the Gurnee and Doe contracts according to the capital contributed after deducting so much of them as may fairly be attributed to the services of the surviving partner for which he has not received adequate compensation in the commission of five per cent on $26,959.38 allowed him by the Judge of Probate.

(3) That in the absence of any agreement that the surviving partner should take over the personal property at the appraisal, he was not entitled to the benefit of any difference there might be between the appraised value and the actual value of the property, but should charge himself in his account with such increase in value. *Whittaker* v. *Jordan*, 516.

PAUPERS.

See EVIDENCE.

Although a pauper notice given by the overseers of the poor of a plaintiff town to the overseers of the poor of the defendant town, states that the pauper named therein "and wife and children" have fallen into distress but fails to state either the names or the number of the children and in that respect is an insufficient compliance with the statute, yet the overseers of the poor of the defendant town as the authorized agents of the town may waive any objection arising from such an informality or defect in the notice, and if they accept such notice without objection as a sufficiently definite statement of the facts, they must be deemed to have waived any objection arising from the failure of the notice to give a more definite description.

Wellington v. *Corinna*, 252.

Where the overseers of the poor of a defendant town failed to return an answer within two months, as required by Revised Statutes, chapter 27, section 40, to a pauper notice sent to them by the overseers of the poor of the plaintiff town in compliance with the provisions of section 39 of said chapter, and representing that the pauper named in the notice had a legal settlement in the defendant town and requesting his removal, *Held:* That while under the provisions of the aforesaid section 40 the defendant town was estopped to deny that the settlement of the pauper was in any other than the plaintiff town, yet the defendant town was not precluded from showing that the settlement was in fact in the plaintiff town. *Wellington* v. *Corinna*, 252.

PROVERBS.

PUBLIC LANDS.

See EVIDENCE.

RAILROADS.

See EVIDENCE. MORTGAGES. STREET RAILWAYS.

Where, after the lapse of more than twenty-five years during which a railroad had been maintained and operated over the premises of a land owner without objection, *held* that every presumption should be given in favor of the regularity of the preceedings whereby the railroad was located.
Leather Board Co. v. *Railroad Co.*, 472.

Where there was an oral agreement between a land owner and a railroad company under which the railroad was to cross the premises of the land owner, *held* that such owner was estopped from setting up, as against the validity of the location, the failure of the railroad company to file a plan in the registry of deeds. *Leather Board Co.* v. *Railroad Co.*, 472.

Where there was an oral agreement between a land owner and a railroad company under which the railroad was to cross the premises of the land owner, *held* that the nonpayment of compensation to the land owner could not defeat the validity of the location if the claim for damages was waived by the land owner at the time, and that the existence of such oral agreement together with the subsequent occupation of the land by the railroad company were convincing evidence of such waiver.
Leather Board Co. v. *Railroad Co.*, 472.

Where there was an oral agreement between a land owner and a railroad company under which the railroad company was to cross the premises of the land owner, *held* that the railroad company was not entitled to a full four rod location across the premises but was to have as much land as was needed for a road bed and road purposes or "whatever was needed for a road to go across." *Leather Board Co.* v. *Railroad Co.*, 472.

Where an action of trespass was brought against a railroad company, *held*, that the railroad company did not trespass beyond the limits of its right of way. *Leather Board Co.* v. *Railroad Co.*, 472.

A mortgage deed of trust, by a railroad company to trustees of the "railroad and franchise of the company . . . as the same is now legally established, constructed and improved, or, as the same may be at any time hereafter legally established, constructed and improved . . . with all lands, buildings and fixtures of every kind thereto belonging, together with all real estate to said company belonging, also all locomotives . . . and all the personal property of the said company as the same is in use now, or as the same may be hereafter changed or renewed by said company," did not purport to include, and did not include, any after acquired land which might lie outside the railroad location, or which was not used or available for use, for the operation of the railroad; and no after acquired land passed under such deed, except such as appertained to the "railroad" itself, as distinguished from the railroad company. *Railroad Co.* v. *Cotton Mills Co.*, 527.

REPLEVIN.

See EQUITY. OFFICERS.

REPORT OF EVIDENCE.

See EXCEPTIONS.

REPUTATION.

See WITNESSES.

RES JUDICATA.

See JUDGMENT.

RESERVATION OF GROWING TREES.

See LOGS AND LUMBER.

RESERVED LANDS.

See PUBLIC LANDS.

RETENTION OF TITLE.

See TROVER.

RETURN.

See EXECUTION.

REVENUE.

See TAXATION.

REVIEW.

See APPEAL. EXCEPTIONS. INSTRUCTIONS. TRIAL. VERDICT.

ROADS.

See MUNICIPAL CORPORATIONS. WAYS.

RULES OF COURT.

See NEW TRIAL.

"SAFE AND CONVENIENT" WAYS.

See WAYS.

SALES.

In the absence of agreement or understanding between the parties, as to terms of payment, the law presumes a sale to be a cash sale, that is, a sale conditioned on payment concurrent with delivery, and not a sale on credit, and a delivery in such case, f. o. b. car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and if payment is not made, the vendor may repossess himself of the goods sold, and sell them to another. *Berlaiwsky* v. *Rosenthal*, 62.

SCIRE FACIAS.

See EXCEPTIONS.

SEARCH AND SEIZURE.

SET-SCREWS.

See MASTER AND SERVANT.

SETTLEMENT.

See RELEASE.

SHERIFFS AND CONSTABLES.

See OFFICERS.

SIGNATURE.

See PLEADING.

SPECIFIC PERFORMANCE.

When a village corporation has made a contract which is ultra vires, a bill in equity brought by itself for the specific performance of the contract cannot be maintained. *Village Corporation* v. *Water Co.*, 103.

STATE LAND AGENT.

See PUBLIC LANDS.

STATE LANDS.

See PUBLIC LANDS.

STATUTES.

See BANKS AND BANKING. BUILDING AND LOAN ASSOCIATIONS. CHARITIES. CONTINUANCE. CRIMINAL LAW. DEATH. EVIDENCE. EXCEPTIONS. EXECUTION. FALSE IMPRISONMENT. INSURANCE. JUDGES. MASTER AND SERVANT. MUNICIPAL CORPORATIONS. NUISANCE. RAILROADS. REPLEVIN. TAXATION. WATERS AND WATERCOURSES. WAYS. WILLS.

The approval of the Governor is the last legislative act which breathes the breath of life into a statute and makes it a part of the laws of the State. *Stuart* v. *Chapman*, 17.

Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously. *Stuart* v. *Chapman*, 17.

Statutes in pari materia are to be construed together so as to ascertain and carry out the legislative will. *Stuart* v. *Chapman*, 17.

Revised Statutes, chapter 114, section 23, relating to the jurisdiction of disclosure commissioners, was amended by Public Laws, 1905, chapter 131 and Public Laws, 1905, chapter 134. Both of the amendatory Acts were approved by the Governor the same day. *Held:* That these two Acts must be construed together and Revised Statutes, chapter 114, section 23, is to be read, as amended by both Acts, with the words stricken out by chapter 131 and the words inserted by chapter 134. *Stuart* v. *Chapman*, 17.

"STURGIS DEPUTIES."

See SEARCH AND SEIZURE.

SUBROGATION.

See SALES.

SURVIVING PARTNER.

See PARTNERSHIP.

TAXATION.

The plaintiff town of Bradley assessed a tax, for the year 1906, on certain pulp wood belonging to the defendant. The defendant, an Old Town corporation, on April 1, 1906, owned and operated in Old Town, on the west side of the Penobscot River, a mill for the manufacture by mechanical and chemical processes of soda pulp, from pulp wood, for sale to paper manufactures. On the same side of the river it also had a cutting up saw mill and piling ground. Across the river in the plaintiff town, it also had a cutting up saw mill and a piling ground. In the defendant's operations, pulp wood, out of which pulp was to be manufactured, was driven down the river in log lengths to a boom above the defendant's mill. From this boom some of the logs were let down into a boom on the Old Town side of the river, taken out and cut into four foot lengths, and used in mill or piled on the piling ground. Other logs, for economy and convenience in operation, were let down into a boom on the Bradley side of the river, then taken out and cut into four foot lengths, and piled on the Bradley piling ground, from which it was taken across the river in the winter on the ice to the soda mill or piling ground on that side. The pulp wood which was taxed by the plaintiff town had been so cut up and piled on the Bradley ground during the season prior to April 1, 1906, and was still there on that date. It was intended for use in the soda mill in Old Town, but it had not been removed to the Old Town side during the previous winter, because the piling ground on that side was so full it could not be received there. *Held:* That the wood was not taxable, April 1, 1906, by the plaintiff town as being employed in the "mechanic arts" in that town within Revised Statutes, chapter 9, section 13, paragraph 1.

Bradley v. *Fibre Co.*, 276.

Actions by towns for the recovery of taxes are not defeasable by mere irregularities in the election of assessors or collector or in the assessment itself, but only by such omissions or defects as go to the jurisdiction, or deprive the defendant of some substantial right or by an omission of some essential prerequisite. *Greenville* v. *Blair*, 444.

In actions by towns for the recovery of taxes it is not necessary for the town to show that the person acting as collector of taxes is such collector de jure It is enough if he was collector de facto. *Greenville* v. *Blair*, 444.

In actions by towns for the recovery of taxes it is enough if the written authority to the collector to bring the action is signed by the selectmen, without the addition of the words "selectmen" after their signatures.

Greenville v. *Blair*, 444.

That the assessors knowingly and wilfully omitted to assess another resident for certain non-exempt property, is no defense to an action for taxes. The defendant must resort to other proceedings to right that wrong.

Greenville v. *Blair*, 444.

TELEGRAPHS AND TELEPHONES.

See NUISANCE.

TENANCY IN COMMON.

TITLE.

See TROVER.

TORTS.

See ASSAULT AND BATTERY. FALSE IMPRISONMENT. NEGLIGENCE. NUISANCE. TROVER.

TOWNS.

See EMINENT DOMAIN. MUNICIPAL CORPORATIONS. PAUPERS. TAXATION. TELEGRAPHS AND TELEPHONES. WATERS AND WATERCOURSES. WAYS.

TRAVELERS.

See STREET RAILWAYS.

TREASURE-TROVE.

See FINDING LOST GOODS.

TRESPASS.

See DEDICATION. OFFICERS. RAILROADS.

In an action of trespass quare clausum, evidence of an entry upon the locus by the defendant is essential to the maintenance of the action, and if the plaintiff rests his case without such evidence a nonsuit is properly ordered, though the plaintiff omitted to introduce the evidence because of a justifiable understanding that the entry was admitted. If upon such order the plaintiff elects to except to the order, instead of asking leave to re-open the case and introduce the evidence, his exceptions must be overruled.

Moore v. *Archer*, 285.

TRIAL.

See APPEAL. ASSAULT AND BATTERY. CONTINUANCE. INSTRUCTIONS. MASTER AND SERVANT. NEW TRIAL. REFERENCE. STATUTES.

When the evidence presented by a plaintiff with all the inferences which a jury would be justified in drawing from the same, is insufficient to support a verdict in his favor, so that it would be the duty of the court to set aside such a verdict, if rendered, the presiding Justice is not bound to submit the case to the jury but may properly order a nonsuit. *Golden* v. *Ellis*, 177.

When by a former decision under the evidence then presented, it has been determined that the title to certain property is in the defendant and not in the plaintiff, then in a second trial of the same action, involving in part such property, if there is nothing in the evidence at the second trial to change the legal aspect of such title, it is proper for the presiding Justice to instruct the jury to leave such property entirely out of consideration.

Young v. *Chandler*, 184.

While a view taken by the jury of the scene of an accident upon a highway may render the testimony more intelligible and otherwise afford valuable assistance, yet it does not authorize the jury to ignore physical facts or disregard settled rules of law. *Cunningham* v. *Frankfort*, 208.

It is a well established rule in this State that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand. *Wellington* v. *Corinna*, 252.

TROVER.

See CHATTEL MORTGAGES. FINDING LOST GOODS.

ULTRA VIRES CONTRACTS.

See MUNICIPAL CORPORATIONS. WATERS AND WATERCOURSES.

VENDOR AND PURCHASER.

See BROKERS. SALES.

VENUE.

See ACKNOWLEDGMENT.

VERDICT.

See NEW TRIAL. TRIAL.

VILLAGE CORPORATIONS.

See MUNICIPAL CORPORATIONS. WATERS AND WATERCOURSES.

WAIVER.

See INSURANCE (BENEFIT). PAUPERS. RAILROADS. TRUSTEE PROCESS.

WARRANTY.

See JUDGMENT.

WATERS AND WATERCOURSES.

See MUNICIPAL CORPORATIONS.

Under the provisions of Private and Special Laws, 1885, section 2, as amended by Private and Special Laws, 1887, chapter 141, a contract by a village corporation with a water company to purchase its plant after a term of ten years, *held* to be ultra vires. *Village Corporation* v. *Water Co.*, 103.

Private and Special Laws, 1905, chapter 162, authorizing a certain village corporation to "vote to purchase the entire works and rights" of a certain water company, may validate a contract therefor previously made by the village corporation and the water company, and which contract was invalid when made, if the village corporation proceeds according to the terms of the act which requires a vote of the village corporation to purchase before an appraisal of the water plant is made.

Village Corporation v. *Water Co.*, 103.

Where a village corporation authorized to maintain a fire department for the extinguishment of fires within its limits, contracted with a water company to furnish water for the use of its fire department, and certain buildings situate within such limits, and owned by individuals, were destroyed by fire by reason of the failure of the water company to furnish an adequate supply of water for the extinquishment of fires, *Held:* That the water company was not liable to the individual owners of the property destroyed.

Hone v. *Water Co.*, 217.

Individual owners of property destroyed by fire cannot maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes or from a general contract on the part of the water company with the municipality to furnish water for such purposes without a specification of any particular thing to be done to that end and without any stipulation respecting liability for losses by fire.

Hone v. *Water Co.*, 217.

In an action on the case brought by individual owners against a water company to recover damages for property destroyed by fire, on the ground that their loss resulted from the negligent failure of the water company to keep its hydrants in proper condition for use, *held*, on demurrer, that the declaration was not sufficient in substance and that the action was not maintainable.

Hone v. *Water Co.*, 217.

WAYS.

WILLS.

See CHARITIES. COURTS. TRUSTS.

The intention of a testator is to have a controlling influence in the interpretation of the language used in his will, but if he would have that intention, when discovered, fully carried out, he must be expected to conform to the reasonable rules for the regulation of the practical affairs of life, and to the fundamental laws which establish and secure the rights of property, and when an intention is discovered to accomplish two purposes so inconsistent that both cannot be accomplished in accordance with those rules and laws, there must be a failure as to one of them. *Bradley* v. *Warren*, 423.

It is a well settled rule that a devise absolute and entire in its terms, presumptively conveys an estate in fee without words of inheritance and that any limitation over afterwards is repugnant and void.
Bradley v. *Warren*, 423.

The third clause of the will of a testator read as follows: "Third: The residue of my estate, real personal and mixed, I give devise and bequeath in equal shares to wit. One moiety thereof, to my said wife. One moiety thereof to my daughter Alice Buck now wife of Luman Warren, provided however that if my said daughter shall before this will take effect die without issue, said share shall descend to and be distributed among my heirs at law, and if at her decease this will shall have taken effect, and she shall have entered into possession of said estate so much thereof as may remain at her decease shall so descend and be distributed to and among my heirs at law, meaning those who would be my heirs at her decease according to the laws of this State." The said Alice Buck Warren died intestate leaving a husband but no issue living at the time of her death. The will had taken effect, however, and she had taken possession of her half of the estate before her decease.

Held: (1) That the said Alice Buck Warren took an absolute estate in fee in a moiety of the residue of the testator's estate.

(2) That even upon the assumption that she did not obtain a fee but only a life estate by implication the same result must follow for the reason that an unqualified power of disposal was annexed to the gift.
Bradley v. *Warren*, 423.

The probate court has the power upon subsequent petition, notice and hearing to vacate and annul a prior decree, even a decree probating a will, clearly shown to be without foundation in law or fact and in derogation of legal right. *Merrill Trust Co., Appellant*, 566.

If after the probate of a will, it is made to appear upon proper proceedings that the supposed will was not in fact signed by the supposed testator or by some person for him at his request and in his presence, or was not in fact subscribed in his presence by three credible attesting witnesses not beneficially interested, or was probated without legal evidence of such facts, the decree probating the will should be vacated and annulled.
Merrill Trust Co., Appellant, 566.

WITNESSES.

See CRIMINAL LAW.

There was no evidence that the defendant had ever resided in Portland, nor that the witness had ever resided in a community where the defendant had resided. The defendant's counsel asked the witness if he knew the defendant's "reputation for honesty in that community." The question was excluded. The witness further testified, however, that in his dealings with the defendant he had found him "honest and reliable" but that he had never heard his reputation discussed or referred to.

Held: (1) That it was not indispensable that the witness to the defendant's reputation should have resided in the same community with the defendant.

(2) That the defendant's reputation for honesty was not regularly provable by personal knowledge of the witness derived from specific instances in his dealings with the defendant.

(3) That the ruling allowing the witness to state that he "found him honest and reliable" was more favorable to the defendant than he was entitled to.

(4) That the defendant was not aggrieved by the ruling excluding the question relating to the defendant's "reputation for honesty in that community."

State v. *Lambert*, 394.

WORDS AND PHRASES.

WRITS.

See REPLEVIN. TRUSTEE PROCESS.

APPENDIX

"An appendix is removable either with a knife or with shears."
Hippocrates.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

RESOLVES OF MASSACHUSETTS.

STATUTES OF MASSACHUSETTS.

ARTICLES OF SEPARATION.

(MAINE AND MASSACHUSETTS).

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Page 285, strike out the last word in first sentence of head note 3, reading "omitted" and substitute therefor "admitted."

Page 346, 5th line from bottom of the page, strike out the word "facts" and substitute therefor "acts."

Page 348, 15th line from top of the page, for the words reading "Where the word 'public square,' " etc., read "Where the words 'public square,' " etc.

Page 401, in first line of head note 1, substitute "excluded" for "exclusive."

Page 496, first head note, third full line from bottom, insert "at" between "anticipated" and "the."