"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

105

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER 22, 1908—SEPTEMBER 4, 1909

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1910

Entered according to the act of Congress, in the year 1910,

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THE LAWYER

"A lawyer assumes high duties and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life and liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession. He who has not an instinctive and unswerving love for truth and honor, is not the faithful lawyer."

JUDGE ANTHONY THORNTON.
(216 Ill. 12)

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

WARREN C. PHILBROOK

ASSISTANT ATTORNEY GENERAL

CHARLES P. BARNES

REPORTER OF DECISIONS

GEO. H. SMITH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1910

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

MARIA L. GIFFORD, Admx.,

vs.

WORKMEN'S BENEFIT ASSOCIATION.

Penobscot. Opinion December 22, 1908.

Fraternal Beneficiary Associations. Contracts. Rules. Assessments. Failure to pay Assessments. Suspension. Reinstatements.

1. Fraternal beneficiary associations can impose such terms and conditions upon membership not contrary to law as they may choose and members must comply with those terms and conditions in order to be entitled to the benefits of membership.
2. A rule of such an association that a member failing to pay an assessment on or before the last day of the month in which the call is dated "shall stand suspended from all rights, benefits, and privileges of this association without further notice," is a valid rule and self-executing.
3. When the rules of such an association provide that a suspended member to be reinstated shall within thirty days from his suspension pay all arrears of assessments, such payment must be made during the life of the applicant for reinstatement. Payment of such arrears after his death by some other person will not affect the reinstatement, unless such payment be accepted by the association with knowledge of the death.

On agreed statement of facts. Judgment for defendant.

Action brought by the plaintiff as administratrix of John T. Gifford late of Lee, deceased intestate, to recover the sum of $1000 alleged to be due under a benefit certificate issued to the said deceased

by the defendant association and of which said association the deceased was a member at the time the certificate was issued. Plea, the general issue.

When this action came on for trial, an agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

A. L. Blanchard, for plaintiff.

E. F. Danforth, Louis C. Stearns and Louis C. Stearns, Jr., for defendant.

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

BIRD, J. This is an action brought by the administratrix of the insured to recover the sum of one thousand dollars claimed to be due under a benefit certificate issued by the defendant, a fraternal beneficiary Association or Order, to the husband of the plaintiff, John T. Gifford, deceased.

It is among the objects of the Order "to establish and maintain, for all accepted members a Benefit Fund, from which, on satisfactory evidence of the death of a member who has complied with all its lawful requirements a sum not to exceed the amount stated in the certificate shall be paid" . . . . (By-Law II.)

By the general laws of the Order it is provided that "when an assessment is deemed necessary by the Executive Committee, for either Benefit, Reserve or General Fund, it shall be called on the first or second day of the month, and payment by the members must be made on it before the last day of the same month to the Supreme Secretary in Boston, Mass. (Law VII.) That "If a member fails to pay to the Supreme Secretary an assessment for either fund on or before the last day of the month in which the call was dated, he shall stand suspended from all rights, benefits and privileges of this Association without further notice; (Law VIII.) and also that "Any member who has been suspended for non-payment of assessments, may be reinstated within thirty days from the date of his suspension by payment of all assessments called prior to such suspension and

for which he was in arrears. He shall thereupon be reinstated to all rights, benefits and privileges from date thereof." (Law IX.)

The benefit certificate issued by defendant to deceased contains the following clause: "This certificate is issued upon the express condition that said John T. Gifford shall in every particular while a member of said order comply with all the laws, rules and requirements thereof."

The defendant, if liable at all, must be liable upon a contract,— a contract of insurance. The terms and conditions of the contract 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. *Patterson* v. *Supreme Commandery, etc.*, 104 Maine, 355. In the present case, deceased in his application for membership in the association expressly agrees to comply with all laws and rules of the Fraternity.

The certificate issued to the deceased bears date the twenty-fifth day of September, 1895, and he apparently had complied with all the laws, rules and requirements of the Order on the thirty-first day of July, 1907, when the defendant legally and properly called an assessment as of August first, 1907. On the last day of July, 1907, defendant mailed a notice of this assessment to "John T. Gifford, Lee, Maine," which was the last known post office address of deceased. This was in strict conformity to the constitution of the Order relative to notice of assessments.

The notice mailed on the thirty-first day of July, 1907, reached the post office in Lee, Maine, August second, 1907, and on the same day, without the knowledge or direction of either deceased or defendant, was forwarded by the postmaster at Lee to Norcross Maine. The deceased was then at work about two miles from Norcross post office, at Perkin's Siding where he remained until September fourth following. The mail from Norcross post office intended for Perkin's Siding was taken and carried thither by whomsoever happened to be at the post office. The deceased was found unconscious September fourth, 1907, and was then removed to Milo, Maine, where he died September fifteenth following without knowledge of the August assessment.

Two days before his decease, the plaintiff, in the name of deceased, advised the Supreme Secretary of his failure to receive notice of either August or September assessments to which reply under date of September sixteenth was made stating that there was no September assessment and enclosing a duplicate card for the August assessment with a suggestion of immediate payment. On the same day, September 16, one of the sons of deceased, who were the beneficiaries under the certificate, received the card which was mailed to deceased on the thirty-first day of July preceding and which then gave the first notice received by any member of deceased's family of an assessment for the month of August.

On the day of the receipt of the original notice of the August assessment, September 16, the son of deceased, making no allusion to the death of the insured, forwarded the amount of the August assessment to defendant association and September 18 defendant received the assessment and stamped on the back of the notice of the assessment "Received payment Sept. 18, 1907." On the twenty-first day of September, the defendant first received notice of the death of plaintiff's intestate (the insured) and two days later, September 23, sent its check for the amount of the August assessment to plaintiff, which the latter returned to defendant, defendant to plaintiff and plaintiff to defendant which now holds it subject to order of plaintiff.

Upon the foregoing we are to inquire first if one of the beneficiaries under the laws of the Order had the right to pay the delayed assessment after the death of the insured. We must hold that under the laws of the association deceased stood suspended on the first day of September, 1907 from all rights, benefits and privileges of the association and without notice or other action on the part of the defendant association. The provision for suspension was self executing. *Richards* v. *Maine Benefit Association*, 85 Maine, 99, 101; *Coombs* v. *Insurance Co.*, 65 Maine, 382; *Rood* v. *Benefit Association*, 31 Fed. 62, 64. The certificate of deceased therefore stood forfeited on the first day of September, 1907, *Madeira* v. *Benefit Society*, 16 Fed. 749, subject to his right of

reinstatement by payment within thirty days from that date of all assessments called prior to that date for which he was in arrears: See Law IX, supra.

The failure to pay the assessments worked his suspension as a member and the suspension and the forfeiture of the benefit certificate effected by such suspension continued until the insured did the act required for his reinstatement as a member. Being dead he could do no act to reinstate himself and the act of another could not reinstate him being dead.

This is not the case where the laws of the association provide for reinstatement upon presentment of valid reasons for the non-payment of an assessment. In such case the suspension is conditional and it may be held that reinstatement upon presentment of such reasons restores the party to membership as of the day of his suspension and that such reasons may be presented after his death by his representative or a beneficiary. But on this point it is not necessary to express an opinion. Such, we repeat, is not the present case. Here the suspension is absolute and unconditional and payment of arrears works the reinstatement as of the day of such payment. "He shall thereupon be reinstated to all rights, benefits and privileges from date thereof." (Law IX, supra.)

We cannot regard the right of reinstatement as other than a purely personal right which does not survive nor pass to his representatives or the beneficiaries under the certificate. The payment made by the son of deceased, after the death of the latter, although within the period of thirty days after his suspension, could not in itself effect a reinstatement. See *Supreme Commandery, etc.*, v. *Bernard*, 26 App. Cas. (D. C.) 169; 6 A. & E. Ann. Cas. 694.

Has defendant waived the forfeiture by receiving the overdue assessments from the son of deceased after, but without knowledge of, his death?

A waiver is the voluntary relinquishment of some known right, benefit or advantage, and which, except for such waiver, the party otherwise would have enjoyed. *Stewart* v. *Leonard*, 103 Maine, 128, 132. Knowledge of the existence of the right, benefit or advantage on part of the party claimed to have made the waiver is

an essential prerequisite to the relinquishment. *North Berwick Co.* v. *N. E. F. & M. Ins. Co.*, 52 Maine, 336, 340, 341; *Williams* v. *Relief Association*, 89 Maine, 158, 164, 165; *Swett* v. *Relief Society*, 78 Maine, 541, 545; *Phoenix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 196. "One cannot be said to waive that which he does not know." *Marcoux* v. *Society, etc.*, 91 Maine, 250, 258.

It is admitted to be true that at the time of the receipt of the payment made by the son of deceased the defendant had no knowledge either of the death of John T. Gifford or that the payment was made by his son, a beneficiary, and not by himself. There was no waiver by reason of the acceptance of the assessment paid by the son of deceased, after, but in ignorance, of his death; *Williams* v. *Relief Association*, 89 Maine, 158.

There is no evidence in the case upon which the doctrine of estoppel can be invoked by plaintiff.

In accordance with the agreement of the parties, judgment is to be entered for the defendant.

Judgment for defendant.

WILLIAM R. KALLOCH *vs.* A. H. NEWBERT.

Knox. Opinion December 22, 1908.

Officers. Deputy Enforcement Commissioners. Warrants. Intoxicating Liquors. Interstate Commerce. Search and Seizure. Statute, 1905, chapter 92, section 3. Revised Statutes, chapter 29, sections 36 to 58 inclusive.

It is a well established rule of law that an officer in the service of a writ or warrant is protected in the performance of his duty, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which he acts.

An officer is not bound to look beyond his process. He is not to exercise his judgment touching the validity of the process in point of law, but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case, he is to obey its commands.

There is nothing in the interstate commerce law that renders intoxicating liquors immune from seizure and the court is not aware of any decision that so holds. But after seizure of such liquors and upon libel and hearing if it is shown that they were articles of interstate commerce, then the carrier is entitled to a return of such liquors.

Whether intoxicating liquors are commodities within the protection of the interstate commerce law, is a judicial question to be settled by the court and not one to be determined by the officer as a condition precedent to the execution of his warrant. The officer is not required to adjudicate whether the liquors described in his warrant are seizable or not.

A deputy enforcement commissioner duly appointed and qualified under the provisions of chapter 92, Public Laws, 1905, has authority to serve warrants duly issued for the violation of the provisions of Revised Statutes, chapter 29, section 47, which provides that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale."

Where the defendant officer acting under a search and seizure warrant duly issued, searched the plaintiff's vessel and seized about 500 gallons of intoxicating liquors, and while making the search found in the cabin of the vessel, and separate and apart from the other liquors, a small package containing about two quarts of intoxicating liquor but upon the plaintiff's statement that these two quarts of liquor had been purchased by him for a friend, omitted to seize the same, *Held* that the omission of the defendant to seize the liquor in this package should be regarded as a mere incident, when considered in connection with the actual seizure of nearly 500 gallons

of intoxicating liquors, and that the duty of the defendant officer to seize the liquor contained in the package must be held to have been intended to be waived by the plaintiff by virtue of his own statement that he had purchased the same for a friend.

Boston & Maine Railroad v. *Small*, 85 Maine, 462, distinguished.

On exceptions by plaintiff. Overruled.

Action of trespass against the defendant, who was a Deputy Enforcement Commissioner duly appointed and qualified under chapter 92, Public Laws of 1905, for breaking and entering, on July 30, 1906, the plaintiff's vessel lying at a wharf in Rockland harbor, and of which said vessel the plaintiff was then and there captain and in command, and taking and carrying away certain intoxicating liquors found in said vessel. The declaration in the plaintiff's writ is as follows:

"In a plea of trespass, for that the said A. H. Newbert at Rockland aforesaid on the thirtieth day of July A. D. 1906, with force and arms broke and entered the plaintiff's schooner and vessel called the Hastings of which said schooner and vessel the plaintiff was then the captain and commander, said schooner and vessel being then and there engaged in lawful interstate commerce, and then and there had on board said vessel a valuable cargo of freight and merchandise for transportation, and said defendant after breaking and entering as aforesaid, then and there took and carried away the goods and chattels of the plaintiff, viz: two barrels each containing twenty-six gallons of whiskey; one ten gallon keg of rum; one ten gallon can of gin; 25 cases of whiskey; one keg containing twenty gallons of gin; one keg containing twenty gallons of wine; one keg containing ten gallons of wine; one keg containing five gallons of brandy; and seven hundred and twenty pint bottles of whiskey then and there being found and being of great value, to wit, of the value of five hundred dollars and then and there converted the same to the use of the said defendant against the peace of the State.

"For that the plaintiff on the thirtieth day of July A. D. 1906, at Rockland aforesaid, was owner and in command as captain of a vessel named Hastings, and was then and there lawfully engaged with said vessel in interstate commerce, and on said day had in his possession on board said vessel at Rockland aforesaid a large

amount of merchandise as freight for transportation and delivery. That on said thirtieth day of July, A. D. 1906, said defendant falsely pretending to have in his possession for service a legal complaint and warrant to enable him to enter on board and search said vessel, with force and arms broke and entered said vessel and cargo of merchandise aforesaid, and then and there took and carried away the goods and chattels of the plaintiff, viz: two barrels of whiskey; one keg of rum; one can of gin; one keg of gin; two kegs of wine; seven hundred and twenty-seven bottles of whiskey contained in barrels and cases. Also twenty-five other cases containing whiskey and other liquors all of the value of five hundred dollars and then and there assaulted the plaintiff and placed him under arrest and caused him to be tried and condemned in the Police Court of said Rockland, and sentenced to a fine and imprisonment, without being charged with any crime; from which condemnation and sentence said plaintiff was obliged to appeal to the next succeeding term of the Supreme Judicial Court. Whereby the plaintiff was caused great loss of the goods and chattels aforesaid and by reason thereof for a long time was obliged to neglect and abandon his said vessel and to employ others to care for same, and thereby suffered great loss of time; and thereby was prevented from delivering said freight and merchandise, and from receiving charges for freight thereon to the amount of fifty dollars, and other injuries the said A. H. Newbert then and there did to the plaintiff against the peace of the State which shall then and there be made to appear, with other due damages."

Plea, the general issue with brief statement as follows:

"And for special matter of defence by way of brief statement by leave of court pleaded, to be used under the foregoing general issue, the defendant says:

"That he was on said thirtieth day of July, one of the deputy enforcement commissioners of the State of Maine, duly appointed and qualified; that whatever he did in the premises he did by virtue and in accordance with the commands of a warrant duly signed and issued by the Judge of the Police Court of the City of Rockland under the seal of said court and to him directed as one

of said deputy enforcement commissioners, and of the libel filed therein to forfeit said liquors, the said Judge and said court having jurisdiction in the premises; which said warrant was by him duly served and returned and on which proper legal proceedings were therefore had; and that he did no more in the premises than was necessary in the performance of his duty under said warrant and libel.

"That said liquors have since been returned to and accepted by said Kalloch and he, said Kalloch, has not suffered any legal loss or damage on account thereof, and this the defendant is ready to verify."

Tried at the January term, 1908, Supreme Judicial Court, Knox County. Verdict for defendant. The plaintiff excepted to certain rulings made by the presiding Justice during the trial.

The case is stated in the opinion.

David N. Mortland, and Rodney I. Thompson, for plaintiff.

Arthur S. Littlefield, for defendant.

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

SPEAR, J. This is an action of trespass and comes up on exceptions. The plaintiff was the master of a vessel which was engaged in interstate commerce and lying at a wharf in the city of Rockland. The defendant was a deputy enforcement commissioner duly appointed and qualified under chapter 92, Public Laws of 1905. By virtue of a complaint and warrant properly issued from the police court of the city of Rockland, which was placed in his hands for execution, the defendant was directed to search the plaintiff's vessel for intoxicating liquors, and seize them if found. No controversy is made that the warrant was an ordinary search and seizure warrant in due form and without apparent defect. The defendant served the warrant and found and seized about 500 gallons of intoxicating liquor. The liquor was duly libeled and upon hearing, being adjudged to be within the protection of the interstate commerce clause of the Constitution, was ordered returned, and this order

was properly executed. While making the search, the defendant went into the cabin of the vessel with the plaintiff and found a small package of liquor containing about two quarts which the plaintiff said "a friend of his sent by him to Boston to get." Upon this statement the defendant did not take the package. The case was submitted to the jury with a verdict for the defendant. The defendant justified his acts in making the search and seizure as a duly qualified officer acting under a legal warrant issued from a court of competent jurisdiction. The Justice presiding ruled that if properly executed, such a warrant was a legal justification. The plaintiff objected to this ruling and denied that the warrant if fair upon its face and legally sound afforded justification for three reasons. First, because the vessel was engaged in interstate commerce. Second, by the provisions of the Public Laws of 1905, chapter 92, section 2, the defendant had no power to act in the enforcement of the prohibitory law with respect to the keeping of intoxicating liquors. Third, to afford a complete justification under the warrant, it was the duty of the defendant to seize all the liquors he found on board the vessel. Nothing appeared upon the face of the warrant in any way indicating that the liquors described therein were commodities of interstate commerce.

Upon the facts here presented, the plaintiff's first ground of complaint is without merit. There is nothing in the interstate commerce law that renders intoxicating liquors immune from seizure and we are aware of no decision that so holds. But after seizure and upon libel and hearing if it is shown that they were articles of interstate commerce, then the carrier is entitled to a return of the goods. Whether liquors are commodities within the protection of the interstate commerce law, is a judicial question to be settled by the court and not one to be determined by the officer as a condition precedent to the execution of his warrant. We think this is precisely the rule laid down in *B. & M. Railroad* v. *Small*, 85 Maine, 462. The court say: "It is urged that it may at times work a great hardship upon an innocent owner, if an officer must in every case seize whatever intoxicating liquors he finds under a search warrant, however evident it is they are not intended for unlawful sale. The policy of

the law is that every owner or keeper of intoxicating liquors shall be prepared to defend them, before the courts and not before the officer against the accusation, that they are intended for unlawful sale." In other words the officer is not required to adjudicate whether the liquors described in his warrant are seizable or not.

It is also a rule of law too well established to now require discussion, that for reasons founded on public policy and in order to secure a prompt and effective service of legal process, the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case, or subject matter, he is to obey its commands. The defendant's warrant if properly executed, was a complete justification.

The plaintiff's second proposition is that the defendant's warrant, if in other respects a justification, failed in this that the act of the legislature creating the enforcement commissioners, vested in them authority only "in the enforcement of the law against the manufacture and sale of intoxicating liquors, omitting to give them any authority against the keeping of intoxicating liquors, an offense specified in sec. 47, R. S., chapter 29." We think this contention is equally untenable. It will be observed by reference to chapter 29, R. S., that sections 36 to 58 inclusive, the sections relating to the manufacture, selling and keeping for sale intoxicating liquors, are under the title, "Manufacture and sale of intoxicating liquors." This title covers six pages of the chapter. The act of 1905 provides that "Commissioners, with the advice and under the direction of the Governor, shall have and are authorized to exercise all the common law and statutory powers of sheriffs in their respective counties in the enforcement of the law against the "manufacture and sale of intoxicating liquors." By section 3, the deputy enforcement commissioners have the same powers as the Commissioners, that is, all the powers of sheriffs.

The subject matter of R. S., chapter 29, covering section 47 relating to the keeping of intoxicating liquors, is "The manufacture and sale of intoxicating liquors." The act of 1905 is entitled "An act to provide for the better enforcement of the laws against "The manufacture and sale of intoxicating liquors." "The manufacture and sale referred to and intended in the act of 1905 is "The manufacture and sale" specified in chapter 29. This act, therefore, construed in pari materia embraces everything in chapter 29 under the title "Manufacture and sale of intoxicating liquors." Section 47 is there found and consequently included.

If this were not so, it is perfectly clear that the legislature intended that these officers should have authority to enforce every provision of the prohibitory law.

They used the phrase "manufacture and sale" as a general term calculated to cover every violation of the prohibitory law from section 36 to 58 inclusive, and as before noted section 47 comes under this general head and was intended to be included within it. The rule of construction upon the interpretation of statutes that the intention of the legislature shall control, when such interpretation does no violence to the language used, is too well established to require citation. *Collins* v. *Chase*, 71 Maine, 434; *Holmes* v. *Paris*, 75 Maine, 559; *Landers* v. *Smith*, 78 Maine, 212; *Gray* v. *County Commissioners*, 83 Maine, 429.

The third ground upon which the plaintiff seeks to hold the defendant for damages in trespass is based upon the fact that the defendant in serving his warrant did not make a seizure of all the liquors upon the vessel, which came to his notice. It appears from the evidence of both the officer and his aid that they left in the cabin of the vessel about two quarts of liquor. The uncontradicted testimony with respect to the omission to seize this liquor was given by the defendant as follows: "We looked all around the cabin, saw nothing there but a small package of liquors, there might have been a couple of quarts in it, which Captain Kalloch said a friend of his sent by him to Boston to get."

The plaintiff argues that this omission of the officer brings the case fully within the rule laid down in *B. & M. Railroad* v.

Small, 85 Maine, 462. But the cases seem to be clearly distinguishable. The facts and the motives which animated the officers in the execution of their warrants, in the two cases are entirely dissimilar. In the railroad case, the court say: "The defendant officer exercised the authority to search but he wilfully and deliberately refused to seize the intoxicating liquors he found, and made a false return that he found none. He assumed to nullify the main command of the statute and of his process." The officer omitted to seize a barrel of intoxicating liquor.

Not so in the case at bar. The defendant seized hundreds of gallons of intoxicating liquors. It was not in a spirit of "wilful and deliberate" refusal to obey his warrant that he omitted to seize the two quarts found in the cabin, separate and distinct from the rest of the cargo, but in deference to the plighted word of the Captain that they had been purchased by him for a friend. It would at least be a travesty upon justice if not an anomaly in law, to now allow the plaintiff to invoke the kindness of a favor as the technical foundation of a suit for damages against the doer of the friendly act.

The omission of the officer to take the small package should be regarded as a mere incident, when considered in connection with the actual seizure of 500 gallons of intoxicating liquors under his warrant. The duty of the officer to seize this comparatively insignificant quantity must be held to have been intended to be waived by the plaintiff by virtue of his own statement that he had purchased it for a friend. Under the circumstances in this case, he cannot now be permitted to assert his own wrong by taking advantage of the position assumed by the officer upon his own suggestion. The plaintiff was surely not injured by the officer's act of courtesy and confidence. The railroad case above cited is not in conflict with this conclusion. The opinion seems to be founded upon the doctrine of sound public policy. After discussing the Six Carpenter's case, the court say: "Our stricter rule is firmly established in our law, and we think upon grounds of public policy it is the better and more reasonable rule. While, of course, in a given case an officer may have a sufficient, lawful excuse for his omission, the general,

plain, reasonable and necessary proposition is, that a ministerial officer must faithfully obey every lawful command in the statute or process, or he will be left without its protection in any suit against him for any acts done by him under color of such statute or process." We think this case falls fairly within the exception.

Neither public policy nor private right requires that the defendant in the case at bar should answer in damages to the plaintiff for performing an act in compliance with the plaintiff's assent.

Exceptions overruled.

LULU C. BOWEN

vs.

WORUMBO MANUFACTURING COMPANY.

Androscoggin. Opinion December 24, 1908.

Master and Servant. Negligence. Assumption of Risk. Icy Stairway. Duty of Master. Evidence. Verdict.

When the evidence in behalf of a plaintiff upon the question of the defendant's liability is entirely uncontradicted, it must receive its full probative force.

It is well settled law that a general knowledge of a danger, without an appreciation of it is not conclusive upon the question of the assumption of the risk.

The plaintiff was an operative in the defendant's woolen mill where she had been employed about sixteen months. At the rear entrance to the mill was an outside stairway of twenty-one steps descending to the ground, with a railing on each side about three feet above the stairs, but without any balusters between the treads and the rail. This stairway was uncovered and entirely exposed to the elements, and was so located and constructed that the drippings from the roof fell directly upon the upper steps. On Monday, December 10, 1906, there was a coating of ice upon the upper steps caused by melting snow and ice on the roof dripping upon the stair-

way, but this ice was concealed by a few inches of light snow that had fallen Sunday night and Monday forenoon. The plaintiff came out of the mill at noon and saw the snow on the steps, but she testified that she saw no ice there, and there was no evidence that she knew that the ice was on the steps at that hour. She started to come down with her right hand on the rail and found a safe footing in the snow on the first step, but slipped on the second one and fell under the railing and off of the end of the steps to the ground and was injured. Not only was the snow frequently shoveled off of these stairs in the winter, but also the ice forming upon them from time to time was frequently chopped and scraped off by the servants of the defendant employed for that purpose in connection with other duties; but this was not done on the forenoon of the accident. This open stairway had been habitually used with the knowledge of the defendant for a period of eighteen years as a means of entering and leaving the mill by all operatives who might find it a more direct and convenient way than that from the front entrance, in going to and from their homes.

Held: (1) That the jury was warranted in finding that there was a failure of duty on the part of the defendant towards the plaintiff in neglecting to keep this stairway in a reasonably safe and suitable condition for the accommodation of its operatives who thus had an implied invitation to use it in entering and leaving the mill.

(2) That the jury was also warranted in finding that the plaintiff was not guilty of contributory negligence.

(3) That under the facts and circumstances of the case, it cannot be said as a matter of law that the plaintiff understood and appreciated the dangerous condition of the steps and hence voluntarily assumed the risk of using them, and that this question was properly submitted to the jury as a question of fact and that the finding of the jury in favor of the plaintiff on that question does not appear to be unreasonable.

(4) That the damages awarded by the jury do not appear to be excessive.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff, who was an operative in the defendant's woolen mill, and caused by the alleged negligence of the defendant in failing to keep in a reasonably safe and suitable condition a certain stairway connected with its mill, and habitually used by the plaintiff and other operatives for the purpose of entering and leaving the mill. Plea, the general issue. Verdict for plaintiff for $1475. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton, for defendant.

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

WHITEHOUSE, J. The plaintiff was an operative in the defendant's woolen mill and recovered a verdict of $1475 for injuries received by slipping on the second step from the top of an outside stairway leading to the mill, and falling to the ground a distance of thirteen feet. At the trial the defendant introduced no testimony except that of a medical expert who testified in regard to the plaintiff's present physical condition. The evidence in behalf of the plaintiff upon the question of the defendant's liability was therefore entirely uncontradicted, and must receive its full probative force. The case comes up on motion to set aside the verdict.

At the rear entrance to the mill was an outside open stairway of twenty-one steps descending to the ground, with a railing on each side about three feet above the stairs, but without any balusters between the treads and the rail. This stairway was uncovered and entirely exposed to the elements, and was so located and constructed that the drippings from the roof above fell directly upon the upper steps.

The accident happened on Monday noon, December 10, 1906. The plaintiff had then been employed in the mill about sixteen months. Sometime between Saturday and Monday, and possibly at an earlier date, the melting snow and ice on the roof had dripped upon the stairway and formed a coating of ice upon the steps varying in thickness from half an inch to two inches; but this ice was concealed on Monday noon by a few inches of light snow that had fallen Sunday night and that forenoon. The plaintiff came out of the mill at noon time and saw the snow on the steps, but states that she saw no ice there, and there is no evidence in the case that she knew that there was ice on the steps at that hour. Three persons, one woman and two men immediately preceded her and passed down without accident. She started to come down with her right hand on the rail and found a safe footing in the snow on the first step, but slipped on the second one and fell under the railing and off of the end of the steps to the ground. Twelve or fifteen other operatives came down this stairway at the same noon hour.

There was undisputed evidence that not only was the snow frequently shovelled off of these stairs in the winter, but that the ice forming upon them from time to time was frequently chopped and scraped off by the servants of the defendant employed for that purpose in connection with other duties; but this was not done on the forenoon of the accident.

There was also undisputed testimony that this open stairway had been habitually used with the knowledge of the defendant for a period of eighteen years, as a means of entering and leaving the mill by all operatives who might find it a more direct and convenient way than that from the front entrance, in going to and from their homes.

It is the opinion of the court that these facts afforded sufficient evidence to warrant the jury in finding that there was failure of duty on the part of the defendant towards the plaintiff in neglecting to keep this stairway in a reasonably safe and suitable condition for the accommodation of its operatives who thus had an implied invitation to use it in entering and leaving the mill, and also in finding that the plaintiff was not guilty of contributory negligence on her part at the time of the accident.

It is insisted, however, by the defendant that the plaintiff must have known of the danger and that in attempting to descend the stairs in that condition, she voluntarily assumed the risk of so doing. But it is settled law that a general knowledge of a danger, without an appreciation of it is not conclusive upon the question of the assumption of the risk. *Frye* v. *Bath Gas and Elec. Co.*, 94 Maine, 17. And in the case at bar it has been noted that the duty of the defendant, prior to the accident, had frequently been performed by cutting and removing the ice from the stairway, and that thus its condition necessarily changed from time to time. When therefore this fact is considered with the testimony of the plaintiff that she did not see any ice there before she fell and the absence of any direct evidence that she knew that there was ice concealed under the snow on the steps at that time, it cannot be said as a matter of law that she understood and appreciated the dangerous condition of the stairs and hence voluntarily assumed the

risk of attempting to use them. To this effect was the decision of the court in *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. on page 162, a case in which the facts were analogous to those at bar but more favorable to the defendant. In the opinion the court say: "We are of opinion that it cannot be said as a matter of law, that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated which resulted in the accident. She knew that the steps were icy and that there was some danger in passing over them. But the evidence tended to show that this slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. See also *Osborne* v. *London & North Western Railway*, 21 Q. B. D. 220, a case precisely in point."

It is accordingly the opinion of the court that the question whether the plaintiff understood and appreciated the danger was properly submitted to the jury as a question of fact, and that their finding in her favor upon that question does not appear to be unreasonable.

Nor does it satisfactorily appear from the evidence that the damages awarded by the jury were excessive.

Motion overruled.
Judgment on the verdict.

In Equity.

CORNELIUS DOHERTY AND GEORGE H. HAYES, Executors,

vs.

JOHN C. GRADY et als.

Washington. Opinion December 24, 1908.

Descent and Distribution. Wills. Rules of Construction. Presumptions. "Legal Heirs." Per Stirpes and Per Capita.

In considering a will, the general rule is that the intent of the testator is to govern but it is the intention expressed in the will and not otherwise.

It is a familiar rule of construction that the words of a will must receive their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed.

The distinction made in cases in regard to the right of beneficiaries named in a will to take per stirpes or per capita, depends upon determining whether the phraseology of the will divides them into classes, in which the individuals of each class take equally, or establishes but one class all the members of which take equally.

According to the established rule of law, a devise to "heirs whether it be to one own's 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.

Such presumption, however, will be easily controlled, by any words in the will, indicating a different intention of the testator; as if, after a devise to "heirs," it be added, "in equal shares," or "share and share alike," or "to them and each of them," or "equally to be divided," or any equivalent words, intimating an equal division then they will take per capita, each in his own right. But when there are no such words, the presumption is that the testator referred to the familiar law of descents and distributions, to regulate the distributions of his bequest.

Where a testator in his will used the phrases, "to my legal heirs then living in equal shares," "to my legal heirs, in equal shares" and "in equal shares to my legal heirs," it was *held* that these phrases were undoubtedly calculated to convey precisely the same meaning and that the language used in the will designates but one class, his legal heirs, who take in equal shares according to his express directions.

The will of a testator contained the following clauses:

"7th, I hereby direct and authorize my executors or their successors to form a trust fund of the amount or amounts received from the sale of the said real estate, together with all the rest, residue and remainder of my personal estate after the above mentioned bequests shall have been made and deposit the same with the Morton Trust Company of New York City.

"8th, I bequeath to my wife Mary R. Grady, and hereby direct and authorize my executors to pay to her during her lifetime the interest on the sum of forty thousand dollars, and no more.

"9th, The interest on the balance of the fund I give and bequeath to my legal heirs, in equal shares, payable annually.

"10th, It is my will and request and I hereby authorize my executors and trustees, after the death of my wife, Mary R. Grady, to distribute the balance of the fund then in the hands and possession of the said Morton Trust Company, in equal shares to my legal heirs.

"11th, Should my wife, Mary R. Grady, die within twenty years from the date of my decease the fund is to remain on deposit with the said Morton Trust Company until after the expiration of that time when it is to be disposed of as provided in clause ten the interest to be divided amongst my legal heirs."

Held: 1. That the testator intended to make a specific bequest to his widow of the income on the sum of $40,000, which became vested immediately upon his death, but not payable until the expiration of a year from that date.

2. That it was the intention of the testator that his widow should receive from the date of his death until the trust fund was actually established a rate of interest upon $40,000 equivalent to that allowed by the Morton Trust Company.

3. That whenever the Morton Trust Company declares a dividend of interest on the trust fund, whether quarterly, semi-annually or annually, the widow will be entitled to receive her interest on the $40,000.

4. That in default of the payment of any installment of interest, the widow will be entitled to simple interest on the amount of such default from the time it becomes due and payable until it is paid.

5. That, according to clause ten of the will, the balance of the trust fund is to be divided per capita among the legal heirs of the testator.

6. That upon the happening of the contingency named in the 11th clause of the will, the interest on the trust fund until the expiration of twenty years should be divided equally among the legal heirs living at the time of the decease of the widow and payable to them in the same manner as it was paid to the widow in her lifetime.

7. That under clause 9 of the will, the interest is payable annually and is to be divided per capita among the legal heirs of the testator.

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

Bill in equity brought by the executors of the last will and testament of William O. Grady, deceased, against John C. Grady a brother of said deceased, Mary R. Grady widow of said deceased, Eliza P. Grady, a sister of said deceased, and several others interested in the estate of said deceased, asking for the construction of certain paragraphs of the will of said deceased. Answers were duly filed by all the defendants. When the cause came on for hearing on bill, answers and stipulations of counsel, it was agreed that the same should be reported to the Law Court for determination.

The case is stated in the opinion.

The will of said deceased is as follows:

"Be it Remembered, that I, William O. Grady of Eastport, in the County of Washington and State of Maine, being of sound mind and memory, but knowing the uncertainty of this life, do make this my last will and testament.

"After the payment of my just debts and funeral charges I bequeath and devise as follows:

"1st, I give and bequeath to my sister Eliza P. Grady, my horses and carriages.

"2nd, I give and bequeath to my wife, Mary R. Grady, all other articles of personal property domestic or household use or ornament belonging to me, which at my decease may be in my house at Eastport, Maine or in any other house which may be my principal place of residence.

"3rd, I give and bequeath to my brother, John C. Grady, the sum of five thousand dollars, to be paid to him in yearly payments of one thousand dollars each, for the term of five years.

"4th, I give, bequeath and devise to my wife, Mary R. Grady, all my interest in the homestead property at Eastport, Maine, during her lifetime and at her decease to my nephew, George O. Grady, during his lifetime and at his decease to his children, should he die without issue to my legal heirs then living in equal shares, as tennants in common, it being my express wish and desire that the

homestead property shall always remain in the possession of the Grady family. Should my wife, Mary R. Grady, not desire to occupy the homestead property as a residence it is my wish and desire that my sister Eliza P. Grady, shall so occupy it.

"5th, I give bequeath and devise to my nephew, John Weston Grady, all my interest in the three stories building and lot situated on Water Street in said Eastport, at the head of the wharf property, with the express understanding that my sister Eliza P. Grady, is to have the use of that portion of said building now used by her for office purposes, during her lifetime, free from rent.

"6th, I hereby direct, authorize and empower my executors or their successors to sell and convey all and any of the rest, residue and remainder of my real estate, for cash, either together or in parcels and for the best price obtainable and shall for the purpose aforesaid execute all such deeds, assurances and things, as they may think fit.

"7th, I hereby direct and authorize my executors or their successors to form a trust fund of the amount or amounts received from the sale of the said real estate, together with all the rest, residue and remainder of my personal estate after the above mentioned bequests shall have been made and deposit the same with the Morton Trust Company of New York City.

"8th, I bequeath to my wife, Mary R. Grady, and hereby direct and authorize my executors to pay to her during her lifetime the interest on the sum of forty thousand dollars, and no more.

"9th, The interest on the balance of the fund I give and bequeath to my legal heirs, in equal shares, payable annually.

"10th, It is my will and request and I hereby authorize my executors and trustees, after the death of my wife, Mary R. Grady, to distribute the balance of the fund then in the hands and possession of the said Morton Trust Company, in equal shares to my legal heirs.

"11th, Should my wife, Mary R. Grady, die within twenty years from the date of my decease the fund is to remain on deposit with the said Morton Trust Company until after the expiration of that

time when it is to be disposed of as provided in clause ten the interest to be divided amongst my legal heirs.

"12, I hereby appoint as executors and trustees of this my last will and testament Cornelius Doherity and George H. Hayes of Eastport, Maine.

"In testimony whereof, I hereunto set my hand, and in the presence of three witnesses declare this to be my last will, this seventeenth day of December in the year one thousand nine hundred and four.

"WILLIAM O. GRADY. (seal)"

L. D. Lamond, for plaintiffs.

C. B. & E. C. Donworth, and L. H. Newcomb, for defendants.

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

SPEAR, J. This is a bill in equity for the construction of certain paragraphs in the will of William O. Grady of Eastport, namely: 7th. I hereby direct and authorize my executors or their successors to form a trust fund of the amount or amounts received from the sale of the said real estate, together with all the rest, residue and remainder of my personal estate after the above mentioned bequests shall have been made and deposit the same with the Morton Trust Company of New York City.

8th. I bequeath to my wife, Mary R. Grady, and hereby direct and authorize my executors to pay to her during her lifetime the interest on the sum of forty thousand dollars, and no more.

9th. The interest on the balance of the fund I give and bequeath to my legal heirs, in equal shares, payable annually.

10th. It is my will and request and I hereby authorize my executors and trustees, after the death of my wife, Mary R. Grady, to distribute the balance of the fund then in the hands and possession of the said Morton Trust Company, in equal shares to my legal heirs.

11th. Should my wife, Mary R. Grady, die within twenty years from the date of my decease the fund is to remain on deposit with the said Morton Trust Company until after the expiration of that time when it is to be disposed of as provided in clause ten the interest to be divided amongst my legal heirs."

The case shows that executors of the will were duly appointed and qualified and that Mary R. Grady, widow, elected to take the pecuniary and other provisions made for her by the will in lieu of her distributive share in the estate and of her dower in the lands of her late husband.

The executors declare that they are in doubt with respect to the proper interpretation of the above clauses of the will and desire to submit certain questions to the judgment of the court relating thereto:

1st. Whether the interest on $40,000 given by the 8th clause of the said will to the said widow, Mary R. Grady by the said William O. Grady commences from the date of the death of the said William O. Grady or from the time of forming the trust fund with the Morton Trust Company of New York.

2nd. If the interest commences from the date of the death of the testator should the same be computed according to the rate of interest allowed by said Morton Trust Company or based upon the income which the estate has earned since the death of the testator until the trust fund was actually formed.

3rd. Whether in the final distribution of the estate according to clause ten in said will, the balance of the fund is to be divided into four equal parts, one fourth to John C. Grady, brother, one fourth to Eliza Grady, sister, one fourth to the four children of James B. Grady, deceased and one fourth to George O. Grady, only heir of George O. Grady deceased, or does the clause "in equal shares to my legal heirs" mean that the children of the deceased brothers are to share equally with the brother and sister now living.

The defendant, Mary R. Grady, also propounds the following questions: 1st. When is the interest payable that was bequeathed to the testator's widow, Mary R. Grady, by the 8th clause of the

will? If periodically, at what periods is it payable and how is the amount of each installment to be determined?

2nd. If there has been any default in payment of any such installment, does it bear interest and if so, from what date and at what rate?

The brother, sister and George O. Grady, nephew, likewise ask:

Should the contingency occur that is provided for by the 11th item of the will, what disposition is to be made of the interest on the trust funds from the time of the happening of said contingency to the termination of the twenty year term mentioned in said item.

The other questions appear to be duplicates of those referred to.

In answer to the first question it is the opinion of the court from the clear and unambiguous phraseology, that the testator intended by clause eight of the will to make a specific bequest to his widow of the income on the sum of $40,000, which became vested immediately upon his death, *Prescott* v. *Morse*, 62 Maine, 447, but not payable until the expiration of a year from that date, *Hamilton* v. *McQuillan et al.*, 82 Maine, 204.

In answer to the second question, the court is of the opinion that it was the intention of the testator that his widow should receive from the date of his death until the trust fund was actually established a rate of interest upon $40,000 equivalent to that allowed by the Morton Trust Company of New York City.

In this connection may be considered the first question put by Mary R. Grady in her answer in which she asks "if the interest is payable periodically, at what periods it is payable and how is the amount of each installment to be determined." In answer to this question the court is of the opinion that the testator intended that the beneficiary should receive her interest in accordance with the rule observed by the Morton Trust Company in the payment of interest upon trust funds of this character, that is, whenever the Morton Trust Company declared a dividend of interest upon this trust fund, the plaintiff would be entitled to receive it when so declared whether quarterly, semi-annually or annually.

Her second question also logically arises in this connection. It is the opinion of the court in answer to this question that in default

of the payment of any installment of interest, the beneficiary will be entitled to simple interest on the amount of such default from the time it becomes due and payable until it is paid, *Hamilton* v. *McQuillan et al.*, supra. To avoid possible confusion it is proper to reiterate that the legatee's income would bear no interest for a year after the death of the testator as already suggested.

In answer to the third question of the executors, the court is of the opinion that, according to clause ten, the balance of the fund is to be divided per capita among the legal heirs of the testator. That is, the children of deceased brothers living at the time of the death of the testator, are to share equally with the brother and sister.

In considering a will, the general rule is that the intent of the testator is to govern but it is the intention expressed by the will and not otherwise. *Cotton* v. *Smithwick*, 66 Maine, 367. It is also a familiar rule of construction that the words of a will must receive their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed. *Andrews* v. *Schoppe*, 84 Maine, 170; *Jacobs et al.* v. *Prescott et al.*, 102 Maine, 63. These rules of construction are stated in various ways and have become so well settled as to now be considered elementary formulas for the construction of wills. As said in *Hall* v. *Hall*, 27 N. H. 275, "the words used by the testator are the means we are to use to ascertain his intention."

Under these rules it becomes necessary to determine what the testator intended by the use of the language "to my legal heirs, in equal shares," which he employed to give expression to his will. It will be noticed by reference to the various clauses in the will that this form of expression is somewhat varied, reading in item 4, "to my legal heirs then living in equal shares;" in item 9, "to my legal heirs in equal shares;" in item 10, "in equal shares to my legal heirs." These different expressions were undoubtedly calculated to convey precisely the same meaning.

The brother, sister and a nephew of the testator contend that the words "in equal shares" as used in his will should be given

no significance in the construction of the clauses where the phrase appears; that the will should be construed precisely as it would, if these words were omitted and the testator had designated his beneficiaries as his legal heirs only. If this contention is to be regarded, the law seems to be well settled that a bequest to heirs or legal heirs designates not only the persons who are to take but also the manner and proportion in which they take. Where no other words are found to control, the law presumes the intention of the testator to be that they shall take as heirs would by the rules of descent, that is per stirpes instead of per capita. But a careful consideration of every item of the will, disclosing the use of the phrase "in equal shares" three times, differing a little in form but not in meaning, seems to clearly indicate a purpose in the mind of the testator to give these words some effect. The repetition of this phrase shows that it was not used accidently but intentionally. If so used, the words must be presumed to convey their usual meaning in the connections in which they were used. *Daggett* v. *Slack et al.*, 8 Met. 450, is decisive of the question here involved. In the opinion Chief Justice Shaw says: "The question then is, whether these heirs shall take per capita or per stirpes. And the court are of opinion, that, according to the established rule of law, 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. Therefore in the present case, where there are no such words, the true construction of the will is, that the grandchildren take per stirpes, and not per capita; and therefore that the petitioner is entitled to one eighty-eighth part only of the devised estate. 1 Roper on Leg. (1st Amer. ed.) 126; 2 Jarman on Wills, 46. Such presumption, however, will be easily controlled, by any words in the will, indicating a different intention of the testator; as if, after a devise to "heirs," it be added, "in equal shares," or "share and share alike," or "to them and each of

them," or "equally to be divided," or any equivalent words, intimating an equal division, then they will take per capita, each in his own right. But when there are no such words, the presumption is, that the testator referred to the familiar law of descents and distributions, to regulate the distribution of his bequest." In precise point is *Dukes* v. *Faulk*, 37 So. Carolina, 255, 34 Am. St. R. 745, *Mason's Exors.* v. *Trustees M. E. Church*, 27 N. J. Eq. 47.

The distinction made in these cases in regard to the right of beneficiaries named in a will to take per stirpes or per capita, depends upon determining whether the phraseology of the will divides them into classes, in which the individuals of each class take equally, or establishes but one class all the members of which take equally. The language of the will before us designates but one class, his legal heirs, who take in equal shares according to his express directions.

In answer to the last question relating to the 11th item of the will, the court are of the opinion that upon the happening of the contingency therein named, the interest on the trust fund until the expiration of twenty years should be divided equally among the legal heirs living at the time of the decease of Mary R. Grady and payable to them in the same manner as it was paid to Mary R. Grady in her lifetime.

While item 11, provides for distribution of interest "amongst my legal heirs," leaving off the phrase "in equal shares," we are yet inclined to the belief that he intended the division to be made, in accordance with the general design observed in the rest of his will for the disposition of his property. It seems improbable that he made this contingent division of interest an exception to the rule.

In the answers of John Weston Grady et als., the question is asked "In what proportion are the respective heirs to take under the 9th and 10th items of said will." The answer already given with respect to the interpretation of item 10, is applicable to item 9 of the will, so far as the proportions which the heirs are to take are concerned, and the interest is payable annually as the will provides.

Bill sustained. One bill of costs to be allowed the plaintiffs and one bill of costs to be allowed the defendants, and reasonable counsel fees for one attorney for the plaintiffs and reasonable counsel fees for one attorney for the defendants to be paid from the estate and allowed to the executors in their account.

Decree in accordance with this opinion.

In Equity.

BOARD OF POLICE OF THE CITY OF BIDDEFORD et als.,

vs.

THE INHABITANTS OF THE CITY OF BIDDEFORD.

York. Opinion December 24, 1908.

City of Biddeford. Police Board. Orders Drawn by Police Board, City may Refuse Payment of such Orders, When. Special Laws, 1893, chapter 625, sections 4, 6. U. S. Constitution, Article IV, section 2, paragraph 2.

Under a statute requiring a municipality to pay all the expenses of its police department "upon the requisition" of the Board of Police constituted by the statute, the municipality is not obliged to pay the naked negotiable order or warrant of the Board which does not upon its face or by accompanying papers show what expenses the order or warrant is drawn for.

In equity. On report. Bill dismissed.

Bill in equity brought by the "Board of Police of the City of Biddeford, by Henry G. Hutchinson and James F. Tarr, a majority of the members thereof, in behalf of said Board, and also in behalf of Charles B. Harmon, James Mogan, Napoleon Ducharme, George E. Clark, Frank W. Dearing, John Hanson, George A. Bowie, Gideon A. Boutin, George W. Wormwood, William Fanning, Joseph Cote, John W. Hayes, William Dunn and Joseph Cormier, all of Biddeford in the County of York and State of Maine, and the

last named fourteen individuals in their own behalf," "against the Inhabitants of the City of Biddeford, a municipal corporation duly created and existing by law within the County of York and State of Maine," praying for a decree that the defendant city should pay certain orders issued by the Board of Police. The defendant city filed an answer with a demurrer therein inserted.

When this cause came on for hearing, it was reported to the Law Court "on bill, answer and demurrer."

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiffs.

Robert B. Seidel, and George F. & Leroy Haley, for defendant city.

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

EMERY, C. J. By chapter 625 of the Special Laws of 1893 the legislature transferred from the Mayor, Aldermen and Council of the city of Biddeford to a Board of Police, the appointment and control of the police force of that city. This Board of Police is composed of three members, the Mayor being one and the other two appointed by the Governor. By section four of the act, the city is to provide suitable rooms for the Board and such suitable accommodations for the police as the Board should require. Another provision in that section is as follows: "All expenses for the maintenance of said rooms, the pay of the police and all incidental expenses incurred in the administration of said police shall be paid by said city upon the requisition of said board." By section six, the board is to make report annually in December to the Governor and to the City Council of the city. Its records are to be open to the inspection of the Governor or to such persons as he may designate.

On March 18, 1908, two members of this Board of Police issued to Charles B. Harmon, a member of the police force, an order or warrant of the following tenor to wit.

"Board of Police of the City of Biddeford.

$34. Biddeford, Maine, March 18, 1908.

To the City of Biddeford.

You are hereby called upon and required to pay to Charles B. Harmon or order the sum of thirty-four dollars and charge the same to the account of

Police Department,
H. G. Hutchinson,
James E. Tarr,
Board of Police."

No. 2976.

The other member of the Board, the Mayor, did not sign the document.

The city authorities refused to pay this order or warrant until they should be officially informed what it was for. Thereupon Mr. Harmon and other policemen in like situation brought this bill in equity against the city for a decree that the city shall pay this and all such orders from the Board of Police without further audit or question.

It is to be noted that the order itself gives no information as to what it was given for, and that the records of the Board issuing the order are not open to the inspection of the city officials. The case for the plaintiffs, therefore, is necessarily based on the proposition that the Board of Police can issue naked negotiable drafts or warrants upon the city which the city must pay without question and without information as to what bills or claims they are for, or whether they are within the jurisdiction of the Board. We do not think the Act constituting the Board of Police confers such an unusual, unchecked and dangerous power. The city, of course, must pay the lawful expenses of the Board and of the police, including rooms and salaries, upon the requisition of the Board of Police, but it is nevertheless entitled to know that the money is for such lawful expenses and salaries. In this case it is entitled to know what it is paying Mr. Harmon for, whether for salary, or for supplies, and if supplies, what supplies, or whatever else it may be for. Assuming, what does not appear on the face of the order, that it is

for the amount of a bill or claim presented by Mr. Harmon to the Board and allowed by them, yet the city is entitled to know what the bill is for, to know that it is a bill within the jurisdiction of the Police Board to audit and draw an order for. To hold otherwise is to hold that the legislature has put the treasury and taxpayers of Biddeford in the power of two irresponsible men not of their own choice, irresponsible in that they give no bond, are not accountable to the city, and their doings are not open to inspection by the citizens or city council of the city; is to hold that if these two men issue in the name of the Board of Police naked orders upon the city in payment of claims against themselves personally, or for any other unlawful purpose, the city must pay the orders without question. That such could be a consequence of the plaintiff's theory shows its error.

It is true that the language of the statute is that the city shall pay "upon the requisition of the Board" but that language in its connection does not mean that the city must pay whatever order or warrant for money a majority of the Board may choose to issue. Granting that the Board may requisition the payment of the salaries and other expenses of the police, it does not follow that they can requisition money out of the city treasury upon their mere naked order or warrant. The city still has the right to know what is the occasion for the issue of the order, whose and what claim the money is to pay, and to refuse payment if it does not appear that the claim is one within the jurisdiction of the Police Board to allow against the city. For instance, the salaries of the policemen are left by the Act to be fixed by the city, except that they shall not be fixed below a certain amount without the consent of the Board of Police; and the number of policemen that the Board can appoint is limited to a certain number except by consent of the city. Upon the plaintiff's theory, the board can nevertheless compel the city to pay any sums for salaries and for as many men as it chooses to appoint.

In the extradition clause of the U. S. Constitution, Art. IV, sec. 2, par. 2, the language is that the executive of one State "shall on demand" of the executive of another State deliver up a person charged with having committed a crime and fled from justice in that

State. Nevertheless, a mere demand is not sufficient. The executive upon whom the demand is made has the right to know whether and with what crime the person demanded is charged, and these must appear upon the face of the extradition papers. *Roberts* v. *Reilly*, 116 U. S. 80.

Bill dismissed with costs.

HYMAN LEAVITT *vs.* JOSEPH L. DOW.

Cumberland. Opinion December 30, 1908.

Assault and Battery. Inadequate Damages. New Trial.

By the general common law rule, new trials were not granted upon the ground of inadequate damages in actions of trespass, but this rule has been relaxed, and it is now held in England and the United States, that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to cases of inadequate damages.

It is the duty of the court in case of inadequate damages for a plaintiff, to set aside the verdict when the jury in rendering the verdict either disregarded the testimony or acted from passion or prejudice, or when the smallness of the verdict shows that the jury made such a compromise as was equivalent to a verdict for the defendant.

Where the plaintiff brought an action to recover damages for assault and battery and the verdict was for the plaintiff with damages assessed at one cent, *held* that there was an evident failure of justice to the plaintiff, and that the damages awarded him were clearly inadequate.

On motion by plaintiff. Sustained.

Action of trespass to recover damages for an alleged assault and battery made by the defendant upon the plaintiff, brought in the Superior Court, Cumberland County. Plea, the general issue with brief statement alleging that "the injury if any to the plaintiff was inflicted by the defendant in self defense from the assault of the plaintiff." The jury returned a verdict for the plaintiff, assessing the damages in the sum of one cent. The plaintiff then filed the following motion:

"And now said Hyman Leavitt after verdict in his favor and before judgment, moves that said verdict be set aside and a new trial granted, for the following reasons:

"I. Because it is against law and the charge of the Justice.

"II. Because it is against evidence.

"III. Because it is manifestly against the weight of evidence in the case.

"IV. Because the damages assessed at one cent are manifestly and grossly inadequate."

The case is stated in the opinion.

William Lyons, for plaintiff.

Frank P. Pride, for defendant.

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

PEABODY, J. This was a civil action of trespass to the person to recover damages for assault and battery.

The verdict was for the plaintiff for a nominal sum of one cent damages.

The case comes before the Law Court on the plaintiff's motion for a new trial on the ground that the damages assessed by the jury are manifestly and grossly inadequate.

There were two meetings of the parties on the day of the alleged trespass. A technical assault and battery seems to be admitted by the defendant's attorney, although denied by the defendant in his own testimony, who also justifies his acts on the ground that they were done in self defense, and claims that there was no actual injury inflicted on the plaintiff by him.

It is shown by the testimony of the plaintiff and his witnesses that on August 16th, 1906, he was sitting on a box in front of the window in his dry goods store on Main Street in the city of Westbrook, Maine, talking with another man, when the defendant came along the street, stopped and making an insulting remark, took off the plaintiff's cap, caught hold of his vest tearing off a button and gave him two or three slaps on the head; that in a minute or two

he went away, but soon came back, got hold of the plaintiff by the coat and started shaking him saying, "Now you Jew, you can say to my face what you said behind my back," and struck him in the face and pulled him off the box on which he had remained sitting; that the plaintiff then got hold of the defendant around his body and pushed him over in front of Lemontagne's store, which was next to his own, during which time he was struck by the defendant and received a black eye; and that the assailants were separated by those present. The plaintiff immediately afterward felt a bad pain, was dizzy and dropped on the floor in his store. He first noticed Dr. Horr, sitting by him, who gave him some medicine. That evening he felt the same pain coming over him and was attended by Dr. Woodman who administered morphine; these pains returned and Dr. Woodman was again called. Later he was suffering and as Dr. Woodman could not come, Dr. Hall was called to attend him, and he was taken to the hospital where he remained one night. He still occasionally, before the coming of bad weather, feels the same pain. Previous to the alleged assault he had learned from his physician that he had a weak heart. He has paid $30 for expenses incurred in consequence of the trouble with the defendant.

These facts are not controverted except by the defendant's denial of an assault in the first instance; but in this he is opposed by several witnesses, who were present, called by the plaintiff and also by one called by himself, who was at the time on the opposite side of the street and testified; "I saw him (the defendant) just as any fellow would go along and tap him, (the plaintiff) on the head and brush his cap off on the sidewalk."

As to the part taken by the plaintiff in the second instance, the evidence is somewhat conflicting, but the testimony of the defendant and his witnesses tends to prove that the violence used was largely due to the desperate resistance of the plaintiff in his efforts to push away his assailant, using unnecessary force and such unjustifiable means as biting him in the breast and holding him in his grasp until the parties were separated by the bystanders.

The jury were perhaps warranted in finding that the injuries to the person of the plaintiff not directly due to his own defensive acts were trivial, but it is clearly shown by the whole evidence that two

separate unprovoked assaults accompanied by grossly insulting language were publicly made by the defendant upon the plaintiff.

Under the circumstances of the case we think there must be in addition to some actual injuries to the person of the plaintiff, material damages for injury to his feelings from the humiliation to which he was publicly subjected by the defendant.

The law gives a plaintiff in case of personal trespass, compensation for both physical and mental suffering, directly resulting from the wrongful acts of the defendant. The anger and excitement of the plaintiff upon the second assault indicates that he was keenly conscious of the indignity he had received. By the general common law rule, new trials were not granted upon the ground of inadequate damages in actions of trespass and perhaps in all actions of tort. *Hackett* v. *Pratt*, 52 Ill. App. 346. But this rule has been relaxed, and it is now held both in England and in courts of the United States that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to setting them aside for inadequacy of damages. *Phillips* v. *Southwestern R. Company*, (1879) L. R. 4 Q. B. Div. 406; *Benton* v. *Collins*, 125 N. C. 83, 47 L. R. A. 33; *Welsh* v. *McAllister*, 13 Mo. App. 89.

It is the duty of the court in case of both excessive and inadequate damages to set aside the verdicts if the jury in rendering them either disregarded the testimony or acted from passion or prejudice. *McDonald* v. *Walter*, 40 N. Y. 551: *Richards* v. *Sanford*, 2 E. D. Smith, 349; *Paul* v. *Leyenberger*, 17 Ill. App. 167; *Cayford* v. *Wilbur*, 86 Maine, 415.

When the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted. 47 L. R. A. 41, supra, and cases cited; *Whitney* v. *Milwaukee*, 65 Wis. 409.

There is an evident failure of justice to the plaintiff. The damages awarded him are clearly inadequate. We are convinced that the jury were influenced by prejudice or that their verdict was a compromise, which is essentially equivalent to a verdict for the defendant.

Motion sustained.
New trial granted.

INHABITANTS OF NORWAY *vs.* L. F. WILLIS, Appellant.

Oxford. Opinion December 30, 1908.

Taxation. Personal Property Employed in Trade. "Mill." Revised Statutes, chapter 9, sections 12, 13, paragraph I.

Under Revised Statutes, chapter 9, section 13, paragraph I, which enacts that "all personal property employed in trade, in the erection of buildings or vessels, or the mechanic arts, shall be taxed in the town where 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 shipyard therein for the purpose of such employment," the personal property which may or may not be taxable is property wholly distinct from the store, shop, mill, etc., which by virtue of the proviso, must be occupied for the purpose of such employment.

The personal property which may or may not be subject of taxation under Revised Statutes, chapter 9, section 13, paragraph I, is movable property wholly distinct from the "store, shop, mill, wharf, landing place or shipyard," which, by virtue of the proviso, must be occupied "for the purpose of such employment" by the owner or other person under him, so employing it, in order to render it legally taxable in the town where it is employed. One and the same thing cannot at the same time serve as personal property employed and as the building or place in which it is employed.

On report. Judgment for defendant.

Action of debt brought in the Norway Municipal Court, Oxford County, to recover a tax of $8.50 assessed by the plaintiff town, in 1906, on a portable steam saw mill owned by the defendant, a non-resident. This saw mill was set up in the plaintiff town, on land not owned by the defendant, about July 1, 1905, and employed in sawing certain lumber in the plaintiff town, and remained in the plaintiff town until July, 1906. The plaintiff town claimed the right to tax this saw mill by virtue of the provisions of Revised Statutes, chapter 9, section 13, paragraph I.

Plea, the general issue. The aforesaid Municipal Court rendered judgment for the plaintiff town and thereupon the defendant appealed to the Supreme Judicial Court in said county. When the action came on for trial in said Supreme Judicial Court, an agreed state-

ment of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Kimball & Son, for plaintiffs.

Wright & Wheeler, for defendant.

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

BIRD, J. The defendant, an inhabitant of the town of Paris, on the first day of April, 1906, was the owner of a portable steam saw mill which on that day was set up on land, not owned by him, in the town of Norway, and was then being used by him in sawing certain lumber under a contract with its owners. This mill was set up and first used in the plaintiff town about July first, 1905, and there remained until July, 1906, when the defendant completed his contract. The assessors of the town of Norway on the first day of April, 1906, assessed a tax upon the saw mill as personal property and this suit is brought for its recovery. The regularity of the assessment, the commencement of the suit and of all the intermediate proceedings is admitted. The only question presented is whether or not the saw mill was properly and legally taxable in the plaintiff town.

The general provision of the statutes relative to the taxation of personal property is that it "shall be assessed to the owner in the town where he is an inhabitant on the first day of each April." R. S., c. 9, § 12. To this general rule is made, among others, the following exception: "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 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 shipyard therein for the purpose of such employment." R. S., c. 9, § 13, par. I.

The parties agree that the personal property in question, the portable steam saw mill, was employed on the first day of April,

1906, in the mechanic arts, and for the purposes of this case this is assumed to be so. See *Limerick* v. *Watson*, 98 Maine, 379, 382. The defendant, however, denies that if so employed it comes within the terms of the proviso of the exception. The plaintiff contends that as the personal property so employed was a mill, defendant was therefore in occupation of a mill while so employing it. To this contention we are unable to assent.

The word "mill" has two definitions,—a primary and a secondary:

1. A complicated engine, or machine, for grinding and reducing to fine particles grain, fruit or other substance, or for performing other operations by means of wheels and a circular motion as a grist-mill for grain, a coffee mill, cider mill and bark mill. The original purpose of mills was to comminute grain for food, but the word "mill" is now extended to engines or machines moved by water, or steam, for carrying on many other purposes. We have oil-mills, saw-mills, slitting-mills, bark-mills, fulling-mills, etc.

2. The house or building that contains the machinery for grinding, etc. *State* v. *Livermore*, 44 N. H. 386, 387. (1862.)

The first definition is an apt description of the personal property claimed to be taxable in plaintiff town, while the word "mill" as used in the proviso of the exception falls within the terms of the second definition. In the latter sense it is used in R. S., c. 128, § 8; and c. 94, §§ 1-6. See *Farrer* v. *Stackpole*, 6 Maine, 154, 156, and 158; *Crosby* v. *Bradbury*, 20 Maine, 61, 65; *Baker* v. *Bessey*, 73 Maine, 472, 479.

The personal property which may or may not be subject of taxation under the exception is movable property wholly distinct from the "store, shop, mill, wharf, landing place or shipyard," which, by virtue of the proviso, must be occupied "for the purpose of such employment" by the owner or other person under him, so employing it, in order to render it legally taxable in the town where it is employed. One and the same thing cannot at the same time serve as personal property employed and as the building or place in which it is employed.

The action of the assessors arose from a confusion of terms. A large quantity of merchandise may be termed a "store." If in this sense the defendant on the first day of April in the year in question had exposed for sale in an open field in the plaintiff town a "store" of hardware it could hardly be contended that he was in occupation of a store for the purpose of employing the hardware in trade.

"The occupation of the store, shop, mill, or wharf on the first day of April in the year for which the tax is assessed, is the essential thing." *Ellsworth* v. *Brown*, 53 Maine, 519, 522. See *Martin* v. *Portland*, 81 Maine, 293, 297. It does not appear that defendant was in the occupation of any of the structures or places mentioned in the exception either for the purpose of employing his personal property or otherwise. *Trafton* v. *Hill*, 80 Maine, 503, 509.

The conclusion reached is not only consistent with, but is supported by previous judicial constructions of the statute. See *Martin* v. *Portland*, 81 Maine, 293, 297; *Limerick* v. *Watson*, 98 Maine, 379, 383; *Creamer* v. *Bremen*, 91 Maine, 508, 513; *Ellsworth* v. *Brown*, 53 Maine, 519, 521, 523.

In accordance with the agreement of the parties, there must be,

Judgment for defendant.

In Equity.

NETTIE ROLFE

vs.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

Knox. Opinion December 30, 1908.

Equity. Verdict. Award of Referees. Evidence.

The verdict of a jury upon an issue framed in equity, is merely advisory and must be such as to satisfy the conscience of the court; and in determining whether or not such verdict be set aside, the vital question presented is whether there be sufficient legal evidence to sustain a decree.

A bill in equity may be maintained to set aside the award of referees for mutual mistake in making such award.

Every presumption is in favor of the validity of an award and the burden of proof is upon the party who would impeach it, and the evidence must be clear and convincing.

In the case at bar, the court is not satisfied that the evidence adduced by the plaintiff is of such clear and convincing character as to overcome the presumption in favor of the validity of the award and sustain a decree in favor of the plaintiff.

In equity. On report. Bill dismissed.

Bill in equity brought to set aside an award made by referees in a fire insurance matter. The defendant demurred and answered. The demurrer was overruled and the defendant excepted. The cause was then tried to a jury and a verdict rendered. The case was then reported to the Law Court with the stipulation that "upon the whole case the court is to render judgment in accordance with the rights of the parties."

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

John A. Morrill, for defendant.

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

BIRD, J. This is a bill in equity to set aside an award. The plaintiff and defendant are parties to a policy of insurance of the Maine Standard form to which was annexed a rider containing a provision to the effect that the liability of the defendant shall not exceed the sum of nine hundred dollars (the amount of the policy) nor more than two thirds of the actual destructible value of the property at the time the loss may happen. In the month of July, 1906, and within the term of the policy the property insured was totally destroyed by fire. Failing to agree the parties entered into an agreement in February, 1907, by which E. L. Philoon, chosen by defendant, and John L. Hilt, chosen by plaintiff, were selected as referees (the appointment of a third being waived) "to examine into, consider and appraise the amount of loss or damage, if any, by said fire to the property described in said policy" and make their award which when signed by the referees should be conclusive and final upon the parties as to the amount of loss and damage. The referees heard the parties and their respective counsel, and by an award signed by both referees and dated the 11th day of May, 1907, "determined the amount of loss and damage referred to in the foregoing submission to be eight hundred fifty dollars." The bill of complaint filed February 25, 1907, alleges in paragraph IV, upon information that the sum found and inserted in the award was never agreed upon by the referees as the total amount of the loss to the premises, but was agreed upon as the part of the total loss which the defendant by its policy agreed to pay, that the award as signed does not represent any agreement or conclusion reached by the referees but that the award "was signed, and was intended to be the sum representing two thirds of the total loss or damage by the fire, and not the full amount thereof," and that the award was signed by accident and mistake by the referees and does not represent their finding.

The defendant demurred to the bill and especially to the allegations of paragraph IV. The demurrer was overruled and defendant excepted. The ruling was correct as the bill sets forth a mutual

mistake of the referees in properly setting out in the award the sum by them agreed upon. The answer of defendant denies all the allegations of paragraph IV of the bill. No replication appears to have been filed.

At the last January term of the court in the county where the bill is pending the following issue of fact was submitted to a jury,— "Did John L. Hilt at the time he signed the award, understand and intend and agree that the amount specified in the award of $850 was the total amount of the loss or damage by fire to the property described in the policy, or the amount which Mrs. Rolfe, the insured, was to receive for her loss under the terms of the policy." To this inquiry the jury made answer. "The amount Mrs. Rolfe was to receive for her loss."

The case is now before this court upon report which includes all the evidence submitted to the jury, with the stipulation that "upon the whole case judgment is to be rendered in accordance with the rights of the parties.

It is well settled that the verdict of a jury, upon an issue framed in equity, is merely advisory and must be such as shall satisfy the conscience of the court to found a decree upon. Otherwise, it will be set aside. The vital question presented is whether there be sufficient legal evidence to sustain a decree in favor of complainant. *Larrabee* v. *Grant*, 70 Maine, 79, 83; *Metcalf* v. *Metcalf*, 85 Maine, 473, 478; *Duffy* v. *Insurance Co.*, 94 Maine, 414, 417; *Redman* v. *Hurley*, 89 Maine, 428, 434;

Every presumption is in favor of the validity of an award and the burden of proof is upon the party who would impeach it to show the grounds for such impeachment. *Burchell* v. *Marsh*, 17 How. 344, 351; *Bigelow* v. *Newell*, 10 Pick. 348, 354, and the evidence must be clear and convincing. *Young* v. *Kinney*, 48 Vt. 22. See also *Fessenden* v. *Ockington*, 74 Maine, 123, 125; *Linscott* v. *Linscott*, 83 Maine, 384, 387; *Bridgeport* v. *Eisnman*, 47 Conn. 34, 37.

The answer as we have seen, denies any mistake. The evidence submitted consisted of the testimony of the two referees and of other witnesses offered as tending to corroborate one or the other of the

referees. The testimony of the referee summoned by complainant is to the effect substantially that he intended in signing the award, to fix the sum which complainant is to be paid by defendant or two thirds of the entire destructible loss, while the other summoned by defendant testified that the sum named in the award was the amount of the total loss, two thirds of which would be payable to complainant. No advantage will follow a detailed discussion of the evidence. Nor is it needful to consider whether, if each of the principal witnesses be correct, the mistake is such as may be remedied in a court of equity. Assuming, without expression of opinion, that it might be, a careful examination of the evidence does not satisfy the court that the evidence of the referee testifying in behalf of complainant and that in corroboration, is of such clear and convincing character as to overcome the presumption in favor of the validity of the award and sustain a decree in favor of complainant. Nor is it the opinion of the court that the issue should be submitted again to a jury.

The verdict is set aside and the bill dismissed for want of equity and lack of evidence to show otherwise.

Decree to be entered accordingly.

In Equity.

JOSEPH M. BRIGHT et als.
Executors of the last will and testament of John E. Chapman
vs.
LUCY CHAPMAN.

Penobscot. Opinion December 30, 1908.

Husband and Wife. Marriage Settlements. Same Enforceable in Equity. Widow's Allowance. Revised Statutes, chapter 63, section 6.

Section 6 of chapter 63, Revised Statutes, which, among other things, provides that "a husband and wife by a marriage settlement executed in presence of two witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them," is restricted to the rights which either party to the marriage settlement may have in the estate of the other.

Marriage settlements may be made which contain agreements as to matters growing out of the marriage relation other than "rights" in the estate of one or the other.

After dissolution of the marriage by death the marriage settlement provided for by the statute is cognizable in the courts of common law.

Equity will enforce ante-nuptial settlements, and especially is this true in the case of a widow's claim for an allowance inasmuch as an ante-nuptial agreement is no defense in a court of probate to her petition for an allowance.

Where in a marriage settlement it was provided that the intended husband should assign to the intended wife a certain paid up policy of life insurance held by him for the sole use and benefit of the intended wife, in case she survived him, "to be paid in full satisfaction of any and all claims by descent or otherwise" which the intended wife might have as widow in her intended husband's estate in event of his decease and which said policy was assigned to the intended wife, and the intended wife covenanted and agreed that the marriage settlement should be "a bar both in law and in equity to any claim she may make to any part of the real or personal estate" of the intended husband, and after the execution of the settlement the parties thereto were joined in marriage and the wife having survived her husband, filed a petition as his widow for an allowance out of his personal

estate, it was *held* that the expressions, "any and all claims by descent or otherwise," and "any claim she may make to any part of the real or personal estate of the husband," were amply broad to cover the claim of the widow for an allowance, and that she should be enjoined from prosecuting her claim for an allowance.

In equity. On report. Injunction to issue.

Bill in equity brought by the executors of the last will and testament of John E. Chapman, late of Bangor, deceased testate, to restrain the defendant, the widow of said deceased, from prosecuting in the Probate Court her claim for an allowance out of the personal estate of her deceased husband. The plaintiffs contended that the defendant was barred from prosecuting her claim for an allowance by reason of a marriage settlement entered into by her and her said husband previous to their marriage. The defendant's answer to the bill and the plaintiffs' replication were duly filed.

After a hearing thereon duly had, it was agreed to report the case to the Law Court "upon bill and answer and replication and admissions of record and so much of the documentary evidence as is legally admissible, for the determination thereof."

The case is stated in the opinion.

Wilford G. Chapman, for plaintiffs.

Matthew Laughlin, for defendant.

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

BIRD, J. On the twentieth day of March, 1905, John E. Chapman, then about seventy years of age, and Lucy Thomas entered into a marriage settlement which was executed in the presence of two witnesses, as provided in R. S., c. 63, § 6. Subsequently on the same day they were married and thereafter lived as husband and wife at Bangor, Maine, the residence of the husband, until his death on the eighteenth day of March, 1907. He left, beside the widow, four adult children. It does not appear that the widow then had living children by a former marriage.

The will of the husband was duly admitted to probate in the month of April following his decease and letters testamentary issued

to complainants, all of whom qualified and entered upon the discharge of their duties.

The will makes no mention of the widow, save to direct the trustees of the testator, to whom he gives, for the benefit of his children, all his other property, to do all things needful to secure to his wife, surviving him, the sum provided for her in the marriage settlement.

The inventory of his estate shows personal property to the amount of $16,924.90 and real estate to the amount of $22,500.00, or a total of $39,424.90. The debts of deceased with expenses and charges will not exceed two thousand dollars.

The marriage settlement recites that in consideration of their intended marriage it is agreed by the parties that the rights of each in the estate of the other during marriage and after its dissolution by death shall be determined by the marriage settlement and that the "settlement shall bar each of all rights in the estate not so secured, and for the further purpose of making a pecuniary provision for the benefit of said intended wife, instead of her right and interest by descent in said intended husband's estate, consented to by her by becoming a party to this agreement, in order to bar her right and interest by descent in her intended husband's lands," and it also recites his ownership of a paid up policy of life insurance, then of the paid up value of $4419.00, which he has agreed to assign to her for her sole use and benefit, in case she survives him, "to be paid in full satisfaction of any and all claim by descent, or otherwise, which said party of the second part [the intended wife] may have as widow, in her intended husband's estate, in the event of his decease."

Following the recitals are the mutual agreements of the parties by the first of which the policy of insurance is assigned to the intended wife provided that all dividends and accumulations during his life shall be hers, that the proceeds of the policy shall be paid to the wife only after the marriage and after the death of the husband and that if the wife does not survive the husband after the marriage, the assignment shall be void and the policy shall revert to him.

The settlement concludes as follows:

"Second. If said party of the second part shall not survive said party of the first part, after the solemnization of said intended marriage, all of her estate shall descend according to the laws of Maine for the descent of estates of persons dying intestate, unless she shall change the same by will, in which case said party of the first part relinquishes all rights in the estate of his said intended wife, except such as may be provided for him in said will.

"Third. Said party of the second part hereby consents to accept said pecuniary provision here made for her for the consideration aforesaid and hereby covenants and agrees that this instrument shall be a bar, both in law and in equity, to any claim she may make to any part of the real or personal estate of the said party of the first part, except as herein provided."

On the twenty-seventh day of April, 1907, the widow received from the insurance company which issued the policy of insurance its paid up value, amounting with accumulations to the sum of $4433.00, which however, although retained by her, she denies was paid to her in satisfaction of any claim for an allowance out of the personal estate of her deceased husband.

On the twenty-eighth day of May, 1907, the widow filed in the Probate Court a waiver of any specific provision made for her in the will, in so far as any was made, in which she claims an allowance out of the personal estate of the deceased, refuses to repudiate the marriage settlement, declares her willingness to abide by it in so far as her rights in said estate are precluded by it, and, while admitting herself precluded by it from any right or interest in the property and estate of her deceased husband, "claims that she is entitled to claim an allowance out of the personal estate of the deceased."

On the thirtieth day of July, 1907, the widow filed in the Probate Court her petition for an allowance and the complainants thereupon filed their bill in equity asking that defendant be enjoined from prosecuting or maintaining her petition for an allowance before the Probate Court.

It is the contention of defendant that the whole subject of marriage settlements is covered by R. S., c. 63, § 6; that this provision does not authorize a widow to bar herself from an allowance, that it supersedes any common law rules in regard to the same and that this court in the exercise of its equity powers cannot restrain the widow.

The section invoked provides that husband and wife may determine what rights each shall have in the other's estate during marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them. Even under this section recourse must be had to equity for the enforcement of the marriage settlement in so far as it concerns rights of one party in the estate of the other during marriage. *Wentworth* v. *Wentworth*, 69 Maine, 247, 254; *Miller* v. *Goodwin*, 8 Gray, 542, 543 and 544. After dissolution of the marriage by death the settlement provided for by our statute is cognizable in the courts of common law. *Wentworth* v. *Wentworth*, 69 Maine, 247; *Sullings* v. *Richmond*, 5 Allen, 187, 192. But section six, chapter 63, R. S., is restricted to the rights which either party to the marriage settlement may have in the estate of the other, see *Wentworth* v. *Wentworth*, 69 Maine, 247, 253, and it does not follow that the section quoted covers the whole field of marriage settlements. On the contrary it is clear that marriage settlements may be made which contain agreements as to matters growing out of the marriage relation other than "rights" in the estate of one or the other. *Wentworth* v. *Wentworth*, 69 Maine. 253; *Sullings* v. *Richmond*, 5 Allen, 187, 192; *Jenkins* v. *Holt*, 109 Mass. 261, 262. Equity will enforce such ante-nuptial settlements; *Sullings* v. *Sullings*, 9 Allen, 234, 236; *Tarbell* v. *Tarbell*, 10 Allen, 278, 280; *Butman* v. *Porter*, 100 Mass. 337, 339, and especially is this true in the case of a widow's claim for an allowance inasmuch as an ante-nuptial agreement is no defense in a court of probate to her petition for an allowance. *Wentworth* v. *Wentworth*, 69 Maine, 247, 255.

It is also urged by defendant that the marriage settlement is not broad enough to include a claim of the widow for an allowance.

To this we do not assent. The widow's demand for an allowance, or right to demand an allowance, is commonly, if not invariably, known in our courts as the widow's claim for an allowance. *Gowen's App.*, 32 Maine, 516, 517; *Kersey* v. *Bailey*, 52 Maine, 198, 199; *Tarbox* v. *Fisher*, 50 Maine, 236; *Smith* v. *Howard*, 86 Maine, 203, 207; *Paine* v. *Forsaith*, 84 Maine, p. 71; *Brown* v. *Hodgdon*, 31 Maine, 65, 69.

The language of the indenture "to be paid in full satisfaction of any and all claim by descent, or otherwise" which the wife may have in her intended husband's estate and the words of the third paragraph "a bar, both in law and in equity, to any claim she may make to any part of the real or personal estate" of the husband, are amply broad to cover a claim for a widow's allowance.

Defendant claims that the settlement is inequitable by reason of the inadequacy of the provision made for her. It does not appear from the record that it was not entered into understandingly nor that it was procured by fraud or deceit. Moreover, as we have seen, defendant retains the avails of the policy of insurance, declines to repudiate the settlement and is willing to abide by it in so far as her rights in the husband's estate are concerned except that she claims an allowance and that the settlement is no bar thereto. A question of construction only is presented which has already been decided adversely to defendant. See *Paine* v. *Hollister*, 139 Mass. 144, 145.

Injunction to issue as prayed.

In Equity.

LYDIA M. B. ROBINSON et als., Executors and Trustees,

vs.

LYDIA M. B. ROBINSON et als.

Hancock. Opinion December 30, 1908.

Wills. Construction. Trust. Trustees. Power of Sale.

While it is true that under the orignal theory of a trust the powers and duties of the trustee were confined substantially to holding and caring for the property, it is equally true that the purposes of the modern trust are of a much broader character requiring ordinarily much greater powers on the part of the trustee including a power of sale, which is generally expressly given.

When a trustee under a will is charged with a duty which cannot be performed without a power of sale, and no power of sale is expressly given by the will, a power of sale will be implied.

The words "invest and manage" in the will of a testator, import and imply a power of sale unless a contrary intention can be found in the will taken as a whole.

Where a testator directed that one-fourth of the principal of her residuary estate "shall be paid to the children or direct descendants of my said deceased child," *held* that the term "be paid" was applicable exclusively to personality.

Where a testatrix by her will left the residuum of her estate to her executors in trust, to invest and manage and pay over the income to her children during their lives with directions, upon death of any one of the children, that a proportionate part of the principal of the residuary estate should be paid to the children or other direct descendants of such deceased child, *Held:*

(1) That the trustees could not ascertain the true amount of the estate or pay over the fractional part directed to be paid to the children of a deceased child until the whole estate had been converted into money.

(2) That upon the whole will it was the intention of the testatrix that the trustees should have power to sell the real estate devised by the residuary clause and give to the purchaser or purchasers good title in fee simple and that her will so directs.

In equity. On report. Decree according to opinion.

Bill in equity brought by "Lydia M. B. Robinson, of Paoli, County of Chester, Commonwealth of Pennsylvania, Christine W. Biddle, of Philadelphia, said Commonwealth, Spencer F. B. Biddle, of Graham, State of Montana, and Henry J. Biddle, of Vancouver, State of Washington, as Executors and Trustees under the last will and testament of Mary D. Biddle, late of said Philadelphia," against "Lydia M. B. Robinson, Christine W. Biddle, Spencer F. B. Biddle, Henry J. Biddle as individuals, Lydia Spencer Moncure Robinson (daughter of Lydia M. B. Robinson,) Spencer Biddle and Rebecca Biddle both of said Vancouver (minor children of Henry J. Biddle,") asking for the construction of the last will and testament of the said Mary D. Biddle.

In lieu of a formal answer to the bill, the defendants filed the following agreement: "It is hereby agreed that the allegations of fact in complainants' bill are true and the respondents join in the prayer of complainants for a construction of the will of Mary D. Biddle."

When the cause came on for hearing before the Justice of the first instance, it was agreed to report the case to the Law Court for determination.

The case is stated in the opinion.

Edward B. Mears, for plaintiffs.

Hale & Hamlin, for defendants.

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

BIRD, J. This bill in equity is brought by the executors and trustees under the will of Mary D. Biddle for the construction of the will.

The case comes before this court upon complainants' bill and an agreement of all the defendants wherein the allegations of fact in the bill of complainants are admitted to be true and the respondents join in the prayer of the bill for the construction of the will. This agreement appears to be one which might properly be made by all parties respondent.

In brief, the bill sets out that Mary D. Biddle, late of Philadelphia, in the State of Pennsylvania, died on the third day of December, A. D. 1900, testate; that her will was duly admitted to probate at said Philadelphia, setting forth particularly the clause of which construction is requested; that the will was duly admitted to probate by the Probate Court of Hancock county in this State on the fifth day of April, A. D. 1904, and that letters testamentary were duly issued to complainants on the twentieth day of said April and letters of trust on the first day of November, A. D. 1904; that the testatrix left her surviving four children, who are the complainants, no husband and three grandchildren, one of the latter being the daughter of Lydia M. D. Robinson and the others children of Henry J. Biddle; that all the specific bequests made by the will have been paid in full or otherwise provided for in accordance with its terms; that the only persons having any interest now in the estate of the testatrix are the complainants and the three grandchildren; that there are no debts against the estate and that no personal property of any great value was left by testatrix in the State of Maine; that she died seized of certain real estate in the county of Hancock forming part of her residuary estate, part of which is unimproved and unproductive of income and now liable for taxes, for the payment of which no express provision is made under the will or afforded by the estate of the testatrix, except out of the income of said lands, whereby the interest of the present beneficiaries under the will are prejudiced, and that it would be beneficial to all of them if the real estate referred to could be sold by the executors and trustees, who believe that by the true construction of said will the testatrix gave and granted unto them full power and authority to convey all real estate, wheresoever situated, comprising any part of her residuary estate so as aforesaid devised in trust; and that in the event of the sale of any said real estate, purchasers are likely to refuse to accept a deed from the executors and trustees until their powers in the premises have been judicially determined.

The complainants particularly inquire whether or not the executors and trustees have power to sell and convey, in fee simple or otherwise, the real estate in this State.

The will of Mary D. Biddle, after providing for sundry specific bequests, provides for the sale immediately or after the termination of life estates of certain improved property in Pennsylvania with the instruction that the proceeds, upon sale, become part of her residuary estate. Then follows the clause of which construction is particularly required and which, omitting immaterial portions is as follows:

"I give, devise and bequeath all the residue of my estate to my executors hereinafter named, in trust, however, to invest and manage the same, and to pay over the interest and income annually arising therefrom to my four children during their lives, in equal shares, without anticipation and free from any claims or demands of any of their creditors or of any other persons or person whomsoever . . . . and on the death of any one of my children I direct that the one fourth of the principal of said residuary estate . . . . shall be paid to the children or other direct descendants of my said deceased child, such distribution being made per stirpes."

The complainants urge that the words "invest and manage" imply or import in and of themselves a power of sale. While it is true that under the original theory of a trust the powers and duties of the trustee were confined substantially to holding and caring for the property, it is equally true that the purposes of the modern trust are of a much broader character requiring ordinarily much greater powers on the part of the trustee including a power of sale, which is generally expressly given.

The power of sale where not expressly given will be implied from the fact that the trustee is charged with a duty which cannot be performed without a power of sale. *Putnam Free School* v. *Fisher*, 30 Maine, 523, 527; *Jones* v. *A. T. & S. F. R. R. Co.*, 150 Mass. 304. In both these cases no powers were given the trustee as to the investment or management of the property, yet in the latter case the court says "The discretion which our laws give to trustees in making investments, when no specific directions are given by the creator of the trust, requires that a somewhat more liberal view be taken of the implied powers of trustees of personal property to change investments than has been taken in England and some other jurisdictions." Id. p. 308.

In *Boston Safe D. & T. Co.* v. *Mixter*, 146 Mass. 100, a testator, after bequeathing to each of his four children the income of a specified sum to be held in trust, gave to them the residue of his estate, real and personal, to be divided equally between them share and share alike, to them, their heirs and assigns forever. After the marriage of a daughter, the testator by a codicil directed that all the property and estate so given the daughter in addition to said income in said will be paid to a corporation as trustee to be invested for her benefit, that after the death of his daughter, the estate left in trust be divided among her children equally and, if she leaves no children, the sum so left in trust with the corporation be paid, one-third to her husband and the balance divided among her brothers and sisters.

"In these provisions he is clearly dealing with the whole trust estate as a single fund, and they imply that the trustee is to make the division according to his directions. It must do this so far as the fund consisted of personal property, and there is nothing to indicate that he intended that there should be any difference as to that part of the fund which at his death was real estate. The whole estate held in trust was 'to be invested by said corporation as shall seem prudent and safe', which implies that the trustee may find it prudent to change the investments. The testator does not directly or by implication give any vested legal estate to those who under the codicil will be the distributees at his daughters decease. He imposes upon the trustee the duty of dividing and transferring the fund after her death." Id. p. 104.

The court then says:

"Looking at the whole will, it seems to us reasonably clear that he intended to give to the trustee the legal title to both the real and the personal estate, with the power to sell and convey the same, and that such a title in the trustee is necessary in order to enable it to carry out the purposes of the testator. *Sears* v. *Russell*, 8 Gray, 86; *Packard* v. *Marshall*, 138 Mass. 301." Id. p. 104.

In *Harvard College* v. *Weld*, 159 Mass. 114, 118, the court says: "The foregoing considerations seem to us sufficient to show that the testator did not intend or attempt to make the land in

question inalienable when it reached Harvard College; and that the first words of the trust imposed upon it 'to manage and invest the same to the best advantage' carry a power to sell."

It would seem that the words "invest and manage" properly import and imply a power of sale unless a contrary intention on the part of the testator can be found in the will taken as a whole.

There are other considerations, however, which lead to the belief that a power of sale was intended by the testatrix. She directs the sale by her executors, of sundry parcels of productive real estate and that the proceeds shall become part of her residuary estate. It is hardly supposable that real estate, part of which was unproductive, should be retained by the trustees when it is not expressly or impliedly provided that it shall be enjoyed by the cestui que trust in specie. Moreover, she treats the whole trust estate as a single fund in the provision "I direct that one-fourth of the principal of said residuary estate . . . shall be paid to the children or direct descendants of my said deceased child." The term shall "be paid" is applicable exclusively to personality. *Cook* v. *Cook*, (N. J. Eq.) 47 Atl. Rep. 732. See also *Putnam Free School* v. *Fisher*, supra.

The trustees could not ascertain the true amount of the estate or pay over the fractional part directed to be paid to the children of a deceased child until the whole estate had been converted into money. *Putnam Free School* v. *Fisher*, 30 Maine, 523, 527.

Upon the whole will therefore we conclude that it was the intention of the testatrix that the trustees should have power to sell the real estate devised by the residuary clause and give to the purchaser or purchasers good title in fee simple and that her will so directs.

Decree in accordance.

HARRY J. GILBERT *vs.* ADA WILBUR.

Androscoggin. Opinion December 30, 1908.

Promissory Note. Consideration.

Where there was no forbearance to sue nor express agreement therefor, no discharge nor extinguishment of the original debt, no novation, nor new consideration, a note, in which no day of payment was fixed, given by the mother of a minor son to one who had sold personal property not necessaries to the minor, after the bargain with the minor had been fully completed and in which the mother had no part, was *held* to be without consideration.

On exceptions by plaintiff. Overruled.

Action of assumpsit on a promissory note given by the defendant to the plaintiff. Plea, the general issue.

Tried at the January term, 1908, Supreme Judicial Court, Androscoggin County. At the conclusion of the evidence, the presiding Justice ruled that no consideration for the note had been shown and ordered a nonsuit and thereupon the plaintiff excepted.

The case is stated in the opinion.

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

H. P. Carver, for defendant.

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

BIRD, J. This is an action of assumpsit on a note of the following tenor:—

$250. Auburn, Maine, Dec. 1st, 1907.

For value received I promise to pay Harry J. Gilbert or order two hundred and fifty dollars ($250) with interest at 6%.

MRS. ADA WILBUR.

The plea was the general issue. The defense was want of consideration.

It appears that Earl Wilbur, the minor son of the defendant on or about the 25th day of November, 1907, bargained with the plaintiff for a milk route, to be delivered to the purchaser on the first day of December following, for the sum of $250, of which $150

was to be paid on delivery and $20 per month thereafter until full payment was made. In these negotiations between the plaintiff and the minor, the defendant had no part.

It was understood by the parties to the trade that the purchaser was to obtain the money for the cash payment from or through the guardian of the minor. The purchaser entered into possession of the milk route on the first day of December, 1907, without making the cash payment. The plaintiff after endeavoring without result to obtain the amount of the promised cash payment from the guardian on the sixth day of December, made the note in suit and sent it by the purchaser to be signed by his mother. This she did and it was delivered on the day following by the minor to the plaintiff. Subsequently to the delivery of the note, the plaintiff made an ineffectual attempt or attempts to obtain the cash payment from the guardian. Being unsuccessful, he commenced this suit on the eleventh day of December following. At the trial, upon the close of the plaintiff's evidence in rebuttal, a nonsuit was ordered for failure of plaintiff to show consideration for the note. To this order the plaintiff excepted.

We are unable to perceive wherein the plaintiff is aggrieved by this order. Here was no agreement of defendant with plaintiff nor credit given the defendant as a part of the bargain between plaintiff and the minor: *Sawyer* v. *Fernald*, 59 Maine, 500, 503; no discharge or extinguishment of the minor's indebtedness as in *Seymour* v. *Prescott*, 69 Maine, 376, and neither forbearance to sue nor an agreement therefor, the note being payable on demand; *Payne* v. *Caswell*, 68 Maine, 80; *Thompson* v. *Gray*, 63 Maine, 230; *Lambert* v. *Clewley*, 80 Maine, 480; *Moore* v. *McKenney*, 83 Maine, 80-86; nor novation, see *Hamilton* v. *Drummond*, 91 Maine, 175; nor any new consideration.

The foregoing is not to be regarded as a conclusion that forbearance, or an agreement to forbear, to sue a minor for property, other than necessaries, sold him may be consideration for the note or undertaking of another. Upon this point no opinion is expressed.

Exceptions overruled.
Judgment for defendant.

STATE OF MAINE *vs.* ALMON B. LEAVITT, Appellant.

Cumberland. Opinion January 2, 1909.

Fish and Fisheries. Legislature has Control of Same. Clams. Private and Special Laws, 1903, chapter 317, Not in Conflict with 14th Amendment U. S. Constitution. Colonial Ordinance, (Mass.) 1641. U. S. Constitution, 14th Amendment. Private and Special Laws, 1903, chapter 317. Statute, 1821, chapter 179, section 3. Revised Statutes, 1841, chapter 61; 1857, chapter 40, section 19; 1871, chapter 40, sections 19, 20; 1883, chapter 40, sections 23, 24; 1903, chapter 41.

1. The State holds the rights of common fishery in trust for the public, and as to them, it exercises not only the rights of sovereignty, but also the rights of property.
2. The legislature has full power to regulate and control such fisheries, and may grant exclusive rights therein, when the interest of the public will thereby be promoted.
3. Chapter 317 of the Private and Special Laws of 1903, which forbids the taking or digging of clams in any of the shores or flats of Scarboro, from the first day of April until the first day of October, in each year, by any person, except inhabitants or residents of the town, or hotel keepers within the town taking clams for the use of their hotels, is not obnoxious to that portion of the Fourteenth Amendment of the Constitution of the United States which declares that "No state shall deny to any person within its jurisdiction the equal protection of the laws," and is a constitutional exercise of legislative power.

On exceptions by defendant. Overruled.

Complaint against the defendant for digging clams on Scarboro flats, Cumberland County, in violation of the provisions of Private and Special Laws, 1903, chapter 317. On this complaint a warrant was duly issued by a trial justice in said county. Presumably the defendant was convicted in the trial justice court although the record is silent on that point. The defendant then appealed to the Superior Court in said county, and the appeal was entered at the May term, 1908, of said Superior Court at which said term "the defendant filed

a demurrer to the complaint and warrant with the agreement entered of record by the consent of the court that if final judgment on the demurrer was for the State, the defendant should have right to a trial by jury."

The presiding Justice of said Superior Court by a pro forma ruling, overruled the demurrer and held the complaint and warrant to be sufficient in law, and thereupon the defendant excepted.

The case is stated in the opinion.

Joseph E. F. Connolly, County Attorney, for the State.

Charles P. Mattocks, and John A. Snow, for defendant.

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

SAVAGE, J. Complaint for digging clams in violation of the provisions of chapter 317, Private and Special Laws of 1903. The case comes up on exceptions to the overruling of the defendant's demurrer.

The statute in question is as follows:

"Section 1. No person shall take or dig or destroy in any manner clams in any of the shores or flats within the town of Scarboro from the first day of April until the first day of October in each year under a penalty of not less than ten or more than one hundred dollars for each and every violation of this statute.

Section 2. The aforesaid section shall not apply to inhabitants or residents of said town taking clams for the use of himself and family nor to hotel keepers within the town taking clams for the use of their hotels."

The complaint alleges that the defendant was not a hotel keeper within the town taking clams for the use of his hotel, and that he was not an inhabitant or resident of the town taking clams for the consumption of himself and family.

The only point raised by the defendant is that this statute is obnoxious to that portion of the Fourteenth Amendment of the Constitution of the United States which declares that "No state shall

deny to any person within its jurisdiction the equal protection of the laws," and hence that it is unconstitutional and void.

We may first inquire into the nature of the right or privilege the equal protection of which is said to be denied by the statute in question. The shores of the sea and navigable rivers within the flux and reflux of the tide, by the common law belonged prima facie to the King. Holding the soil thus, the King held the appurtenant right of fishery, in trust for the benefit of his subjects. *Moulton* v. *Libbey*, 37 Maine, 472; *Com.* v. *Hilton*, 174 Mass. 29. And after Magna Charta, he could not, by an exercise of his prerogative, exclude the public from the right of fishery, or grant an exclusive right to a private individual, either together with or distinct from the soil. Hale, De Jure Maris, Ch. 5. The grantee of the King took the soil subject to the trust. Hence the right of taking fish where the tide ebbs and flows was common to all the people. *Warren* v. *Matthews*, 1 Salk. 357; *Ward* v. *Creswell*, Willes, 265; *Carter* v. *Burcot*, 4 Burr. 2162.

This common right of fishery included shell fish as well as swimming fish. *Bogott* v. *Orr*, 2 B. & P. 472; *Parker* v. *Cutler Milldam Co.*, 20 Maine, 353; *Moulton* v. *Libbey*, supra; *Martin* v. *Waddell*, 16 Pet. 367; *Weston* v. *Sampson*, 8 Cush. 347.

But the restriction placed by Magna Charta upon the exercise of the King's prerogative did not operate to abridge the power of Parliament over public and common rights. As was said in *Gough* v. *Bell*, 22 N. J. L. 459, "Of necessity, the jurisdiction to regulate and dispose of those rights which are common and public must reside in the legislative body, which is the representative of the people." *Wooley* v. *Campbell*, 37 N. J. L. 163. "The power of the commonwealth by the legislature over the sea, its shores, bays and coves, and all tide waters, is not limited, like that of the crown at common law." Shaw, C. J., in *Com.* v. *Alger*, 7 Cush. 82.

These public fishery rights were granted in the colonial charters to be held for the benefit of the inhabitants. *Moulton* v. *Libby*, supra, *Dill* v. *Wareham*, 7 Met. 438. The public rights were granted, accompanied as in England, with the powers of legislative regulation and control. When the colonies became independent,

the rights of common fishery remained in the States, for the public benefit. *Martin* v. *Waddell*, supra. The States hold them in trust for the public, and as to them, they exercise not only the rights of sovereignty, but also the right of property. *Com.* v. *Hilton*, 174 Mass. 29; *McCready* v. *Virginia*, 94 U. S. 391; *Stevens* v. *P. & N. R. R. Co.*, 34 N. J. L. 532.

By the Colonial Ordinance of 1641 of the Massachusetts Bay Colony which by usage and judicial adoption is taken to be a part of the common law of this State, *Lapish* v. *Bangor Bank*, 8 Maine, 85, the title to the seashore between high and low water mark, not exceeding one hundred rods, was vested in the owner of the upland. But it has always been held that the title is held subject to the public rights of fishery, for the right of each householder to have free fishing so far as the sea ebbs and flows was declared in the same ordinance. *Parker* v. *Cutler Milldam Co.*, supra; *Moulton* v. *Libby*, supra; *Weston* v. *Sampson*, supra.

It is, therefore, settled law that each State, unless it has parted with title, as by the Colonial Ordinance referred to, owns the bed of all tidal waters within its jurisdiction, and as well, the tidewaters themselves and the fish in or under them, so far as they are capable of ownership. For this purpose the State represents the people in their united sovereignty. The right which the people thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship. *McCready* v. *Virginia*, 94 U. S. 391; *State* v. *Peabody*, 103 Maine, 327. It is a right which belongs to the people of the State alone, and which they are not obliged to share with the people of other States. *McCready* v. *Virginia*, supra; *State* v. *Tower*, 84 Maine, 444; *Com.* v. *Hilton*, supra; *Corfield* v. *Coryell*, 4 Wash. C. C. 371. 8 Cyc. 1050.

Likewise it is true that the legislature of each State representing the people has full power to regulate and control such fisheries by legislation designed to secure the benefits of this public right in property to all its inhabitants. *State* v. *Peabody*, 103 Maine,

327; *Moulton* v. *Libbey*, supra. And it is not to be assumed that a legislature would undertake to control such a fishery even by granting exclusive rights, except on the ground that the interest of the public would be thereby promoted. *Com.* v. *Hilton*, supra.

Although there are a few authorities which seem to hold that a public right of fishery is inalienable by the State, the great weight of authority and judicial expression is to the effect that the State in the exercise of its power of regulation and control may grant exclusive rights of fishery to individuals. *Com.* v. *Hilton*, supra; *Com.* v. *Vincent*, 108 Mass. 441; *Burnham* v. *Webster*, 5 Mass. 265, (which was a Scarborough case) *Cleaveland* v. *Norton*, 6 Cush. 380; *Wooley* v. *Campbell*, 37 N. J. L. 163; *Gough* v. *Bell*, 22 N. J. L. 441; *Lakeman* v. *Burnham*, 7 Gray, 437; *Hathaway* v. *Thomas*, 16 Gray, 290; *Com.* v. *Bailey*, 13 All. 541; *Chalker* v. *Dickinson*, 1 Conn. 382; *Hickman* v. *Swett*, 107 Cal. 276; *Ex parte Maier*, 103 Cal. 476; *Geer* v. *Connecticut*, 161 U. S. 519. See *Moor* v. *Veazie*, 32 Maine, 343; *Mullen* v. *Log Driving Co.*, 90 Maine, 555. In the case of *Com.* v. *Hilton*, 174 Mass. 29, which we have cited several times in this opinion, the right of the State to prohibit by authorized municipal regulation, the taking of clams for sale by any except the inhabitants of the town in which the clam beds are situated was upheld, though in that case it appears that by general statutes the right of every citizen of the State to take clams "for his family use" was saved.

From the time of the adoption of the Ordinance of 1641 until the present time, it has been the policy of Massachusetts and Maine to regard the inhabitants of the several towns as entitled to superior or preferential privileges in the clam beds within their respective limits, and this policy has been repeatedly crystallized in the statutory law. In the Colonial Ordinance of 1641, it was declared that "every inhabitant that is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them." It should be said that the phrase "free fishing" has been held not to mean exclusive fishing. *Melvin*

v. *Whiting*, 7 Pick, 79; *Coolidge* v. *Williams*, 4 Mass. 139; *Com.* v. *Bailey*, 13 All. 541. These cases, however, recognize the power of the State to appropriate or grant the fisheries.

In *Com.* v. *Hilton*, the Supreme Judicial Court of Massachusetts, citing the ordinance referred to, and many Massachusetts statutes, said: — "From the earliest times, in regulating common rights in fisheries, statutes have been passed which authorize a preference of inhabitants of the town in which the fishing place is located." In *Dill* v. *Wareham*, 7 Met. 438, after declaring that towns have no property in fisheries, the court said:—"Still the laws recognized some rights of the inhabitants of towns, as the celebrated Colony Ordinance of 1641, which secured free fishing and fowling but limited the privileges thereby secured to householders, and to such free fishing and fowling within the limits of their respective townships. Such regulations obviously gave the privilege rather to the inhabitants of townships personally and respectively than to the town in its corporate capacity; and rather as a common privilege than as a right of property."

In this State the principle of preference was recognized at the start, and in some form or other has continued to be recognized. In the Statute of 1821, ch. 179, sect. 3, the taking of shell fish without permits from the selectmen was forbidden, with the exception that "every inhabitant of each town might take without permit shell fish for the use of his or her family." The privilege of taking a limited amount for bait was also excepted. The same provisions appear in R. S., 1841, ch. 61, and were held, in *Moulton* v. *Libby*, supra, to be a valid regulation of the common fisheries. In R. S., 1857, ch. 40, sect. 19, the provisions were modified by limiting permits to inhabitants of the State to their respective towns. These regulations were continued unchanged in R. S., 1871, ch. 40, sects. 19, 20, and R. S., 1883, ch. 40, sects. 23, 24. By R. S., 1903, ch. 41, the power of regulating clam digging within their respective limits was remitted to the towns. The towns were to vote, and the municipal officers were to grant permits. But a preference for "the use of the inhabitants of the town" is still shown, except when the

town fails to take action, in which case there is free fishing for every one. *State* v. *Wallace*, 102 Maine, 229.

Up to this point we have discussed the power of the State without reference to the Fourteenth Amendment to the federal constitution. This somewhat lengthy recapitulation of time worn principles has seemed necessary in order that we may view precisely the legal situation with respect to common fisheries to which it is claimed that the Fourteenth Amendment has now attached and concerning which all the inhabitants of the State are entitled to the equal protection of the laws.

"What satisfies the equality protected by the constitution has not been and probably never can be precisely defined." *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 293; *Strauder* v. *West Virginia*, 100 U. S. 303. Perhaps the most comprehensive definition is that found in *Barbier* v. *Connolly*, 113 U. S. 27. "The Fourteenth Amendment in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . . that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances. . . . Class legislation discriminating against some, favoring others is prohibited; but legislation which is carrying out a public purpose is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." In 6 L. R. A. 621, it was well said that "to forbid an individual or a class the right to the acquisition or use or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness and invalid as subversive of rights guaranteed by the Fourteenth Amendment." In our own case of *State* v. *Montgomery*, 94 Maine, 192, we said that the inhibition of the Fourteenth Amendment was designed to prevent any person or class of persons from

being singled out as a special subject for discriminating and hostile legislation." *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181.

And it is important to note in this connection that the equality clause in the Fourteenth Amendment did not create any new or substantive legal rights, nor enlarge the general classification of rights of persons or things existing in any State under the laws thereof. It operated upon them as it found them established, and it declared in substance that such as they were in each State, they should be held and enjoyed alike by all persons within its jurisdiction. *Minor* v. *Happersett*, 21 Wall. 162; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Ward* v. *Flood*, 48 Cal. 36; 17 Am. Rep. 405.

But the equality clause is not necessarily infringed by special legislation, nor by a legislative classification of persons or things. "It only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformily upon all persons in similar circumstances . . . . It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions. . . . . The rule therefore is not a substitute for municipal laws. It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to relations." *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 293; *Kentucky Railroad Tax Cases*, 115 U. S. 321. We have already seen that the Fourteenth Amendment is not infringed upon by a State law confining the right of fishing within the navigable waters of the State to citizens of the State. *McCready* v. *Virginia*, 94 U. S. 391.

Special legislation is not obnoxious to the equality clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions. *Missouri Pac. Ry. Co.* v. *Mackay*, 127 U. S. 205; *Hayes* v. *Missouri*, 120 U. S. 68. Wherever the law operates alike upon all persons and property

similarly situated, equal protection cannot be said to be denied. *Walston* v. *Nevin*, 128 U. S. 578. The equality clause means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances. *Missouri* v. *Lewis*, 101 U. S. 22; *Dow* v. *Beidelman*, 125 U. S. 680; *Wurts* v. *Hoagland*, 114 U. S. 606; *Missouri Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Lowe* v. *Kansas*, 163 U. S. 81; *Leavitt* v. *C. P. Ry. Co.*, 90 Maine, 153.

It was said by this court in *State* v. *Mitchell*, 97 Maine, 66, that "these constitutional provisions do not prevent a state diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a state making different regulations for different localities, for different kinds of business and occupations . . . and generally for different matters affecting differently the welfare of the people. Such different regulations of different matters are not discriminations between persons, but only between things and situations. They make no discrimination for or against any one as an individual or as one of a class of individuals, but only for or against his locality, his business or occupation, the nature of his property," etc.

But discrimination, to be constitutional, must be based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150; *State* v. *Montgomery*, 94 Maine, 192. It must be reasonable and based upon real differences in the situation, condition or tendencies of things. *State* v. *Mitchell*, supra; *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *New York, New Haven and Hartford R. R. Co.* v. *New York*, 165 U. S. 623.

In the light of these interpretations of the equality clause of the Fourteenth Amendment, is the statute in question so manifestly unreasonable and arbitrary in its discrimination, as to fall before the constitutional inhibition? We are led to think not.

The statute forbids all classes of persons with two exceptions, from taking clams in Scarboro for any purpose. The exceptions are

inhabitants or residents of the town who may take clams for the use of themselves and families, and hotel keepers within the town who may take for the use of their hotels. It is evident that all of the inhabitants of the State cannot take clams in Scarboro without limit. Such indiscriminate taking might be destructive of the fishing itself, a point which is noticed in some of the cases. *Nickerson* v. *Brackett*, 10 Mass. 212; *Corfield* v. *Coryell*, 4 Wash. C. C. 371. That the State may by regulation prevent such destruction we think must be conceded. To do this the State must necessarily limit the times within which or the number of persons by whom they may be taken. The State can undoubtedly limit the times. It can fix "close times." But would it be a practicable regulation of clams for all to have clams one year and none to have any another? We do not know the clam digging situation in Scarboro as the legislature is presumed to have known. But we are concluded by the legislative determination that the interest of the public would be promoted by this legislation. *Com.* v. *Hilton*, 174 Mass. 29. It must be assumed that there was good reason in the public interest for the classification, saving only the question of equal protection of individuals or classes.

Since it must be assumed that the public interest required some limitation upon the right of clam fishing, it does not seem to us that it is unreasonable or arbitrary for the State having a proprietary interest as well as a governmental power all for the public benefit to give the preference to those whom the law for more than two hundred and fifty years has given a preference, and who were enjoying a preference when the Fourteenth Amendment was adopted, namely, the inhabitants of the town within which the fisheries are located. The discrimination between them and the inhabitants of other towns seems to us to "bear a just and proper relation" to the difference in situation, in locality and in the actual enjoyment of prior legal rights or privileges. It is not unreasonable that they to whose doors nature has brought these "succulent bivalves" . . . . shall be entitled to them before those who are less favorably situated whenever there must be restriction. And we do not think that the

legislative recognition of this existing superiority in situation and privilege denies to others the equal protection of the law.

And it may be said further that if the State may, under the circumstances, prefer some, it may so far as the Fourteenth Amendment is concerned, entirely exclude others. A preference violates equality as certainly as exclusion does.

The reasons suggested by us for holding that this discriminating legislation is not inimical to the equal protection clause of the Fourteenth Amendment apply alike to the inhabitant of the town who takes clams for his own use and to the hotel keeper in the town who takes them for use in his hotel.

Exceptions overruled.
Case to stand for trial.
as per stipulation.

MAURICE C. PROVENCHER *vs.* FRANK P. MOORE.

Somerset. Opinion January 7, 1909.

Evidence. Cross-Examination. Collateral Facts. Same Cannot be Contradicted, When.

Since one's conduct necessarily varies according to the circumstances and the motives which influence him, his agreement with one person can never afford a safe criterion for his agreement with another person under other circumstances.

The reason for the rule excluding all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the fact in dispute, is that such evidence tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them.

It is the uniform rule that answers to collateral inquiries on cross-examination cannot be contradicted by the party inquiring.

Where the plaintiff brought an action of assumpsit on an account annexed containing an item for boarding the defendant's horse and the defendant contended that the plaintiff agreed to keep the horse for its use, and on cross-examination the plaintiff was asked if, prior to the time of taking the defendant's horse, he did not offer to keep the horse of one Buker for its use and the plaintiff answered that he did not, and Buker was called by the defendant and permitted against objection to testify that the plaintiff did offer to take his horse for its keeping, *Held:* (1) That the evidence relating to the Buker horse was collateral to the issue and should have been excluded. (2) That the defendant having inquired of the plaintiff on cross-examination concerning a collateral matter should have been held to abide the answer, and not have been permitted to present testimony tending to disprove it.

On exceptions by plaintiff. Sustained.

Assumpsit on account annexed in which the plaintiff sought to recover, among other things, for boarding the defendant's horse. Plea the general issue with brief statement of payment. Verdict for defendant.

During the trial and on cross-examination the plaintiff testified as follows:

Q. "Didn't you try to get another horse before you got this? (Defts.)

A. "No sir.

Q. "Didn't you try to get Percy Buker's?

A. "No sir.

Q. "Didn't you ever say anything to Percy Buker about taking his horse for his keep?

A. "No sir.

Q. "You swear to that, don't you?

A. "Yes sir, sure."

The said Percy Buker, called by the defendant, in direct examination testified as follows:

Q. "In 1905 or 1906 in the fall, did you have some talk with Maurice Provencher about his taking your horse?

A. "I did.

Q. "What did he say?

MR. GOWER: "I object, as a collateral issue.

MR. GOODWIN: "I want to show that Mr. Provencher at this time was offering to take another horse for his keep as we say he did this.

THE COURT: "He denied it on the stand?

MR. GOODWIN: "Yes.

THE COURT: "I admit it and you may have an exception.

WITNESS: "He wanted to know if I would sell my horse and I said no. He says 'I will take her for her keeping through the winter if you want me to.'"

Q. "What did you say?

A. "I said I had a place for her."

The plaintiff excepted to the rulings admitting the aforesaid testimony of the witness Buker.

The case is stated in the opinion.

Gower & Hight, for plaintiff.

Forrest Goodwin, for defendant.

SITTING: EMERY, C. J., SAVAGE, PEABODY, KING, BIRD, JJ.

KING, J. Action of assumpsit on an account annexed containing an item for boarding the defendant's horse. The defendant contended that the plaintiff agreed to board the horse for its use. On cross-examination the plaintiff was asked if prior to the time of taking defendant's horse he did not offer to keep the horse of one Buker for its use. He answered that he did not. Buker, called by defendant, was permitted against objection to testify that the plaintiff did offer to take his horse for her keeping. The case is before the Law Court on exceptions to the admission of this testimony. We think the exceptions must be sustained. "You are not to draw inferences from one transaction to another that is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference." Stephen Ev. 198, Note VI.

The only logical probative effect of Buker's testimony, if true, is that the plaintiff was then willing to take his horse for her keeping. Because that offer of plaintiff is similar in kind to the agreement for which the defendant contended it does not follow that an inference may be drawn from it in support of the latter. Since one's conduct necessarily varies according to the circumstances and the motives which influence him, his agreement with one person can never afford a safe criterion for his agreement with another under other circumstances. The motives which might have influenced the plaintiff to offer to take Buker's horse for her keeping—such as his knowledge of the qualities of the horse, his then need of a horse, or his relations with Buker, may have been wanting in relation to the agreement in issue.

The reason for the rule excluding all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the fact in dispute is "that such evidence tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them." Greenleaf Ev. Sec. 52; *Parker* v. *Publishing Co.*, 69 Maine, page 174.

The testimony of Buker should have been excluded for another reason, because it violates the uniform rule that answers to collateral inquiries on cross-examination cannot be contradicted by the party inquiring. *Bell* v. *Woodman*, 60 Maine, page 465; *State* v. *Benner*, 64 Maine, Page 287-8; *Davis* v. *Roby*, 64 Maine, page 427. The defendant having inquired of the plaintiff on cross-examination concerning a collateral matter should have been held to abide the answer, and not have been permitted to present testimony tending to disprove it.

The testimony of Buker was a direct contradiction of the plaintiff, tending to discredit him as a witness, and must be regarded as prejudicial.

It is the opinion of the court, therefore, that the entry must be,

Exceptions sustained.

STATE OF MAINE, By Information, *vs.* AMOS K. BUTLER.

Somerset. Opinion January 6, 1909.

Legislative Power. Same Cannot be Delegated. Public Office. Same can be Established only by Legislature. Special Attorney for the State. Statute Authorizing Governor to Create such Office Unconstitutional. Legislative Act Held Unconstitutional, When. Constitution of Maine, Article III, sections 1, 2; Article IV, par. 1, section 1. Statute, 1905, chapter 92, section 8.

1. The entire legislative power of the State is by the constitution vested exclusively in the legislature, and no part of that power can be transferred or delegated by the legislature to either of the other departments of the government.
2. Only the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the establishment of such office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination.
3. An office of special attorney for the State in any county to have full charge and control of all prosecutions in the county relating to the law against the manufacture and sale of intoxicating liquors, would be a public office with governmental functions and could be established only by the legislature.
4. Section 8 of chapter 92 of the Public Laws of 1905, enacting that "The governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof" is unconstitutional and without any force of law for the reason that the creation of the office is left to the discretion of the governor contrary to the constitution.
5. While an act of the legislature should not be held unconstitutional except in cases where the conflict between the legislative act and the constitution is clear and irreconcilable by any reasonable interpretation, yet when there is such a conflict as in this case, the court must declare the act void, for the duty of the court to maintain the constitution as the fundamental law of the State is imperative and unceasing.

On report. Judgment of ouster.

An information in the nature of quo warranto filed by Hannibal E. Hamlin in his capacity as Attorney General of the State, for and in the name of the State but at and by the relation of Thomas J. Young who was County Attorney for the County of Somerset,

against the defendant, Amos K. Butler, who had been appointed "Special Attorney for the State" in said county, to act in all matters relating to the enforcement of the laws against the manufacture and sale of intoxicating liquors, and was acting in such matters.

The Information is as follows:

"State of Maine.

"SOMERSET, ss:—

"To the Supreme Judicial Court, or any Justice thereof:—

"STATE OF MAINE By Information *vs.* AMOS K. BUTLER

"Be it remembered that on the twelfth day of February, A. D., 1908, Hannibal E. Hamlin, Attorney General of the State of Maine for and in the name of the State of Maine but at and by the relation of Thomas J. Young of Solon, Somerset county, State of Maine, comes into court and files this information against Amos K. Butler of Skowhegan, Somerset county, State of Maine.

"And thereupon the said Attorney General informing shows and gives this court to understand as the claim of said relator, as follows, viz:

"(1) That said Thomas J. Young, the relator, who served the said county of Somerset as its lawful County Attorney for the two successive years expiring on the thirty-first day of December, A. D. 1906, was at the State election held on the second Monday of September A. D. 1906, duly and legally elected as County Attorney of said Somerset county, that he duly qualified as County Attorney as aforesaid on the nineteenth day of November A. D. 1906, and became in all respects the lawful County Attorney for said Somerset county for the term beginning the first day of January A. D. 1907 and expiring on the thirty-first day of December 1908, that he duly entered upon the discharge of his duties as said County Attorney on the first day of January A. D. 1907 for his said present term, and that he ever since has held, and now holds the office of said County Attorney except in so far as he may have been ousted in the

performance of his duties thereof by the said Amos K. Butler as hereinafter set forth.

"(2) That since said Thomas J. Young has been County Attorney, as aforesaid it has been and still is his duty as such official to act as attorney for the State in said Somerset county in all cases in which the said State or county is interested including the violations of the laws of said State against the manufacture and sale of intoxicating liquors.

"(3) That the said Amos K. Butler claiming to act as "Special Attorney for the State of Maine in the County of Somerset" under an appointment from the Governor of this State dated the fourth day of January A. D. 1908, (the validity of which said appointment is at the instance of said relator questioned and denied) at the December term of the Supreme Judicial Court begun and holden at Skowhegan within and for the county of Somerset on the fourth Tuesday of December 1907, to wit: On the eighth day of January A. D. 1908 at said Skowhegan, did assume and exercise and from thence continually afterwards to the time of the exhibiting of this information has so assumed and exercised and still does exercise without legal authority or right, the office of the Attorney of the State of Maine for said county of Somerset, to wit, the said office of County Attorney for said county of Somerset in that he then and there assumed and exercised the same powers vested in the said Thomas J. Young as County Attorney for said county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and then and there assumed and held full charge and control thereof, and now exercises said powers and has and holds full charge and control of said prosecutions and claims the right and privilege so to do, and that he the said Butler as aforesaid then and there at said term of said court conducted the prosecution relating to the law against the manufacture and sale of intoxicating liquors, and then and there had full charge and control against the written protest and objection thereto then and there filed in said court by said relator, the said Thomas J. Young, as County Attorney for the said county of Somerset aforesaid, and for and during all the time, at and from said eighth day of January to the commence-

ment of this proceeding, has there claimed and still does there claim without legal authority or right whatsoever to act as the Attorney of the State for the county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors and to have, hold and exercise full charge and control thereof, and to have, use and enjoy all the liberties, privileges and powers belonging and appertaining to said County Attorney for said county of Somerset in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, which said office, liberties and powers to the extent aforesaid, he, the said Amos K. Butler, for and during the time at and from said eighth day of January to the commencement of this proceeding has usurped and does ursurp, preventing the said Thomas J. Young from performing all the duties of his said office as County Attorney for the county of Somerset.

"(4) That there may be, therefore two officers of the law claiming the same rights and powers before the grand jury for the county of Somerset and in the courts for said county of Somerset.

"(5) That the interests of the State require in all the premises that the title of said Amos K. Butler as "Special Attorney for the State of Maine in the county of Somerset" as aforesaid shall be fully passed upon and determined by proper tribunal under the laws of the land.

"Whereupon the said Attorney General prays the consideration of this honorable court in the premises and that due process of law may be awarded against the said Amos K. Butler in this behalf, to make him answer to the State of Maine and show by what warrant he claims to have, use and enjoy his said office as aforesaid, and that his title, right and powers to his office as aforesaid be considered by the court and that they either be confirmed if valid, or a judgment of this court may be rendered against the said Amos K. Butler directing him not in any manner to intermeddle or concern himself in and about the holding of or exercising his said office, or to intermeddle or concern himself in and with the rights, powers and duties in any way belonging to in whole or in part the said office of the County Attorney for the county of Somerset as aforesaid,

and for such further and other action in all the premises as may seem to the court meet and proper.

"Dated this twelfth day of February, A. D. 1908.

"HANNIBAL E. HAMLIN,
Attorney General.

"THOMAS J. YOUNG,
"Relator."

"STATE OF MAINE.

"Somerset, ss. February 12, A. D. 1908.

"Subscribed and sworn to by the above named Thomas J. Young, relator.

"Before me,

"AUGUSTINE SIMMONS,
"Justice of the Peace."

The defendant filed an answer alleging among other things, that he was acting in matters in said county relating to the enforcement of the laws against the manufacture and sale of intoxicating liquors, under and by virtue of his appointment, commission and qualification under the provisions of the Public Laws of 1905, chapter 92, section 8.

The matter came on for hearing at the March term, 1908, Supreme Judicial Court, in said county, and after certain admissions had been made, the case was "reported to the Law Court to render such judgment as the law may require."

Augustine Simmons, for Thomas J. Young, County Attorney.

Arthur S. Littlefield, for Amos K. Butler, Special Attorney.

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

EMERY, C. J. We think the validity of the respondent's claim to exercise the governmental function of public prosecutor in Somerset county will be best determined by looking straight at the language of the constitution and of the statute and at established principles, and by freely allowing them their full, natural effect.

The people of Maine, in organizing their government as a State, vested the legislative power of the government in a body "to be styled the Legislature of Maine," (Art. IV. Par. 1. Sec. 1.) and did not confer any such power on any other person or body, and did not authorize the legislature to do so. It follows that the legislature alone can exercise the legislative power and alone is responsible for its wise exercise, and hence can transfer neither any of the power nor any of the responsibility to any other department or person. Says Judge Cooley in his Constitutional Limitations (6th Ed.) p. 137: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." The proposition needs no other citation of authority, and we do not find it any where doubted.

Further, the people in their constitution expressly divided the powers of the government into three departments, the legislative, executive and judicial, and declared that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Art. III, Secs. 1, 2. Hence not only is the legislature not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions.

Another proposition is undisputed. Only the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its

duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination.

By sec. 8 of chap. 92 of the Public Laws of 1905 the legislature enacted as follows: "The governor may, after notice to and an opportunity for the attorney for the state for any county to show cause why the same should not be done, create to continue during his pleasure the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof. Such appointee shall, under the direction of the governor, have and exercise the same powers now vested in the attorney for the State for such county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof; he shall receive such reasonable compensation for services rendered in vacation and term time as the justice presiding at each criminal term in that county shall fix, to be allowed in the bill of costs for that term and paid by the county."

Acting under this section, after sufficient notice to and opportunity for the county attorney of Somerset county to show cause to the contrary and his refusal to do so, the governor on January 4th, 1908 issued to the respondent a commission of the following tenor:

"STATE OF MAINE.

To all who shall see these Presents,

GREETING.

Know Ye, that I, William T. Cobb, Governor of the State of Maine, do hereby create to continue during my pleasure the office of Special Attorney for the State of Maine in the County of Somerset, all as provided by Chapter 92 of the Public Laws of the State of Maine, for the year A. D. 1905, entitled "An act to provide for the better enforcement of the laws against the manufacture and sale of Intoxicating Liquors," and especially as provided for under Section 8 of said Chapter;

And reposing special trust and confidence in the integrity, ability and discretion of Amos K. Butler, of Skowhegan in the said County of Somerset, do hereby constitute and appoint the said Amos K. Butler Special Attorney (to fill the office of Special Attorney as

above created,) for the State of Maine within and for said County of Somerset and I do hereby authorize and empower him to fulfill the duties of said office to which he is herein appointed according to law and to have and to hold the same together with all the powers, privileges, and emoluments thereto of right appertaining unto him, the said Amos K. Butler, during my pleasure as Governor of the State of Maine, if he shall so long behave himself well in said office."

We assume it will not be disputed that the office described in the statute cited is a public office with governmental functions, powers and duties, such as cannot be performed by a mere administrative agency, and hence an office that only the legislature can create. It could not authorize any other person or body of persons to create the office, much less the governor, the head of the executive department. If, therefore, in enacting the statute the legislature did not itself, upon its own judgment and responsibility, create the office, it does not exist and the respondent is not the officer he claims to be.

Construing the statute in question according to the statutory rule for the construction of statutes that "words and phrases shall be construed according to the common meaning of the language," it would seem plain that the legislature did not itself assume to determine whether there should be an office of "Special Attorney for the State" in any county, but left that question to the governor to determine. The language does not seem fairly susceptible of any other interpretation. It is explicit that the governor should "create" the office if it was to exist. When the legislature adjourned there was evidently no such office in existence. The functions and powers of the county attorneys remained with them, and were not transferred to any new office. The office of "Special Attorney for the State" was not to come into existence until the governor was pleased that it should, until he saw fit to create it. He was instructed to "create" the office before appointing an incumbent. This evidently appeared to the governor and his legal advisers the only reasonable interpretation. In his commission to the respondent he first declares that he (not the legislature) "does hereby create" the office, and then goes on to appoint

the respondent to fill the office "as above created," that is, by himself.

The respondent cites cases to the effect that the legislature may provide legislation for future specified contingencies and confer upon the executive or other persons the power to determine when the specified contingency has arisen; also that the legislature may enact a statute not to go into operation until specified facts or conditions are found to exist, and may empower the governor to decide upon the existence of such facts and conditions. In this case, however, the legislature has not made the existence of the office contingent upon specified facts, or conditions, or contingencies being found by the governor to exist. It leaves the existence or non-existence of the office wholly to the governor's discretion. True, before creating the office, he must invite the county attorney to show cause to the contrary, but he may wholly disregard whatever the county attorney may show as cause, and still create or not create the office at his sole and unlimited discretion. He is not required to find any fact. He need not give any reason or have any reason. The office is to be created or not, at his pleasure. He may even create it for the purpose of blocking the enforcement of the laws by a faithful county attorney. True, no such action by a governor is to be anticipated, and true also that the legislature undoubtedly assumed the governor would use the statute only for the better enforcement of the laws; but he could use it to defeat enforcement and effectually, if the statute be valid. The test is what he could do, not what he probably or undoubtedly would do.

It is this discretion given the governor to create or not create the office that distinguishes this case from those cited by the respondent, and that vitiates the statute. There are cases illustrative of this distinction and vitiation. In *Gilhooly* v. *City of Elizabeth*, 66 N. J. L. 484, 49 At. 1106, the statute provided that "upon the petition of not less than one hundred voters of any city, the governor may in his discretion appoint a commission," to divide the city into wards. The statute was held unconstitutional as being an attempt to delegate legislative power to the governor. The court said; "That this law commits to the governor the determination of

public policy controlling the government of cities does not admit of controversy, as he is given an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the legislature." This language states the principle applicable to the case at bar. In *King* v. *Concordia Ins. Co.*, 140 Mich. 258, 103 N. W. 616, the legislature undertook to empower a commission to frame a standard insurance policy and to make such changes in it from time to time as justice and equity might require. Held void. In *Noel* v. *The People*, 187 Ill. 587, 107 N. W. 500, the legislature undertook to empower a "Board of Pharmacy" to grant in their discretion permits to sell proprietary medicines. Held void as investing the board with an arbitrary discretion. In *Mitchell* v. *State*, 134 Ala. 392, 32 So. 687, the legislature undertook to authorize a board of commissioners to suspend a dispensary for the sale of liquors. Held void. In *State* v. *Rogers*, 71 Ohio St. 203, 73 N. S. 461, the legislature undertook to authorize the Judges of the court of Common Pleas to fix the salaries of county surveyors. Held void on the ground that it had not prescribed any rule, but left the matter to the discretion of the Judges. In *Noel* v. *The People*, 187 Ill. 587, the legislature undertook to transfer to a Pharmacy Board the power to decide what drugs should be sold by druggists. Held void. In *Fogg* v. *Union Bank*, 60 Tenn. 435, it was held that the legislature could not empower trustees of insolvent banks to fix the time for the payment of claims. The foregoing cases are sufficient for illustration and authority. We find no case holding that the legislature may leave any of its legislative powers to be exercised at the discretion of any other person or persons.

The respondent urges as a well settled doctrine that when the intention of the legislature is clearly expressed in an enactment, the court should give effect to that intention and not defeat it by adhering too rigidly to the letter of the statute or to technical rules for statutory construction, and that in some cases it may give effect to such intention even in direct contravention of the terms of the statute. An essential element in the doctrine invoked is that the

intention should clearly appear in the enactment otherwise its terms cannot be disregarded. In this case, however, the language of the statute clearly indicates an intention to leave the question of creating or not creating the office to the discretion of the governor. "The governor may . . . create to continue during his pleasure the office of Special Attorney," etc. Language could hardly be found more indicative of an intention to transfer the power and responsibility to the governor. A contrary intention, even if it existed, is not expressed in the statute, hence the doctrine cited does not apply to this case. It is not the duty nor right of the court to disregard plain language in order to find some intent contrary to that indicated by the language, even to save a statute from being declared unconstitutional.

The respondent further invokes, as a well settled rule, that if the statute is susceptible of two interpretations one of which will avoid conflict with the constitution, that interpretation should be adopted. We do not see that the words and phrases of this statute, construing them according to the common meaning of the language as required by the statutory rules of construction, can fairly bear the interpretation contended for by the respondent. The words are not technical nor of doubtful meaning. They seem plain and explicit. The governor is to "create" the office as well as fill the office when created. Indeed, the respondent admits that the legislature intended the office to remain in abeyance until the governor should act. This interpretation would not save the statute, since under it the time of the statute going into effect and its duration depend, not on any specified fact, or contingency, or condition, but solely upon the will of the governor. "The result of all the cases on this subject is that the law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that in form and in substance it is a law in all its details in presenti, but which may be left to take effect in futuro, if necessary, upon the ascertainment of any prescribed fact or event." *Dowling* v. *Lancashire Ins. Co.*, 92 Wis. 63, 65 N.

W. 738, 31 L. R. A. 112. In the statute before us the beginning and duration of the office intended to be created were left undetermined. No fact or event was prescribed upon the ascertainment of which the statute was to take effect and the office come into existence. The statute was not to take effect, the office was not to come into existence, until the governor in his discretion should so decree. The constitution forbids the governor exercising any such discretion and forbids the legislature allowing it to him.

All through our consideration of this case we have borne in mind the principle that all reasonable doubts are to be resolved in favor of the constitutionality of a statute, but as said by the Supreme Court of Minnesota in *State* v. *Great Northern Rwy. Co.*, 100 Minn. 445, 111 N. W. 289, "While an act of the legislature should never be held unconstitutional except in cases where the conflict between the statute and the constitution is clear, manifest and irreconcilable by any reasonable construction, yet when it so conflicts with the constitution, courts have no alternative than to declare it invalid; for the obligation to support the constitution is imperative and unceasing. This is such a case."

It follows that the respondent has no right to exercise any of the functions of public prosecutor, and the State must have judgment of ouster.

So ordered.

MEMORANDUM.

EMERY, C. J. After the foregoing opinion was written, but before the concurrence of all the concurring Justices could be obtained, the term of office of the relator expired. The majority of the Justices, however, hold that the information should not for that reason be dismissed, and that there should nevertheless be a judgment for the State, since not merely the title of the respondent, but the existence of the alleged office itself is in question and is determined by the opinion. *Commonwealth* v. *Swazey*, 133 Mass. 538.

WILLIAM R. MARSHALL, Administrator,

vs.

STATE OF MAINE.

Waldo. Opinion January 12, 1909.

State Assessors. Terms of Office. When the Terms End, Determined. Constitution of Maine, Article V, part 3, section 1; Article IX, section 2. Statute, 1891, chapter 103, sections 1, 2, 4.

1. The statute creating the office of State assessor, chapter 103, of the Public Laws of 1891, provided that at the first election one assessor should be elected for two years, one for four years, and one for six years, and that assessors thereafter elected should hold office for the term of six years each. The first State assessors were elected by the legislature April 1, 1891.

Held: (1) That the terms of office of the assessors elected at the first election expired April 1, 1893, April 1, 1895, and April 1, 1897, respectively, and that assessors elected after the first election, except when chosen to fill out unexpired terms, hold office for the full term of six calendar years, beginning April 1, of the year when elected.

(2) That the term of office of William C. Marshall, elected in 1897 to fill out an unexpired term which began April 1, 1895, ended April 1, 1901, and that he was entitled to receive his salary until that date.

2. When the State, by resolve, permits itself to be sued on a claim, interest will not be allowed on the amount found to be due, unless the resolve permitting the suit so provides.

On report. Judgment for plaintiff.

Action of assumpsit brought by the plaintiff in his capacity as administrator of the estate of William C. Marshall, late of Belfast, against the State of Maine to recover a balance of salary alleged to have been due the said late William C. Marshall, as State Assessor, for the period from February 1, 1901, to April 1, 1901. Plea, the general issue.

The plaintiff was authorized to bring this action by virtue of the provisions of chapter 29 of the Resolves of 1907, and which said chapter reads as follows:

"Resolved, That William R. Marshall of Sioux Falls, South Dakota, administrator of the estate of William C. Marshall late of

Belfast in the county of Waldo, deceased, be authorized and empowered to bring and maintain a suit at common law in the supreme judicial court against the state of Maine to recover such sums as are claimed to be due said estate for the services of the said William C. Marshall as state assessor, and that such judgment if any, as may be recovered in such action, be paid from the state treasury."

When the action came on for trial, the facts were agreed upon and the case was reported to the Law Court for determination and to render such judgment as the law and the facts required.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Hannibal E. Hamlin, Attorney General, for the State.

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

SAVAGE, J. This action is brought against the State, by permission of the legislature, Chapter 29 of the Resolves of 1907, to recover a balance of salary alleged to have been due to the late William C. Marshall, as State Assessor, for the period from February 1, 1901, to April 1, 1901. Mr. Marshall was paid his salary up to February 1, 1901, at which time Mr. F. M. Simpson, who had been elected to succeed him, took the oath of office. But his administrator claims that his term of office did not expire until April 1, 1901, and that therefore there is still due to his estate the salary for the intervening two months. And the State contends that his term expired when Mr. Simpson qualified. This statement presents the only question raised by the parties.

The first statute providing for the election of State assessors was approved by the governor March 26, 1891, Chapter 103 of the Public Laws of 1891, and contained the following language:

Sect. 1. A board of State assessors shall be chosen biennially by the legislature by joint ballot of the senators and represenatives in convention, consisting of three members . . . . who shall

take and subscribe the oath provided by the constitution of the state, and hold their offices as provided in the following section.

Sec. 2. The term of office of said assessors under said first section shall be, one for two years, one for four years, and the other for six years, and until their several successors are elected and qualified. . . . Said state assessors shall be elected after the approval of this act by the legislature now in session, and shall hold their first meeting at the state capitol within thirty days thereafter. The assessors thereafter elected shall hold office for the term of six years each, excepting elections made to fill unexpired terms.

Sec. 4. . . . . In case of the death, resignation, refusal or inability to serve of any one or more of said board, the governor, with the advice and consent of the council, shall, as soon as may be, fill such vacancy by appointment, and the assessor so appointed shall hold office until his successor is elected by the next legislature, and qualified."

Under this statute, as appears upon the official records, on April 1, 1891, the legislature elected one assessor "for two years," another "for six years," and Frank Gilman "for four years." Mr. Gilman's term is the only one we need to consider. These assessors all qualified on April 2, 1891. Mr. Gilman died during his term of office, and on March 8, 1892, Hall C. Burleigh was appointed by the governor to fill the vacancy, and qualified on the same day. Mr. Burleigh was elected by the legislature January 19, 1893, for the balance of the unexpired term of Mr. Gilman. He qualified February 7, 1893. Mr. Burleigh was elected by the legislature to succeed himself "for six years," January 3, 1895, and qualified April 3, 1895. Mr. Burleigh died during his term of office, and Mr. Marshall was appointed to succeed him, June 5, 1895, and qualified the following day. Mr. Marshall was elected by the legislature January 7, 1897 for the balance of the unexpired term of Mr. Burleigh. Mr. Simpson was elected January 3, 1901, for the period of six years, to succeed Mr. Marshall. He qualified February 1, 1901.

But notwithstanding what appears upon the official records as to the dates of the several elections, and as to the length of time for

which the several assessors were elected, the term of office of a State assessor is fixed by the statute, and its beginning and end must be ascertained from a construction of the statute.

It is contended that the phrases "two years," "four years," and "six years" in the statute were intended by the legislature to mean legislative years, and not calendar years, and that the original term of four years for which Mr. Gilman was elected, and of any succeeding term of six years, ended when successors were elected and qualified at any time during the legislative sessions. It is claimed that it is to be fairly inferred that the legislature had in mind the fact that the terms of office of the secretary of state, treasurer of state and attorney general end when their successors are elected and qualified. *Opinions of the Justices*, 70 Maine, at p. 591. And to support this inference, it is pointed out that these officers are elected under constitutional provisions phrased in language precisely similar to that in the statute in question. Const. of Maine, Art. V, Part Third, Sect. 1; Part Fourth, Sect. 1, and Art. IX, Sect. II. And from this it is claimed that the legislature by adopting this language intended to make the terms of office, by analogy, end as do the terms of these officers. And it is also suggested that the legislative meaning will become clear if we interpret the word "and" in the sentence after fixing the terms of office, "and until their several successors are elected and qualified," as meaning "or."

We think these contentions cannot be sustained. The argument by analogy fails at a vital point. The constitution does not fix the length of the terms of office of the secretary of state, treasurer of state and attorney general. It simply provides that they shall be elected by the legislature biennially. This statute expressly fixes the length of the terms of the State assessors. And while "and" may sometimes be interpreted as "or" to effectuate, and not to defeat, the evident intent of the legislature, it cannot be done when that intent clearly appears, as we think it does here, in the words used. The language "and until their several successors are elected and qualified" was evidently used to prevent a lapse of office in the possible interim between the expiration of a term of office and the election or qualification of a successor. Unless we would do vio-

lence to the language, we must interpret this statute as the legislature expressed it. We think that expression is clear and unmistakable. The terms of office are made definite. The first assessors were to be elected severally for two, four and six years, and the assessors thereafter to be elected were to "hold office for the term of six years each." The use of the expression, "the term of office shall be for four years," or the other expression, "shall hold office for the term of six years," imports, on the face of it, a fixed period of time, and this will control in the absence of anything in the statute to show that something else was intended. The statute contemplates that the terms of office are to expire at definite times, and not at the casual date of an election by the legislature.

It might have been provided by law that these terms of office should begin and end at a certain fixed date, but it was not. The statute being silent, we think the date was fixed by the first election. The terms of the assessors then elected began on that day. By qualifying they could have acted that day. The terms having begun on that day by election, the statute fixed their length. The term of Frank Gilman, in whose case only are we interested now, ended in four years from the date of his election, or April 1, 1895. After his death, his successor, by appointment first and then by election, held office for the full unexpired term. The term of Mr. Burleigh, elected in 1895, did not begin until the original Gilman term ended, so that Mr. Burleigh's term did not end until six years from April 1, 1895. And Mr. Marshall, filling out the unexpired term of Mr. Burleigh, was entitled to the office until April 1, 1901, when his term ended.

The plaintiff is therefore entitled to a judgment. In his writ he makes a claim for interest. But we think interest is not allowable against the State in a case like this, unless the resolve permitting the suit so provided. We do not think that Chapter 29 of the Resolves of 1907, under which we have jurisdiction, contemplates the payment of interest.

Judgment for the plaintiff for $250.

E. A. STROUT COMPANY *vs.* DAISY E. GAY.

Kennebec. Opinion January 22, 1909.

Contracts. Construction. "Listing" Property. Revised Statutes, chapter 1, section 6, paragraph I.

In construing a written contract the words used are to be taken in the ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense.

Nothing can be more equitable than that the situation of the parties, the subject matter of their transaction and the whole language of their instruments should have operation in settling the legal effect of their contract; but it would be a disgrace to any system of jurisprudence to permit one party to catch another, contrary to the spirit of their contract, by a form of words, which perhaps neither party understood.

The defendant, by written contract, placed certain camp property in the hands of one E. A. Strout for sale, and stipulated with the said Strout, among other things, as follows: "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 one per cent of the asking price, if above $2,000." The said E. A. Strout then assigned the contract to the plaintiff, the E. A. Strout Company. The asking price for the property was $5000. The said Strout did nothing with the property except to receive the description of the same and make the contract with the defendant, and neither did the plaintiff do anything with the property after taking the assignment of the contract. Afterwards the defendant withdrew the sale of the property from the plaintiff and thereupon the plaintiff brought suit against the defendant to recover the commission of $50 or one per cent of the asking price. The plaintiff contended that the property had been "listed" in accordance with the contract and that receiving the description of the property and making the contract with the defendant constituted the "listing" and that therefore it was entitled to recover the $50. In view of the surrounding circumstances and purpose of the contract, *Held:* (1) That the most restricted construction of the word "listed" would at least mean that some mention of the defendant's property should appear in some of the plaintiff's pamphlets advertising property for sale, and which was not done. (2) That the property was not "listed" as the contract required.

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

Action of assumpsit on a written contract to recover the sum of fifty dollars, brought in the Superior Court, Kennebec County. Plea, the general issue. Verdict for plaintiff. The defendant filed a general motion for a new trial and also excepted to several rulings of the presiding Justice during the trial.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Fogg & Clifford, for defendant.

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

SPEAR, J. This is an action of assumpsit by *E. A. Strout Company* v. *Daisy E. Gay*, upon the following count in the plaintiff's writ: "For that the said defendant by her contract by her signed at Farmington Maine, on the 21st day of October, 1905, in consideration of the listing of one E. A. Strout of New York City, state of New York, of certain property of the defendant, then and there promised," etc. The amount claimed was $50. The contract was properly assigned by E. A. Strout to E. A. Strout Company. The contract under which the plaintiff relies reads as follows.

"THE E. A. STROUT FARM AGENCY.

Boston-New York.

Number 10315

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 $5000, clear to me. In case I should sell the property to your customer for less than $5500, I will pay to you or your order a commission of two hundred dollars; or if the sale exceeds $2,000, ten per cent. on the full amount of sale. This commission to be due and payable the day 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 one per cent of the asking price, if above $2,000.

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.

In case any money is paid to me to bind the trade by any of your prospective customers, and they forfeit this money to me as damages for not keeping their part of the agreement, I will pay one half of said money to you.

Agent O. P. WHITTIER.

(signature) DAISY E. GAY."

Dated, Oct. 21, 1905.

The defendent does not deny that she withdrew the sale of her property from the agency. Thereupon the plaintiff claimed it was entitled to $50 or 1 % of the asking price. The only ground upon which the defendant agreed to pay this commission was in consideration of the plaintiff having listed the property. It was therefore incumbent upon the plaintiff to prove that it had done this. It will be observed from reading the contract that listing was the only thing the plaintiff undertook to do. Other than this, the contract was absolutely one sided. The evidence upon which it seeks to establish performance on its part is found in a single question and answer:

Q. And leaving the description and making the contract constitutes listing, does it?

A. Yes, sir.

The real question at issue is the meaning of the word "listed" as used in the contract. The court is of the opinion that it is more comprehensive than the plaintiff contends: In construing a written contract the words used are to be taken in the ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense.

R. S., ch. 1, sec. 6, par. I. *Hawes et al.* v. *Smith*, 12 Maine, 429; Cyc. 9, 578.

The Century Dictionary defines list: "To put into a list or catalogue; register; enroll." This is the common and ordinary sense in which the word is used, and the one in which the defendant undoubtedly understood it, and had a right to so construe its meaning. We are unable to surmise how the plaintiff could conceive that, in the mind of the defendant, the word meant less. It must be held that the plaintiff had reason to know that the defendant would interpret the word as calculated to require something more than taking a description of the property, which she had a right to suppose the plaintiff intended to make an effort to sell.

It appears from the case that the original plaintiff was a real estate broker and had established in this State an agency for the sale of all kinds of real property. The defendant desired to sell her camps, as they are called, and proceeded to the defendant's agency for the purpose of placing them in his hands for sale. In negotiating with the plaintiff, the evidence of which was excluded, the defendant gave a description of her property to the agent and then signed a contract in which the plaintiff agreed to list it. Here another rule of construction may be applied as laid down in *Hawes et al. v. Smith*, 12 Maine, 429, in which the court say: "Nothing can be more equitable than that the situation of the parties, the subject matter of their transaction and the whole language of their instruments should have operation in settling the legal effect of their contract; but it would be a disgrace to any system of jurisprudence to permit one party to catch another, contrary to the spirit of their contract, by a form of words, which perhaps neither party understood." In view of this rule, it seems incredible under the circumstances of this case that either party of this contract should have understood the word "list," to mean the mere filing of an inventory of the property to be sold, with the agency of the plaintiff. In view of the surrounding circumstances and the purpose of the contract, we are of opinion that the most restricted construction of the word "list" would at least convey a meaning as broad as the definition above quoted from the Century Dictionary, that is, to cata-

logue, register or enroll, so that some mention of the property would appear in some of its pamphlets advertising property for sale.

There is evidence in the record which tends to show that this was the interpretation placed upon the word by the plaintiff itself. One of the exhibits reads upon the cover, which contains an attractive illustration of a house and surroundings, Strout's List No. 19. Another, Supplement A. to Strout's List No. 19. And still others with different headings. While it does not appear that these documents were shown to the defendant, during the negotiations for the listing of her property, they yet may be considered as a circumstance tending to show the proper interpretation of the language used in the contract.

The plaintiff's own evidence shows that it did not comply with the terms of its contract as herein interpreted by the court. It failed to list the property as the contract required. As the verdict was against the law and the evidence, the exceptions need not be considered.

Motion sustained.
New trial granted.

In Equity.

JOHN A. ERSKINE et als.

vs.

WISCASSET AND QUEBEC RAILROAD COMPANY et als.

Lincoln. Opinion February 8, 1909.

Railroad Location. Width of Location. More than Four Rods may be Taken, When. Bridges over Highways. Railroad Commissioners may Require Railroad to Build Same. Railroad Estopped to Deny Location, When. Excavation Widened by "Natural Elements" Does not Widen Location. Statute, 1889, chapter 282, section 2. Revised Statutes, 1883, chapter 18, section 27; chapter 51, sections 6, 14, 15.

In 1894 the Wiscasset & Quebec Railroad Company filed, in attempted compliance with statutory requirement, with the clerk of the county commissioners of Lincoln County, a "location" of its proposed railroad through the town of Alna. The statute permitted a railroad company to take land for its location not "to exceed four rods in width, unless necessary for excavation, embankment or materials," and required that the "location" filed with the commissioners should show the boundaries of the land taken. The "location" filed described only a single line, and the width of the land taken was not given. Thereafter, upon application by the company, the railroad commissioners, acting under statute authority, and apparently assuming the "location" filed to be legal and effective, authorized the company to excavate through a certain highway in Alna to such depth as might be necessary to grade its railroad, and required it to construct a bridge over the railroad track across the excavation "within the location of said railroad." Later the company excavated through the highway to a depth of about thirty-three feet, and about one hundred and twenty feet in width at the surface of the ground. In 1898, on a bill in equity brought by the selectmen of Alna against the company, it was ordered to construct a bridge "in accordance with the adjudication and report of the railroad commissioners." No bridge has ever been constructed. In 1897, after the bill in equity had been brought, but before the decree of the court, the company filed a new "location," as it had a statutory right to do, in which the land taken was described as a strip four rods wide, of which the line described in the prior location was the center. Since the excavation was originally made, it has become widened somewhat by the action of the natural elements. The Wiscasset, Waterville & Farmington Railway Company is the present owner of the railroad, having succeeded to the title and to the duties of the Wiscasset & Quebec Railroad Company.

In a bill in equity, brought by the present selectmen of Alna, praying for a mandatory injunction to require the present owner of the railroad to perform the judgment of the railroad commissioners, and the former decree of the court, *Held:*

1. That the railroad company had a lawful right by filing a sufficient "location," to take a strip of land at the point in controversy, not only four rods in width, but as much wider as was necessary for the excavation authorized.
2. That the Wiscasset & Quebec Railroad Company, after securing the adjudication of the railroad commissioners, after the actual taking of the land under it, and after being heard in its defense on the original bill in equity, and after judgment thereon, is estopped, in this proceeding, to deny that it had a legal location, as wide as it had a lawful right to acquire, and which it actually did take, although in fact the "location" filed was ineffective, because it failed to give the boundaries of the land taken.
3. That the present owner, having succeeded to the title and the duties of the Wiscasset & Quebec Railroad Company, is in like manner estopped.
4. That the obligation of a railroad company, when it builds its road across a public way, to bear, or share in, the expenses of putting the way into a condition for travel is, in this State, a statutory one, of which the railroad commissioners have jurisdiction; and that they may lawfully require the company to erect at its own expense a bridge over the excavation made by it, so far as the same is within the railroad location.
5. That the rights of the town of Alna had become fixed prior to the new location in 1907, and that the company could not, so far as the town is concerned, limit the town's rights by a new location narrower than the land actually taken.
6. That the widening of the excavation by the action of the natural elements has not widened the location, nor has it added to the responsibility of the railroad company, and that the present owner is obliged to construct a bridge only for the width of the original excavation.

In equity. On report. Decree according to opinion.

Bill in equity for a mandatory injunction, brought by the selectmen of Alna against the Wiscasset & Quebec Railroad Company and its several successors, including the Wiscasset, Waterville & Farmington Railway Company which now owns and operates the railroad formerly constructed by the Wiscasset & Quebec Railroad Company, seeking to enforce the performance of a decree made by the Supreme Judicial Court sitting in Lincoln county, in October, 1898, on a bill filed April 23, 1895, by the selectmen of Alna, wherein the Wiscasset & Quebec Railroad Company was ordered to erect or cause to be erected within a certain time, a suitable and

substantial highway bridge over and across its railroad track and over and across the excavation made by it across a certain highway in said Alna. The Wiscasset, Waterville & Farmington Railway filed an answer to the bill. The other defendants did not answer. When the cause came on for hearing, several agreements and admissions were made and the case was then reported to the Law Court for determination.

The case is stated in the opinion.

Wm. N. Titus, O. D. Castner, and Charles L. Macurda, for plaintiffs.

Norman L. Bassett, for Wiscasset, Waterville & Farmington Railway Company.

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

SAVAGE, J. This case comes up on report. It is a bill for a mandatory injunction, brought by the selectmen of Alna against the Wiscasset & Quebec R. R. Co. and its several successors, including the Wiscasset, Waterville & Farmington Railway Co. which now owns and operates the railroad formerly constructed by the Wiscasset & Quebec R. R. Co. The plaintiffs seek to enforce the performance of a decree made by the Supreme Judicial Court sitting in Lincoln county, in October, 1898, on a bill filed Apr. 23, 1895, by the selectmen of Alna, wherein the Wiscasset & Quebec R. R. Co. was ordered "to erect or cause to be erected by the first day of September 1898 (?), a suitable and substantial highway bridge over and across its railroad track and over and across the excavation made by it across the highway in Alna, at the place named in the complainant's application, said bridge to be located in accordance with the adjudication and report of the railroad commissioners heretofore made." The adjudication of the railroad commissioners referred to was made June 12, 1894, and is in these words: — "The railroad company (The Wiscasset & Quebec R. R. Co.) is hereby authorized and empowered to excavate through and under said way at point of crossing, to such depth as may be necessary to grade said railroad,

and said corporation shall thereupon erect and maintain a suitable and substantial highway bridge over said railroad track; said structure shall be supported on suitable stone abutments, or upon substantial wooden trestles. Said bridge shall be at such height above the railroad track as will give a space or head room of at least twenty feet between the track and the lower part of the stringers of said bridge. Said bridge and top of the approaches thereto shall not be less than twenty feet in width, and said bridge and the approaches thereto, within the location of said railroad, shall be constructed and maintained by said railroad company in such manner that the same shall be safe and convenient for travelers on said way with horses, teams and carriages."

Under this judgment of the railroad commissioners, the railroad company, in June, 1894, excavated through the said highway, at the point of crossing, to the depth of about thirty-three feet, and about one hundred and twenty feet in width at the surface of the ground, and constructed its railroad track across the way, at the bottom of the excavation, and there operated its railroad.

The obligation of a railroad company when it builds its road across a public way, to bear, or share in, the expenses of putting the way into a condition for travel is, in this State, a statutory one, of which the railroad commissioners have jurisdiction. They are to determine the manner and conditions of crossing. Laws of 1889, c. 282, s. 2; R. S., 1883, c. 18, s. 27. And it is not questioned that the railroad commissioners might lawfully require the railroad company to erect at its own expense a bridge over an excavation made by it and construct the approaches to it, so far as the same were within the railroad location. Laws of 1889, chap. 282, sect. 2; R. S., 1883, chap. 18, sect. 27.

It is conceded that the decree of the court made in 1898 has not been performed, and that no bridge of any kind or length has ever been erected by anyone. No reason is offered why one should not be erected. In fact, the Wiscasset, Waterville & Farmington Railway Co., upon which rests the obligations of the original railroad company, in its answer says that it "is under the obligation to construct and maintain so much of said bridge and the

approaches thereto as are within the location of said railroad," but claims that it is not obliged to erect or maintain any part of a bridge or approaches outside the boundaries of its location. It claims that its location is only four rods wide. The company prays that its duty may be so determined and limited by the decree in this case. On the other hand, the plaintiffs contend that under the former decree of the court the railroad company is bound to build a bridge across the entire width of the excavation. Thus the only question which the court is called upon to determine is the length of the bridge and approaches which the company is bound to erect.

The decree of the court was that the bridge should be erected in accordance with the adjudication of the railroad commissioners, and that adjudication was that the bridge and the approaches thereto, "within the location of said railroad" should be constructed by the railroad company. The statute did not give the commissioners any jurisdiction to order the building of a bridge, or a part of one, outside the railroad location, and they did not assume to do so. We think the statute giving the railroad commissioners jurisdiction in this class of cases contemplated that the excavation made in crossing a highway would all be within the railroad location, for another statute, R. S., 1883, ch. 51, sect. 14, empowered a railroad to take, without regard to width, all the land for its location which excavations made necessary, though the width of a location was in general limited to four rods.

The statute also contemplated, and so expressly declared, that the manner and conditions of crossing should be determined before the company entered upon the construction of the railroad. Public Laws of 1889, chap. 282, sect. 2. And since it might become proper in the course of actual construction to change the contemplated grade of the road, and for that purpose to deepen the excavation, and also its width, it could not be certainly known at the time of adjudication just how wide the excavation would be, and how much land it would become necessary to take. And thus it might become necessary to take more land, which it could do under section 14 of chapter 51 of the Revised Statutes of 1883. And even if, after the roadway had been built, it was found that the

land actually embraced by it had not been acquired by a previous taking, it might correct and perfect its location by a new taking under section 15. But it was to be presumed that a railroad company would exercise its rights in such instances and take land for locations wide enough for its necessities. If it exceeded its rights and excavated land which it had not legally taken, that fact did not extend the jurisdiction of the railroad commissioners, unless the statute method prescribed in section 15 was followed by the company. Other methods of prevention or remedy were open to injured parties.

We think the jurisdiction of the railroad commissioners extended to the full width of the railroad location as it then was, or as it might afterwards become by lawful taking, but no farther; and that their adjudication in 1894 must be so construed.

Nor did the court undertake, if, indeed, it had the power, to make its decree broader than the order of the railroad commissioners.

So that the question resolves itself to this:—How wide was the railroad location at the point of crossing, or how wide did it lawfully become? The defendant contends that it was never more than four rods wide. As already stated, the extreme width permitted by the statute was four rods, except when necessary to take more land by reason of excavations and enbankments. R. S., chap. 51, sect. 14. To answer the question we must first look to the records. By R. S., 1883, chap. 51, sect. 6, it was provided, as a preliminary and essential step towards the taking of land for a railroad location, that the company should "file with the clerk of the county commissioners of each county through which the road passes a plan of the location of the road, defining its courses, distances and boundaries." A like copy was to be filed with the railroad commissioners, who were authorized to approve the location, upon petition, after notice and hearing. In 1893 or 1894, prior to the adjudication by the railroad commissioners, the Wiscasset & Quebec R. R. Co. filed, as is alleged and admitted, with the county commissioners of Lincoln county, a "location" of its railroad from Wiscasset, through Alna to the county of Kennebec, which was, as we understand, in attempted compliance with the foregoing requirement of the statute. A copy

of this location is in the record before us. It gives only the description of a single line, beginning at a definite point in Wiscasset and running with definite courses and distances, through Alna, to the Kennebec county line. It does not state whether this is the center or the side line of the location. Nor does it state the width of the location. It fails therefore to give, as the statute required, the "boundaries of the location." Such a "location" was plainly imperfect and ineffective. By it the company did not take any land, and had no statutory location. The present defendant, however, does not seek to avoid its responsibility on this account. It shows that in 1897, after the original bill was filed, but before the decree, a new location was filed with the county commissioners, under section 15, which set out that the original location failed to acquire land actually embraced in its roadway, and that that location was defective and uncertain. The new location described a location four rods in width; the center line of which was, so far as the Alna crossing is concerned, the line described in the original location. And the defendant contends that this proceeding corrected and perfected its location, and limited it at all places to a strip four rods wide, and further, as we understand the contention, that it related back and made it a four rod location as of the time of the attempted location; and further still, that, by relation back, the location referred to in the adjudication of the railroad commissioners must now be deemed to be of the width of the location, as corrected.

We may pass for a moment the effect of the later location. Though the original location was defective and ineffective, yet, we think the Wiscasset & Quebec R. R. Co. cannot now be permitted to deny, in this proceeding, and as against these plaintiffs, that it had a location in Alna. Nor can this defendant, its successor, deny it. After securing the adjudication of the railroad commissioners, after the actual taking of the land under it, and after being heard in its defense in the original bill in equity, and after judgment thereon, it is estopped to deny that it had a location of some width. And so is this defendant. It is also now estopped to deny the necessity of taking as much land as was taken. But how wide was that location? Was it two rods? or three rods? or four rods? or

more? It might have been either. We think the question is to be answered by the acts of the railroad company itself, by the width of the land it actually took and used. We think, disregarding now the new location in 1897, that it is estopped to deny that it had a location as wide as it had a lawful right to acquire and which it actually did take. By actually taking land in the limits within which it might lawfully condemn, it fixed, as to the interests represented by these plaintiffs, the limits of the location.

But the defendant contends that the corrected location should control the conclusion thus reached, and that the decree made after the location was corrected may be presumed to have been made upon the changed situation. The decree is silent as to this, and properly it could only have been made upon the allegations of the bill filed in 1895. However, without resting our decision upon this ground, we think that the rights of the town of Alna had become fixed prior to the new location in 1897, and that it did not lie in the power of the railroad company to modify or limit them, by a subsequent location, narrower than the land actually taken.

It follows that the bill must be sustained against the Wiscasset, Waterville & Farmington Railway Company. If that company shall not erect, or cause to be erected, within four months after the certificate of this decision is received, a suitable and substantial highway bridge, over and across its railroad track, and over and across the excavation made by the Wiscasset & Quebec R. R. Company, across the highway in Alna, at the place named in the original application, said bridge to be erected in accordance with the adjudication and report of the railroad commissioners, hereinbefore referred to, and to extend across the full width of the excavation as it was made by the company at the time of construction, or prior to the making of the former decree, then a decree therefor, with mandatory injunction, will be made by a single Justice. Costs will be awarded to the plaintiffs in any event.

To prevent any misunderstanding, we will add a word further. It appears that since 1898, the opening made by the excavation has been widened by the action of the natural elements. We do not think this has added to the defendant's responsibility. The location

for which the defendant is responsible is the one which its predecessor made. The breaking down or the caving in of a bank of a railroad cut does not widen the location. If the parties cannot agree upon the width of the excavation and location as made by the railroad company, a master will be appointed to ascertain and report the fact.

Decree in accordance with the opinion.

GEORGE M. BONNEY *vs.* PHILO C. BLAISDELL.

Waldo. Opinion February 10, 1909.

Sales. Contracts. Breach. Waiver of Stipulations. Time of Delivery. "Remediable Faults." Measure of Damages.

The plaintiff sold to the defendant a gasolene launch, and agreed to put the boat into commission and "have the same ready for delivery between June first and ninth," 1906. The launch was not prepared for delivery until sometime after June 9. On June 21, the plaintiff informed the defendant that the launch was "ready for trial." On the day following, both parties went out in her for a trial trip. On the trip several trivial and easily remediable defects in the engine were disclosed. On the same day, June 22, the defendant notified the plaintiff that he would not take the launch, assigning no reasons other than the imperfections in the engine. Afterwards the plaintiff let the launch and then sold her for less than the defendant had agreed to pay.

Held: (1) If the time named for the delivery of the launch was of the essence of the contract, the evidence was plenary that strict performance of this stipulation was waived by the defendant.

(2) In such case, it was the duty of the plaintiff to be prepared to deliver the launch within a reasonable time.

(3) It must be assumed that it was, or ought to have been, fairly within the contemplation of the parties that if trivial and easily remediable faults, such as existed in this case, were disclosed on the trial trip, the proffer of which the defendant had accepted, a reasonable opportunity was to be had to cure them. Such would be an obvious purpose of a trial trip.

(4) The refusal of the defendant to take the launch without giving the plaintiff a reasonable further time to remedy the troubles which were found, was, under the circumstances, unwarrantable, and was a breach of his contract.

(5) The evidence does not support the defendant's claim that the plaintiff assented to a recission of the contract.

(6) The plaintiff is entitled to recover the difference between the contract price and the fair market value of the launch at the time of the breach of the contract.

On report. Judgment for plaintiff.

Action of assumpsit to recover damages for breach of a contract for the sale of a gasolene launch. Plea, the general issue.

Tried at the September term, 1908, Supreme Judicial Court, Waldo County. At the conclusion of the testimony, 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 is stated in the opinion.

Dunton & Morse, for plaintiff.

W. P. Thompson, for defendant.

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

SAVAGE, J. Action to recover damages for breach of contract. The case comes up on report. By written contract dated June 1, 1906, made in pursuance to a previous oral agreement, the plaintiff agreed to sell and deliver his gasolene launch named "Naoma" to the defendant for $10,000 and the defendant's launch "Ellie," which was in the trade called worth $3,000. The defendant agreed to pay the $10,000 and to put his yacht in commission and deliver her to the plaintiff "in Boston Harbor at the earliest possible date, and not later than June 20, wind and weather permitting." The plaintiff further agreed "to put his vessel in commission and have same ready for delivery between June first and ninth." The parties mutually agreed to put their boats "in as good order and condition as though they were to be used by themselves, with their full equipment and inventories on board." The plaintiff did not put his boat in commission, and it was not prepared for delivery, until sometime

after June 9. The defendant made a partial payment of $500. The yacht Naoma was then in the Baker Yacht Basin in Quincy, Mass. June 18, for certain personal reasons, the defendant, by letter, asked the plaintiff to release him from the contract. In reply the plaintiff wrote that he should expect the defendant to take the boat as agreed, and that he should get it in order as soon as possible. June 21 the plaintiff wired his agent in New York that the boat was "ready for trial." This information was communicated to the defendant, and June 22 he arrived in Boston and went to the "Yacht Basin." The two parties and others started to make a trip in her. After a little while the engine began to miss explosions and finally stopped entirely. The trouble arose from an imperfectly adjusted clutch, and from the fact that the two forward cylinder inlet valves were not properly ground. The clutch had been put in new since the last season. The difficulty had not been discovered until they were out on this trip. After the engine stopped the parties were set ashore, and on the same day the defendant notified the plaintiff that he would not take the boat, and ever afterwards persisted in the refusal. Within a day or two the trouble with the engine was remedied by grinding the valves and adjusting the clutch and reverse gear, taking one man less than one day's time. Later the plaintiff chartered the boat for ten weeks, for which he received $1,400, and in the following winter sold her for $8,000.

Upon these facts the plaintiff claims to recover for breach of the contract to accept and pay for the boat.

The defense as stated in argument is three fold. First, that the defendant was justified in refusing to accept the boat, because of the failure of the plaintiff to have the boat ready for delivery in reasonably good order and condition on or before June 9th; secondly, that the plaintiff acceded to the recission of the contract by the defendant; and lastly, that the plaintiff has not shown that he was damaged.

The defendant contends, in the first place, that the time mentioned in the contract for the delivery of the boat was of the essence of the contract, that he had a right to insist upon performance, that is, having the boat ready for delivery by June 9th, and that

the failure of the plaintiff in that respect relieved him from any further responsibility. It will not be necessary to determine whether this point is well taken in law, for the evidence is plenary that the defendant waived strict performance of this part of the contract. Later than June 9 he was at the "Yacht Basin" advising about the work then being done on the yacht. In his letter of June 18 he asked to be released from the contract, and intimated a willingness to compensate the plaintiff therefor. And on June 22 he went to Quincy to try the yacht, and made no complaint that day of the delay. When he refused to take the yacht, he did so, not on the ground that she was not ready for delivery on contract time, but because, as he expressed himself in a letter to the plaintiff's New York agent, "the trial today was a complete failure." Moreover, the uncontradicted testimony of the plaintiff is that the defendant expressly assented to some delay at least.

The defendant having waived strict performance as to time, it was the duty of the plaintiff to be prepared to deliver the yacht within a reasonable time. Upon this hypothesis the defendant says he should have been prepared to deliver her on June 22nd. We do not think this follows. The plaintiff was to put the yacht in commission in good order and condition. That means that the boat and her engine and machinery were to be in a good practical, workable condition, all fitted to do their several parts well. The plaintiff had an old, imperfect clutch replaced by a new one, adjusted by an engineer sent by the concern that made the engine. The engine was then tested by running it while the yacht was tied to her moorings. It seemed to work satisfactorily. Then the plaintiff made a proffer of a "trial trip," which was accepted by the defendant. The trial trip was made June 22 and disclosed faults, but trivial, and quickly and easily remedied faults, faults that were quickly remedied by grinding two valves and adjusting a clutch and the reverse gear. Can it be said that under such conditions it was not reasonable that the plaintiff should be permitted to remedy such faults, if he did so within a reasonable time? We think not. One obvious purpose of a "trial trip," among others, is to discover if there are any faults. It is assumed that there may be. And we think it is to be assumed

that it was, or ought to have been, fairly within the contemplation of the parties that if faults were disclosed, such as existed in this case, a reasonable opportunity was to be had to cure them.

The defendant claims further that as late as June 29, the engine needed a "new and dry spark coil." The only evidence of this, however, is found in a letter written by a third party to one who had been the plaintiff's agent in the sale. It is hearsay, is not admissible, and cannot be considered. If it were otherwise, it would only show another fault, as trivial and as remediable as the others.

We conclude, therefore, that it was not unreasonable that the plaintiff be allowed reasonable further time after the "trial trip" to remedy the troubles which were found.

But the defendant, not waiting for such time to elapse, on the afternoon of June 22, sent an oral message to the plaintiff, and a letter to the plaintiff's agent, refusing to take the yacht. In his letter he said, "I am not going to wait for Mr. Bonney to get her into condition." Unless the plaintiff assented to this refusal, we think this was a breach of the contract.

Did the plaintiff assent? It appears that after failure of the "trial trip" the plaintiff and defendant had a conversation on their way in to Boston. The defendant testified that he asked him if he expected him to take the boat in the condition she was in, and that the plaintiff answered, "No." The plaintiff testified as follows: "I told Mr. Blaisdell that I was very sorry that the engine went wrong, and that I felt that it was the fault of an incompetent engineer in not putting the valves in proper order, and Mr. Blaisdell said he had left an important directors' meeting in order to try the boat, and I offered to make an allowance to him. Mr. Blaisdell said he wouldn't decide until later, that he would think the matter over." These statements are not contradictory, and we assume both to be true. But they do not show assent to a recission of the contract.

The defendant, in support of the theory of such an assent, places great stress upon the fact that the plaintiff afterwards chartered the boat to another, and then sold her. Why should he not? The

defendant had refused to take her. The boat was the plaintiff's, and he had no option but to keep her. He had a perfect right to charter or sell her. It did not concern the defendant what he did with her. The defendant had repudiated any claim he might have for her. It is elementary law that when a purchaser unjustifiably refuses to accept the thing purchased, he simply becomes liable to respond in damages. The thing remains the property of the vendor, just as if there had never been any contract of sale.

No valid defense has been shown, and the plaintiff is entitled to recover the difference between the contract price and the fair market value of the yacht, at the time of the breach, in other words, the profit of his bargain. *Bush* v. *Holmes*, 53 Maine, 417. The evidence is meager and not very satisfactory. But we think the plaintiff should have judgment for $3100 and interest from the date of the writ.

Judgment for plaintiff accordingly.

STATE OF MAINE *vs.* PANIEL KAPICSKY.

Androscoggin. Opinion February 10, 1909.

Nuisances. Intoxicating Liquors. Places of Resort. Social Clubs. Indictment. Evidence. Mass. Statute, 1887, chapter 206, section 1. Revised Statutes, chapter 22, section 1.

Section 1 of chapter 22 of the Revised Statutes, provides that "all places used . . . for the illegal sale or keeping of intoxicating liquors, and all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided for by law, are common nuisances." *Held:* That it was the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drank or dispensed in any manner not provided for by law."

Under the provisions of Revised Statutes, chapter 22, section 1, any place that is resorted to, that is, a place of resort for the mere purpose of drinking intoxicating liquors, is a nuisance; any place of resort where intoxicating liquors are illegally kept, is a nuisance; any place of resort where intoxicating liquors are given away, is a nuisance. And any person keeping or maintaining such a place may be punished therefore as provided by statute.

Under the statute, a place of resort is a nuisance if used by a club either to sell intoxicating liquors to its members, or to distribute among its members intoxcating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquors which are bought for and belong to them individually.

If a club, by its agent, purchases and stores intoxicating liquors for its members, and deals out in portions to each member upon his order the liquors belonging to and kept for him, and keeps a place for that purpose, such place is a common nuisance under the statute.

Where the defendant was indicted under Revised Statutes, chapter 22, section 1, for maintaining a common nuisance, to wit, keeping and maintaining a certain tenement as a place of resort where intoxicating liquors were unlawfully kept, sold, given away, etc., from the first day of May, 1908, to the day of the finding of the indictment at the September term, 1908, of the Supreme Judicial Court, Androscoggin county, *Held:* That it was not incumbent upon the State to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of

such purposes during any part of the time comprised within the days named in the indictment, would warrant a conviction. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense. The case is made out, the offense is committed, if for a single day between those dates that place was so used. If for a single hour in the day it was so used, for that hour it was a common nuisance and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.

On exceptions by defendant. Overruled.

The defendant, a member of the St. Bartholomew Society, of Lewiston, was indicted under the provisions of Revised Statutes, chapter 22, section 1, for keeping and maintaining a common nuisance. Verdict, guilty. During the trial, the defendant excepted to several rulings made by the presiding Justice.

The case is stated in the opinion.

The indictment was as follows:

"STATE OF MAINE.

"Androscoggin, ss. At the Supreme Judicial Court begun and holden at Auburn within and for the County of Androscoggin, on the third Tuesday of September in the year of our Lord one thousand nine hundred and eight the grand jurors for said State upon their oath present, that Paniel Kapicski of Lewiston, in said County of Androscoggin, laborer, on the first day of May in the year of our Lord one thousand nine hundred and eight, and on divers other days and times between that day and the day of the finding of this indictment, at Lewiston, aforesaid, in the County of Androscoggin, aforesaid, did keep and maintain a certain place to wit: a tenement there situate, then and on said divers other days and times there used for the illegal sale and for the illegal keeping of intoxicating liquors and where on that day and on said divers other days and times intoxicating liquors were sold for tippling purposes, and which said place was then and on said divers other days and times there a place of resort where intoxicating liquors then and on said divers other days and times were there unlawfully kept, sold, given away, drank and dispensed, and which said place, being so used as aforesaid, was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said

State, against the peace of said State, and contrary to the form of the statute in such case made and provided.

"A True Bill,

"I. B. Isaacson, Foreman.

"Frank A. Morey, Attorney for the State for said County."

Frank A. Morey, County Attorney, for the State.
George S. McCarty, for defendant.

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

WHITEHOUSE, J. This is an indictment against the defendant under section 1 of chapter 22 of the Revised Statutes, for maintaining a common nuisance from the first day of May, 1908, to the day of the finding of the indictment at the September term, 1908, of court in Androscoggin county. It is alleged that the defendant kept and maintained a certain tenement as a place of resort where intoxicating liquors were "unlawfully kept, sold, given away, drank and dispensed in a manner not provided for by law."

The defendant was one of 204 members of the St. Bartholomew Society occupying the premises mentioned in the indictment. The Society had occupied the premises from April, 1908, to the time of the trial of the case in September. The premises consisted of one large lodge room, a billiard room and a small bar room so called, in connection with the latter. The Society itself was regularly organized, having a constitution and by-laws and from the dues assessed to the members, sick and death benefits were paid. The billiard room was open practically all of the time for the recreation of the members. The defendant claimed that the bar room was open three times each week and that at these times cigars and non-intoxicating drinks were sold to the members, the profits of the sales being devoted to the payment of rent, lights, heat and other expenses incident to the running of the rooms. A member of the Society acted as janitor and keeper of the bar room, each in turn for two weeks and without compensation.

The State introduced evidence tending to prove that on two separate occasions during the time mentioned in the indictment,

intoxicating liquors were sold upon the premises by the respondent. The first occasion was on the evening of August 29, when the officer looking through a window saw the defendant making numerous sales of what they claimed to have been ale; the other occasions that of September 5, when the officers looking through a hole in the curtain overhanging this same window, saw the respondent making sales of beer alleged to be intoxicating and later in the evening searched the premises and found the beer which proved upon analysis to contain sufficient alcohol to be in fact intoxicating. The defendant claimed that the beer seized was bought in common by the members of the Society in anticipation of labor day, September 7, each contributing a certain amount for which he was to receive his proportionate part of the beer. It was in evidence that some of the members began to drink their allowance during the afternoon of September 5, and that the drinking continued and was in progress from that time to the time of the seizure late in the afternoon.

The jury returned a verdict of guilty and the case comes to this court on exceptions to certain instructions to the jury given in the charge of the presiding Justice.

It is provided by section 1 of chapter 22 of the Revised Statutes that "all places used . . . for the illegal sale or keeping of intoxicating liquors, and all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided for by law, are common nuisances."

It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drank or dispensed in any manner not provided for by law." *State* v. *McIntosh*, 98 Maine, 397; *State* v. *Stanley*, 84 Maine, 555.

But it is not incumbent upon the State to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment, will warrant a conviction. *Commonwealth* v. *Mitchell*, 115 Mass. 141, and cases cited. In *Commonwealth* v. *Gallagher*, 1 Allen, 592, the defendants erected a temporary tent or booth, constructed of boards and covered with cloth, and on the following day had there several kinds of intoxicating liquors, and between the hours of nine and eleven o'clock in the forenoon, made four or more sales of such liquors. The land on which the booth was erected was hired for three days, but the booth was torn down by the officers at eleven o'clock of the first day.

The defendants were found guilty of maintaining a common nuisance. In the opinion the court says: "The evidence was sufficient to warrant the jury in convicting the defendants. A disturbance of the public peace by the assembly of noisy and dissolute persons, the illegal sale of intoxicating liquors, and other similar acts which tend to make disorder and injure public morals, and thus to create a common nuisance in a house or tenement, may be proved to have occurred in the course of a few hours as well as during a number of days, a week or a month. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense."

In the case at bar the presiding Justice correctly defined the word resort and sufficiently explained the meaning of the phrase "place of resort," as employed in the statute. The following instruction was then giving to the jury:

"All places of resort where liquors are 'given away', and again all places of resort where liquors are 'drank,' even if they are not 'sold' or 'given away,' if it is a place of resort under the definition I have given you, and, when there, those men drink the liquor which is intoxicating, that makes it a nuisance under the laws of this State."

In further defining what constitutes a nuisance under the law, the presiding Justice used the following quotation in instructing the jury, viz:

" 'Among other things the legislature has said, and it applies to this case, that any place of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided for by law, is a nuisance. Any place that is resorted to, that is, a place of resort for the mere purpose of drinking intoxicating liquors, is a nuisance; any place of resort where liquors are illegally kept is a nuisance; any place of resort where liquors are given away is a nuisance. It must be a place of resort; and then the statute goes on to say that any person keeping or maintaining such a place shall be found guilty and be punished therefor.' "

" 'In this case, the State says, that between the first day of May last, and the day of the finding of this indictment, at some time between those dates, this place described here, the tenement and so forth, was a place contrary to the form of this statute, a place of resort, and that at that place of resort at some time during this space of time, liquors were kept, sold, given away, drank, or dispensed in some manner not provided by law. The State need not prove that this place was so kept and used during the whole of that time. The case is made out, the offence is committed, if for a single day between those dates that place was so used. Nay, if for a single hour in the day it was so used, for that hour it was a common nuisance and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance.' "

"It makes no difference, you see, under this statute whether the men were joined as a club and chipped in in advance,—contributed their sixteen cents and bought this liquor and paid for it and had it come,—if when it came there it was drank there on the premises—premises resorted to—that would be no defense whatever."

To these instructions the defendant has exceptions. But it will be observed upon examination of the language used that it is for the most part essentially a restatement of the terms of the statute, and that the comments of the presiding Justice as well as the paragraphs quoted by him are in entire harmony with the previous rulings and

decisions of this court as well as the authorities cited from Massachusetts, and are obviously a correct interpretation of the true meaning and purpose of the statute.

In support of the last paragraph of the instructions to which exceptions were taken, that "it makes no difference under this statute whether the men were joined as a club and chipped in in advance and bought the liquor if when it came there it was drank on the premises resorted to," the case of *Commonwealth* v. *Baker*, 152 Mass. 337, may be cited as an authority. That was an indictment for maintaining a nuisance under the Massachusetts statute of 1887, chapter 206, section 1, which provided that "All buildings or places used by Clubs for the purpose of selling, distributing or dispensing intoxicating liquors to their members or others, shall be deemed common nuisances." In the opinion the court says: "A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member upon his order the liquor belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute."

Finally the defendant's counsel requested the following instruction: "In order to find the respondent guilty of maintaining a common nuisance, the jury must find that the place mentioned in the indictment must have been habitually, commonly used for the purpose."

The presiding Justice gave this instruction in the following language: "This is the law of the State, but there is no limit as to the time as I have stated to you. A nuisance may be maintained and kept in two hours or two weeks or two days if you find the facts are sufficient."

It has already been seen that this instruction respecting the length of time during which it must appear that the nuisance was maintained in order to warrant a conviction is directly and fully

supported by *Commonwealth* v. *Gallagher*, 1 Allen, 592, above cited.

It is accordingly the opinion of the court that when all of the instructions to which exceptions were taken, are considered in their proper relations to the entire charge, and applied to the facts in evidence in this case, no exceptionable error is disclosed. The certificate must therefore be,

Exception overruled.
Judgment for the State.

ELISHA T. HUTCHINSON, Appellant,

vs.

INHABITANTS OF CARTHAGE.

Franklin. Opinion February 16, 1909.

Paupers. Overseers of the Poor. Duties of Same. Contagious Diseases. Quarantine. Board of Health. Revised Statutes, chapter 18; chapter 27, sections 2, 11.

It is made the duty of the overseers of the poor of the town where a person may be found in distress to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself, but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer while the officers were deliberating as to the extent of their official duty and the nature of their remedy.

If the overseers of the poor act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law.

The doctrine that the overseers of the poor may make a contract for the relief and support of those found in need of relief in their town, is well established.

It is immaterial whether a person in need is brought into that condition by quarantine, neglect of the board of health or otherwise, inasmuch as it is the fact of the situation not the method of producing it, that requires the action of the officers of a town.

The plaintiff brought an action to recover $25 for services alleged to have been rendered by him for the defendant town through a contract with the overseers of the poor. The evidence showed that Samuel Kittridge, his wife and several children were taken ill with the measles, quarantined by order of the board of health and left in this helpless situation without nurse or attendant. So serious was the condition of the father and mother that they both died from the results of the disease. Under the stress of these circumstances, the attending physician called upon one of the selectmen and overseers of the poor who, when informed of the situation, with one of his associates made a personal investigation and then, with the approval of both of his associates, employed the plaintiff to take charge of the afflicted family. After the death of Mr. Kittridge, while he had no real estate, nor money in a bank, it was discovered that he had a small amount of personal property all in chattel form, estimated to be about $200, after payment of debts. The defendant town admitted that the services charged for were rendered for the Kittridge family and that the amount claimed was reasonable. The presiding Justice ordered a verdict for the plaintiff and the defendant town excepted.

Held: (1) That the verdict was rightly ordered upon the question of fact.

(2) That Revised Statutes, chapter 27, sections 2, 11, providing that "towns shall relieve persons having a settlement therein, when, on account of poverty, they need relief," is absolute in its terms and was not repealed expressly or by necessary implication by the act, R. S., chapter 18, creating the board of health.

(3) That R. S., chapter 27, section 2, only applies to cases where the settlement of the pauper is in question, and that that question did not arise in the case at bar.

On exceptions by defendants. Overruled.

Action of assumpsit brought in the Municipal Court of Farmington, Franklin County, to recover the sum of $25 for services rendered by the plaintiff to the defendant town by virtue of an alleged contract with the overseers of the poor of the defendant town whereby the plaintiff took care of Samuel Kittridge and his family, residents of the defendant town, while sick with a contagious disease. Plea, the general issue. By appeal on the part of the plaintiff, the action was transferred to the Supreme Judicial Court in said county and was tried at the May term thereof, 1908. At the conclusion of the testimony, the presiding Justice ordered a verdict for the plaintiff for the amount sued for and the defendant town excepted.

The case is stated in the opinion.

Nathan G. Foster, for plaintiff.

Joseph C. Holman, for defendants.

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

SPEAR, J. This is an action of assumpsit for the recovery of $25 for services alleged to have been rendered by the plaintiff for the defendant town through a contract with the overseers of the poor. It appears from the evidence that Samuel Kittridge, his wife and several children were taken ill with the measles, quarantined by order of the board of health and left in this helpless situation without nurse or attendant. So serious was the condition of the father and mother that they both died from the results of the disease. Under the stress of these circumstances, the attending physician called upon one of the selectmen and overseers of the poor who, when informed of the situation, with one of his associates made a personal investigation and then, with the approval of both of his associates, induced the plaintiff, much against his inclination, to accept the employment of administering care to the afflicted family. After the death of Mr. Kittridge, while he had no real estate, nor money in a bank, it was discovered that he had a small amount of personal property all in chattel form, estimated by the administrator to be about $200 after payment of debts. The defendants admit that the services charged were rendered for the Kittridge family and that the amount claimed is reasonable.

Upon this state of facts, the defendants say that the order of the verdict for the plaintiff was erroneous, first, because there was sufficient evidence to raise the question of fact which should have been submitted to the jury whether the selectmen or overseers of the poor acted as agents of Mr. Kittridge or as agents of the town; second, that it was the duty of the board of health to "furnish medical treatment and care for persons sick with such diseases who cannot otherwise be provided for;" third, that the overseers of the poor were not authorized by any provision of the statute to contract for the services rendered.

Briefly re-stating the case, in order to get its logical bearing, it appears that Mr. Kittridge and his family became seriously ill with a contagious disease in the house occupied by him as a home; that the house was quarantined by order of the board of health; that

the board of health failed to provide any assistance and he and his family were left in distress and need; the overseers of the poor were notified of the condition of the family; investigated and ascertained the truth of the facts; and thereupon, in their capacity as overseers, as they say, employed the plaintiff to take care of the Kittridge family. Under this chain of events, granting the most favorable inference which could be drawn from the testimony in favor of their first contention, that the agency of the overseers should be submitted as a question of fact, we are of the opinion that the defendants have failed. While the question might be raised, yet the evidence is so overwhelmingly in favor of the plaintiff upon this point that a verdict of the jury to the contrary could not be permitted to stand.

The defendants' second contention that the statute authorizing the board of health to furnish medical treatment and care was intended to abrogate the statute authorizing overseers of the poor to aid persons found in distress, is clearly untenable.

The statute which says "Towns shall relieve persons having a settlement therein, when, on account of poverty, they need relief," is absolute in terms and was not repealed expressly or by necessary implication by the act creating the board of health.

It is immaterial whether the person in need is brought into that condition by quarantine, neglect of the board of health or otherwise, inasmuch as it is the fact of the situation not the method of producing it, that requires the action of the officers.

In this connection the defendants intimate that the fact that Mr. Kittridge left something like $200 in his estate should operate to defeat the adjudication of the overseers of the poor that he was in need of relief when they employed the plaintiff to take care of him. But our court have several times held that it is the duty of the overseers of the poor to relieve a person found in their town in distress, although he may have property of his own not available for his immediate relief. The court held this to be a true interpretation of the statute although the person found in need of relief was a non-resident and the action was between the town furnishing the supplies against the resident town of the pauper. *Norridgewock*

v. *Solon*, 49 Maine, 385. The reasoning in this case should apply with increased force to the case at bar inasmuch as the overseers were acting in behalf of their own town in furnishing the relief instead of for another town. Yet upon this issue it was said: "But it is contended that he was not, in fact, a pauper; that he had means by which he could have paid for, or secured his own support. All this may be true, and the overseers may still be liable, under the statue to furnish relief."

In a case involving this point, *Alna* v. *Plummer*, 4 Maine, 258, the court hold: "It is made the duty of the overseers of the town where a person may be found in distress to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself; but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer, while the officers were deliberating as to the extent of their official duty and the nature of their remedy." All the cases hold that if the overseers act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law. It requires no evidence in this case to satisfy a reasonable mind that the overseers of the poor acted in good faith, with reasonable judgment and in accord with the demand of humanity. Upon this point the decisions quoted were in construction of a statute practically the same as R. S., chap. 27, sec. 11, is today.

Upon the third point, the doctrine that the overseers of the poor may make a contract for the relief and support of those found in need of relief is too well established to require discussion.

In *Conley* v. *Woodville*, 97 Maine, 241, it is said: "It is entirely true that a town may become liable to the inhabitants of another town for relief furnished a pauper by virtue of a contract between the town and a person furnishing relief."

In *Palmyra* v. *Nichols*, 91 Maine, 17, "Overseers of the poor have the care and oversight of the poor, and in the discharge of their duties, they are the authorized agents of the town. Necessarily they may direct a variety of business, incidental to their general powers." See also upon this point *Clinton* v. *Benton*, 49 Maine, 550; *Corinna* v. *Exeter*, 13 Maine, 321.

But the defendants contend that the care furnished came within the rule of "pauper supplies" and must be applied for or received "as pauper supplies" as required by R. S., chapter 27, sec. 2. But this question does not arise in this case. It becomes material only in suits between towns where it is sought to interrupt a five years' pauper settlement by evidence of the alleged pauper having received "supplies as a pauper." The requirement therefore of section 2, chapter 27, R. S., only applies to cases where the settlement of the pauper is in question.

In this case there is no such question. The overseers of the poor adjudged that the Kittridge family needed services and that the town should furnish them. They then in behalf of the town employed the plaintiff to render the services so adjudged and needed and he rendered them. That is sufficient to sustain the action. The town having hired the plaintiff should pay him. He has no concern of the question whether Kittridge applied for or received his services as pauper supplies such as would interrupt the effect of the five years' settlement. The order of the verdict must be sustained.

Exceptions overruled.

MARY E. FOSS *vs.* MAURICE E. MCRAE et al., Executors.

Washington. Opinion February 16, 1909.

Evidence. "Burden of Evidence." "Burden of Proof."

While the burden of evidence may be said to have shifted from a plaintiff to the defendant when the plaintiff has made out a prima facie case, and from the defendant to the plaintiff again when the defendant's evidence has overcome the prima facie case of the plaintiff, yet the burden of proof has not changed at all, but it is incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which he seeks to recover.

Burden of proof" and "burden of evidence" are often confused. The phrase "burden of proof," is in fact more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must upon the whole, persuade the jury, by legal evidence, that his contention is right. The risk of non-persuasion is all the time upon him. If he fails to persuade, he loses his case. The risk of non-persuasion is the burden which he must assume.

The plaintiff brought an action on a certain written instrument purporting to be a guaranty by the defendants' testator of the payment of certain promissory notes transferred by him to the plaintiff. The defendants gave written notice to the plaintiff of their denial of the execution of the instrument. At the trial, a subscribing witness to the instrument testified that at the time of the execution and delivery of the instrument it did not contain the last four words "And will guarantee them." There was also evidence upon both sides of this issue. The plaintiff contended that upon this issue the burden of proof was on the defendants but the presiding Justice instructed the jury otherwise. *Held:* That the instructions were correct.

On exceptions by plaintiff. Overruled.

Action on an alleged guaranty by the defendants' testator of the payment of some fifty overdue promissory notes transferred by him to the plaintiff. The notes were given by the various promissors to Walter H. Foss, the husband of the plaintiff, and had been by him transferred to the defendants' testator, and later transferred by him to the plaintiff in settlement of matters between them. The record does not disclose the plea nor for whom was the verdict, but presum-

ably the plea was the general issue and that the verdict was for the defendants. During the trial, the plaintiff excepted to certain rulings of the presiding Justice.

The case is stated in the opinion.

R. J. McGarrigle, for plaintiff.

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

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

SPEAR, J. This case comes up on exceptions to instructions given by the presiding Justice to the jury. The case does not show but, inasmuch as the exceptions are by the plaintiff, we assume that the verdict was for the defendant.

The case involved an action on the alleged guaranty by the defendant's testator of the payment of certain over-due promissory notes transferred by him to the plaintiff. To sustain her allegations the plaintiff offered in evidence a typewritten instrument bearing the signature of the defendant's testator of the following tenor.

"Machias, Maine, April 11, 1907.

This is to certify that I have this day in a settlement of business transacted with Mary E. Foss, conveyed and sold to her a lot of notes for which I have received payment in full. And will guarantee them.

(Signed) Asa T. McRae. (Witness) M. E. McRae."

The defendants had seasonably given written notice to the plaintiff of their denial of the execution of this instrument, and at the trial, the subscribing witness, who was one of the defendant's executors, testified that at the time of the execution and delivery of the instrument it did not contain the last four words "And will guarantee them." There was also evidence upon both sides of this issue.

The plaintiff contended that upon this issue the burden of proof was upon the defendants, but the presiding Justice instructed the jury as follows, viz:

"So the question is narrowed right down to this: Were those words, the final four words in this paper, written on there when Mr. Asa T. McRae signed that paper? And the burden is upon

the plaintiff, Mrs. Foss, or her agents, who conduct the suit, to convince you by evidence that in fact and in truth those words were upon that paper when signed by Asa T. McRae; and has she done so? She claims that she has, and she first relies upon the circumstances that the words are found to be on the paper now. That is prima facie evidence that they were there when it was signed, but only prima facie. By prima facie we mean that, if nothing more appeared, if that was all there was, just the paper itself, with no contradiction, it would be taken as sufficient evidence that they were there when signed; but, it appearing that it is disputed that they were there, and there being some evidence to the contrary, the burden is still upon the plaintiff throughout to convince you by evidence that, upon the whole, you believe the words were there when signed."

The instructions were correct. The plaintiff under the notice and rule was required to prove the execution of the instrument upon which she sought to recover. To accomplish this, the subscribing witness was put upon the stand. His evidence clearly developed the real issue in the case. When he had testified to the execution of the paper, as we presume he did under the notice, the plaintiff had established a prima facie case, as the words in dispute appeared upon the face of the paper whose execution had been proven. Had the case stopped here the plaintiff would have been entitled to recover. This is precisely what the presiding Justice instructed the jury at this stage of the proceedings. But the case did not stop here. The very witness the plaintiff relied upon to prove execution, testified that the disputed words,—the substance of the plaintiff's case,—were not upon the instrument when he witnessed the defendant's signature. Again, it is apparent, if the case had stopped at this point, the defendant would have been entitled to the verdict, as the testimony of the witness, showing a material alteration, is undisputed and must therefore prevail. Hence, it follows that it was incumbent upon the plaintiff, to entitle her to recover, to proceed further and introduce evidence tending to overcome the testimony of the attesting witness. The issue of alteration now having been raised, it became her duty to assume the burden

upon all the evidence of persuading the jury that the words of guaranty were upon the paper when it was executed.

Now, while the burden of evidence may be said to have shifted from the plaintiff to the defendant, when she had made out a prima facie case, and from the defendants to the plaintiff, again, when their evidence had overcome the prima facie case, the burden of proof had not changed at all. It was incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which she sought to recover, that the instrument contained the disputed words.

"Burden of proof" and "burden of evidence" are often confused. The phrase, burden of proof, is in fact more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must upon the whole, persuade the jury, by legal evidence, that his contention is right. The risk of non-persuasion is all the time upon him. If he fails to persuade, he loses his case. This risk of non-persuasion is the burden which he must assume.

Exceptions overruled.

MELVINA HUNTINGTON *vs.* CITY OF CALAIS.

Washington. Opinion February 18, 1909.

Municipal Corporations. Defective Ways. Notice of Injury. Municipal Officers. Evidence. Private and Special Laws, 1883, chapter 325, section 11. Revised Statutes, chapter 1, section 6, rule XXV; chapter 13, section 76.

The liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the legislature and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute, R. S., chapter 23, section 76.

The duty imposed upon the person injured to "notify one of the municipal officers" within fourteen days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. Such notice is a condition precedent to a plaintiff's right of action.

When a person seeks to recover of a city or town for damages sustained by reason of a defect in a highway, it must affirmatively appear that such person or some one in his behalf notified "one of the municipal officers" of his injury within fourteen days thereafter in the manner specified in the statute.

To notify one of a fact is to "make it known to him;" to "inform him by notice."

Under the provisions of Revised Statutes, chapter 1, section 6, rule XXV, the mayor and aldermen constitute the municipal officers of cities.

While by its charter, Private and Special Laws, 1883, chapter 325, section 11, the city clerk of the city of Calais is made clerk of the board of mayor and aldermen, yet the city clerk does not thereby become one of the municipal officers of Calais.

Where the plaintiff claiming to have sustained a personal injury by reason of an alleged defect in a public street in the city of Calais, gave to the city clerk of Calais the fourteen days written notice required by Revised Statutes, chapter 23, section 76, *Held:* (1) That it did not appear that this notice was ever in any manner brought to the attention of the municipal officers or any one of them. (2) That there was no presumption either of law or fact that the notice given to the clerk would be brought to the attention of the municipal officers or any one of them within the time stated. (3) That the statute requires that the information specified in the notice should be actually communicated to one of the municipal officers within the period named, and evidence that the information was given to the city clerk fell short of this requirement.

On exceptions by defendant. Sustained.

Special action on the case under Revised Statutes, chapter 23, section 76, to recover damages for a personal injury alleged to have been received by the plaintiff through a defect in a public street which the defendant city was bound by law to maintain and keep in repair. It is assumed that the plea was the general issue and that the verdict was for the plaintiff although the record is silent on both points. The defendant city excepted to certain rulings of the presiding Justice.

The case is stated in the opinion.

R. J. McGarrigle, for plaintiff.

H. J. Dudley, City Solicitor, for defendant.

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

WHITEHOUSE, J. This is an action on the case to recover damages for a personal injury alleged to have been received by the plaintiff through a defect in a public street which the defendant city was bound by law to maintain and keep in repair. The action is based on section 76 of chapter 23 of the Revised Statutes, which provides that a person seeking to recover damages for an injury thus sustained "shall within fourteen days thereafter, notify one of the municipal officers of the 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."

At the trial the plaintiff attempted to prove a compliance with this requirement of the statute by offering evidence that such "fourteen days' notice" had been given to the city clerk. This evidence was admitted by the court subject to objection, and thereupon the defendant's counsel requested an instruction that notice to the city clerk was not a compliance with the statute. The presiding Justice declined to give this instruction and for the purposes of the trial ruled that notice to the city clerk was sufficient. The case comes to this court on exceptions to this ruling.

The liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the legislature

and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute. The duty imposed upon the person injured to "notify one of the municipal officers" within fourteen days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. The notice in question thus becomes a condition precedent to the plaintiff's right of action.

It must therefore affirmatively appear that the plaintiff or some one in her behalf "notified" "one of the municipal officers" of her injury within fourteen days thereafter in the manner specified in the statute. The mayor and aldermen constitute the "municipal officers of cities," R. S., chapter 1, section 6, par. 25, and by the charter of the defendant city (Chap. 325, P. & S. Laws 1883, sec. 11,) the city clerk is made clerk of the board of mayor and aldermen. But the city clerk does not thereby become one of the municipal officers; and there is no evidence in the case that any one of the municipal officers was ever notified of the plaintiff's injury. To notify one of a fact is to "make it known to him:"— to "inform him by notice." It only appears that such a notice was given to the city clerk. It does not appear that it was ever in any manner brought to the attention of the municipal officers or any one of them. It is true that the city clerk is the proper custodian of all papers requiring the consideration of the mayor and aldermen at their regular meetings, but inasmuch as the notice in question must be delivered to one of the municipal officers within fourteen days, and that portion of the time remaining after the receipt of the notice by the city clerk would probably expire in a majority of instances before the next regular meeting of the mayor and aldermen, there is no presumption either of law or fact that such a notice would be brought to the attention of the municipal officers or any one of them within the time stated. The statute requires that the information therein specified should be actually communicated to one of the municipal officers within the period named. Evidence that the information was given to the city clerk obviously falls short of this requirement.

Exceptions sustained.

JULIA E. ABBOTT *vs.* CITY OF ROCKLAND.

Knox. Opinion February 18, 1909.

Municipal Corporations. Defective Ways. Twenty-four Hours' Notice of Defect. Same a Condition Precedent to Recovery. Same Must be of Identical Defect. How Proved. Notice to Police Officer Insufficient. Presumptions. Statute, 1887, chapter 206. Revised Statutes, chapter 23, section 76.

Revised Statutes, chapter 23, section 76, imposes as a condition precedent to the right of a traveler to recover for injuries received upon a highway, proof on his part that "the municipal officers or road commissioners of such town or any person . . . . authorized by any municipal officer, or road commissioner of such town, to act as a substitute for either of them, had twenty-four hours' actual notice of the defect or want of repair.

The twenty-four hours' notice required by Revised Statutes, chapter 23, section 76, must be actual notice, not constructive, and it must be of the identical defect which caused the injury.

The twenty-four hours' actual notice required by Revised Statutes, chapter 23, section 76, may be proved by direct or circumstantial evidence and may be established by all grades of competent evidence.

Where the plaintiff sought to recover damages for a personal injury received by reason of an alleged defective sidewalk in the defendant city, and in relation to the twenty-four hours' actual notice of the defect proof that such notice was given to a police officer, coupled with evidence that such complaints were ordinarily made to the police department and that the police officers were in the habit of reporting them to the street commissioner, *held* not to be sufficient evidence to meet the statute requirement.

Where it was no part of the official duty of police officers to receive complaints about highway defects and report them to the road commissioner, *held* that there was no such official duty or responsibility resting upon such officers as would give rise to a presumption that such a notice given to them was by them communicated to the road commissioner.

On exceptions by plaintiff. Overruled.

Special action on the case to recover damages for personal injuries sustained by reason of an alleged defect in the sidewalk on Lovejoy Street in the defendant city. Plea, the general issue. Tried at the January term, 1908, Supreme Judicial Court, Knox County. At the conclusion of the plaintiff's evidence and on motion of the defendant city, the presiding Justice ordered a nonsuit on the

ground that the plaintiff had failed to introduce sufficient evidence to entitle her to go to the jury on the question as to whether the proper officials of the defendant city, under the statute, R. S., chapter 23, section 76, had twenty-four hours' actual notice of the defect, and to this ruling the plaintiff excepted.

The case is stated in the opinion.

C. M. Walker, and Arthur S. Littlefield, for plaintiff.

Philip Howard, for defendant.

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

CORNISH, J. Section 76 of chapter 23 of the Revised Statutes imposes as a condition precedent to the right of a traveler to recover for injuries received upon a highway, proof on his part that "the municipal officers or road commissioners of such town or any person authorized by . . . . any municipal officer, or road commissioner of such town, to act as a substitute for either of them, had twenty four hours' actual notice of the defect or want of repair." Prior to the passage of chapter 206 of the Public Laws of 1877 all that was required was reasonable notice to the town, which was held to be such notice as gave the town officers or some of the inhabitants, information of the actual condition of the road. The amendment of 1877 prescribed a more definite requirement respecting notice and imposed a more rigorous limitation upon the traveler's right to recover. One of the officers named must now receive twenty-four hours' actual, not constructive, notice and it must be of the identical defect which caused the injury. Such actual notice may be proved by direct or circumstantial evidence, that is by information of the existing facts conveyed to the party to be notified, or by circumstances showing personal knowledge on his part. Being a conclusion of fact it may be established by all grades of competent evidence, but established it must be before the injured party can maintain his action. These general principles thus briefly stated are more fully considered in *Smyth* v. *Bangor*, 72 Maine, 249; *Rogers* v. *Shirley*, 74 Maine, 144; *Hurley* v. *Bowdoinham*, 88 Maine, 293; *Littlefield* v. *Webster*, 90 Maine, 213; *Ham* v. *Lewiston*, 94 Maine, 265.

The injury to the plaintiff for which this suit is brought was caused by a defect in a sidewalk on Lovejoy St. in the defendant city, October 10, 1905. As proof of actual notice to the street commissioner, the plaintiff relied upon the testimony of John Reardon, supplemented by an alleged custom in the police department. Reardon, a boy fourteen years of age, testified that a few days prior to the accident he noticed a bad place in the sidewalk at the point in question, which he describes as "a piece that had rotted off the stringer, and it left quite a hole there, so you could get your foot right in it;" that acting under instructions from his father, he called at the police station on his way to school, and "notified the police to fix it," that he thinks he saw policeman Post there and told him that the hole "was pretty bad" and "needed fixing." The evidence showed that at that hour in the morning either the city marshal or Post should be on duty. The jury might therefore be justified in inferring that Reardon notified Post as he said. Here ends the direct testimony on this point. Reardon notified no one except Post and there is no evidence that Post or any one else ever notified the street commissioner.

Assuming therefore that notice was given to the policeman, and also that it was of the actual defect which caused the injury, which is by no means free from doubt, it stops short of reaching any party required by statute to be notified. The plaintiff seeks to prove the notice by two steps, first by the boy to the police and second by the police to the road commissioner. The first is made out, the second fails. The city marshal and Post both testified that they had no recollection of receiving the complaint from Reardon, nor of communicating it to the road commissioner and the road commissioner himself was not called as a witness. Direct testimony on this point is therefore lacking.

To fill the gap the plaintiff relies upon an alleged custom in the police department to receive complaints about highway defects and report them to the road commissioner, and invokes the rule that a public officer is presumed to have performed his official duty. This is undoubtedly a legal presumption in some cases but it has no application here for the element of official duty is lacking.

The city marshal testified that the police received a great many such complaints and under his instructions made a practice of notifying the commissioner as soon as possible.

But it was no part of their official duty to receive and report such complaints to the commissioner. No statute or ordinance required it; no record of such complaints was kept. Doubtless it was done in many cases in the interest of the municipality, the same as similar complaints to the city clerk or chief engineer of the fire department might be transmitted to the proper authority. But there was no such official duty or responsibility resting upon these officers as would give rise to a presumption that a notice given to them was by them communicated to the commissioner.

The cases cited by the plaintiff are not in point.

In *Welch* v. *Portland*, 77 Maine, 384, the presumption invoked was that the street commissioner himself did his duty by going or sending at once to find and repair a reported defect. This was within the strict line of his official duty. So it might be presumed that a police officer proceeded at once to take measures to quell a riot reported to him, because that was within his official sphere. When out of that sphere any such presumption does not obtain, and there are no presumptions affecting the probability of the action of a street commissioner in the police department nor of a police officer in the street department, in the absence of evidence showing their duties in those departments.

In *Twogood* v. *N. Y.*, 102 N. Y. 216, 6 N. E. 275, actual notice was not required. If the defective condition of the street had existed for such a length of time that its existence ought to have been known to the public authorities it was sufficient. The court therefore held that an instruction to the jury that written reports of the condition of snow and ice made by a police officer to his superior in the usual course of his duty, which reports were customarily transmitted to the corporation attorney, did not constitute a notice to the city, was erroneous, as taking from the jury the question whether this condition had existed for such a length of time that actual notice ought to be imputed. The Maine statute allows no such imputation of actual notice.

In *Joliet* v. *Looney*, 159 Ill. 471, 42 N. E. 855, the required notice could be either express or implied, and the court held that where, with knowledge and approval of the superintendent of streets, a book was kept at the police station, in which policemen were directed to note defects in sidewalks, and the superintendent was accustomed to resort to these reports for information, in case of knowledge of a defect by a policeman for a sufficient length of time, in the exercise of reasonable care, to report and repair it, the city will be chargeable with notice of the defect.

Such a decision has no bearing upon the case at bar where actual notice must be proved.

Finally the plaintiff claims that the fact that the city repaired the defect the next morning after the accident and so far as the evidence shows, without knowing of the injury, adds strength to the theory that the commissioner had received notice of the condition through the channel of the police. This rests upon assumption and not upon evidence. The burden is upon the plaintiff to prove that the commissioner did receive the notice, not on the defendant to prove that he did not receive it.

Taking all the evidence in the case and giving it the full effect which a jury would be authorized to give, it is clear that the plaintiff failed to introduce sufficient to bridge the chasm between the police and the street commissioner or to entitle her to go to the jury on this question of actual notice. The nonsuit was properly ordered.

Exceptions overruled.
Nonsuit to stand.

LOUIS MATSON *vs.* HARRIS MATSON.

Cumberland. Opinion February 18, 1909.

Assault and Battery. Damages.

Where the plaintiff recovered a verdict for $1000 as damages alleged to have been suffered by reason of an assault and battery committed upon him by the defendant, *Held:* (1) That the defendant was properly found guilty of assault and battery but that the damages awarded were excessive. (2) That the compensation which the jury must have given the plaintiff for his mental pain and suffering, his wounded pride and self respect, considering his record and standing in the community was exorbitant. (3) That there was no justification for large punitive damages. (4) That the verdict be set aside unless the plaintiff remit all of the same above $300.

On motion by defendant. Sustained unless remittitur be made.

Civil action brought in the Superior Court, Cumberland County, to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. 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.

M. P. Frank, for plaintiff.

J. E. F. Connolly, R. T. Whitehouse, and J. A. Connellan, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $1000 for damages alleged to have been suffered by reason of an assault and battery committed upon him by the defendant on the second day of July, 1907, and the defendant moves to have it set aside as against the evidence and because the damages are excessive.

The parties are brothers, and were copartners carrying on the business of brewing and selling hop beer from 1898 to 1902, when the partnership was dissolved and thereafter each continued to carry

on the same business in a separate building with resulting competition and hostility between them. October, 1906, some eight months prior to the assault in question, the plaintiff acquired title to the building occupied by the defendant, and took an assignment of the lessor's interest in a certain lease of the same, subject to the defendant's right of occupancy for an unexpired term of three years under the lease. And the plaintiff says that on the second day of July, 1907, in the exercise of his right to enter the building "to view and make improvements," he started to go through the open door of the store where his brother was, and he thus describes the assault which followed:

"I had no more than got inside when he came over and with his left hand grabbed me here (indicating) and hit me with his right hand,—open hand,—and almost knocked me down—I saved myself with my hands—and he shoved me against the wall there and the corner there right near the door. And he called me names . . . He held me there so I couldn't breathe very well and left marks on my throat and tore my collar . . . . My collar was torn and dirty where he put his hands on it . . . . I didn't eat any dinner that day.

Q. Do you mean by that the injuries you received to your throat prevented your eating dinner?

A. I don't know that it prevented my eating, but I felt so bad over it—felt bad about the assault, the insult, that I didn't eat that time."

The defendant denies that the plaintiff came in to the store to take a view with reference to improvements and says that it is utterly improbable that he was contemplating improvements for the defendant's benefit knowing that the lease had three years more to run. The defendant declares the truth to be that the plaintiff's brewing was unsuccessful and his beer unsalable and that his real purpose in coming to his store was to learn the secret process of the defendant's brewing, and the defendant denies that he inflicted any injury upon him whatever or used any more force than was necessary to prevent him from going into his brewing room.

The plaintiff as owner of the premises undoubtedly had a legal right to enter the building for the purpose of examining its condition with a view to changes and improvements, and while the sincerity of his claim that he did in fact enter for that purpose is open to serious question, the defendant's contention on the other hand that the plaintiff entered for the purpose of stealing his formula for brewing beer rests upon suspicion and not evidence. It is therefore the opinion of the court that the defendant was properly found guilty of assault and battery, but the damages awarded by the jury are manifestly excessive. The plaintiff does not claim that he suffered any serious consequences from the assault. He says he had no appetite for his dinner on the day it occurred, and his throat felt "kind of sore, enough so he could notice it." It is in evidence that he had been convicted of violating the statute against the sale of intoxicating liquors, and paid a fine of $100 and costs. The compensation which the jury must have given for his mental pain and suffering, his wounded pride and self respect, considering his record and standing in the community was exorbitant. Nor is there any justification for large punitive damages.

The conclusion is that if the plaintiff will remit all of the verdict above ($300) three hundred dollars within thirty days from the filing of the certificate with the clerk of the court, the motion is overruled. Otherwise, the verdict is to be set aside and a new trial granted.

CITY OF ROCKLAND *vs.* INHABITANTS OF DEER ISLE.

Knox. Opinion February 20, 1909.

Evidence. Poll Tax. Instructions. Revised Statutes, chapter 27, section 1, paragraph VI.

1. That a poll tax was assessed against a person in a given town is not competent evidence that he had his home in that town at the time.
2. That a person voluntarily paid a poll tax demanded of him by the tax collector of a given town is competent evidence that he had his home in that town at the time of the supposed assessment, even though such tax was not in fact assessed against him.
3. A libel for divorce signed by the libellant's own hand was in evidence, and the jury were instructed that in determining where the libellant had his home at the date of the libel, they might consider the statement in the libel as to his residence. *Held:* That the party maintaining that the libellant's residence was not as stated in the libel, had no ground for exception.

On exceptions by plaintiff. Overruled.

Action of assumpsit to recover $409.33 for pauper supplies furnished by the plaintiff to a pauper whose pauper settlement was alleged to be in the defendant town. Plea, the general issue. Verdict for the defendant town. The plaintiff excepted to the ruling of the presiding Justice admitting certain evidence.

The points in issue are stated in the opinion.

Philip Howard, for plaintiff.

E. P. Spofford, and Joseph E. Moore, for defendants.

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

EMERY, C. J. The principal issue in the case was whether under R. S., ch. 27, sec. 1, par. VI, the pauper had had "his home" in the town of Stonington for five successive years after the summer of 1896, and before Aug. 1, 1905. The statutory home is made up of presence and intention. He was personally present in Stonington much of that time and as evidence of his intention to make his home there, the defendant town offered testimony that he had

voluntarily paid poll taxes there each year from 1897 to 1905 both inclusive. This evidence was objected to upon the ground that it did not appear that the poll taxes were legally assessed. Whether they were assessed is immaterial. The payment of them was what indicated the pauper's then intention as to his home. The evidence was admissible for that purpose.

The defendant also put in evidence a libel for divorce dated Oct. 17, 1899 signed by the pauper with his own hand in which libel he was described as of Stonington. The presiding Justice instructed the jury that it was for them to say how much weight that evidence had toward proving the pauper's residence to have been at that time in Stonington. This instruction was sufficiently favorable to the plaintiff.

Exceptions overruled.

CHARLES P. MARTIN *vs.* MELVILLE JOHNSON.

Penobscot. Opinion February 24, 1909.

Trover. Contracts. Logging Permits. Title. Revocable Licenses. Cutting by Trespassers.

In order for a plaintiff to maintain trover, he must have such a general or special property in the goods in question as entitles him to immediate possession.

When a written permit to cut timber is under seal and exclusive, title passes to the permittee as soon as the timber is severed either by himself or a trespasser. Title in such cases passes by reason of the executory contract and not because the permittee himself does the cutting.

In May, 1904, the owners of a township of wild land by written contract not under seal granted the plaintiff "permission, during the ensuing logging season only, to enter with four horses or more teams upon mile squares numbered 9-10-11-15-16-17 and 18 . . . and to cut and remove therefrom, spruce, cedar, fir and pine timber suitable for logs." Also in May 1904, the same owners gave to one Worster a written permit not under seal,

"during the ensuing logging and bark peeling season only" to enter upon mile squares numbered 1-2-7-8-13 and 14 in the same township and cut and remove bark and timber therefrom. In the course of his operation upon lot 8 Worster got over the line and cut certain spruce logs and railroad ties from lot No. 9 which was embraced in plaintiff's permit. The defendant received the logs and ties cut on lot 9, and thereupon the plaintiff's brought an action of trover against the defendant for the value of the same.

Held (1) That the plaintiff's permit did not convey any interest in the land or in the standing timber, but was an executory contract for the sale of timber when severed from the soil and converted into personal property, coupled with a revocable license to enter upon the land for the purpose of cutting and removing it.

(2) That the permit was not exclusive but applied only to such timber as might be cut by the plaintiff himself or those acting under him.

(3) That the cutting by a mere trespasser upon one of the lots permitted to the plaintiff did not give the plaintiff any property in the logs, when severed. They still belonged to the landowner to whom the trespasser and not the plaintiff was liable for the stumpage.

Freeman v. *Underwood*, 66 Maine, 229, distinguished.

On report. Judgment for defendant.

Trover for the alleged conversion of 377 spruce logs, 250 standard railroad ties, and 200 cedar electric ties. Plea, the general issue with brief statement alleging that the title to the logs and lumber was not in the plaintiff.

Tried at the October term, 1907, Supreme Judicial Court, Penobscot County. At the conclusion of the testimony, the parties agreed to report the case to the Law Court for decision upon so much of the evidence as was "competent and legally admissible."

The case is stated in the opinion.

Martin & Cook, for plaintiff.

J. H. Burgess, and P. H. Gillin, for defendant.

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

CORNISH, J. On May 2, 1904, Henry Prentiss as agent for the owners of a township of wild land known as North Yarmouth Academy Grant, by written contract, not under seal, granted the plaintiff "permission, during the ensuing logging season only, to enter with four horses or more teams, upon mile squares numbered 9-10-11-15-16-17 and 18 . . . . and to cut and remove

therefrom, spruce, cedar, fir and pine timber suitable for logs" under certain conditions and restrictions not material here. In the fall of 1904 the plaintiff went upon the premises with six horses, located his camp on lot 18 toward the easterly part of the township, and operated throughout the logging season.

On May 4, 1904, Mr. Prentiss gave to one Worster a written permit, not under seal, "during the ensuing logging and bark peeling season only," to enter upon mile squares numbered 1-2-7-8-13 and 14 in the same township and cut and remove bark and timber therefrom. Worster also in the Fall of 1904 went upon the premises permitted to him and operated upon lots 1-2-8 and 14 toward the westerly part of the town during the same logging season. In the course of his operation upon lot 8 Worster got over the line and cut certain spruce logs and railroad ties from lot No. 9 which was embraced in plaintiff's permit. The defendant Johnson financed Worster in his winter's operation, and, as the plaintiff claims, received the logs and ties cut on lot No. 9. The plaintiff paid Prentiss for the timber cut under his permit and Johnson paid Prentiss for the timber cut under the Worster permit and also that cut on lot 9, without authority.

On August 2, 1906, the plaintiff brought this action of trover against Johnson to recover the value of the timber cut and removed by Worster from lot 9.

The single question is whether a licensee under an unrevoked license of this sort can maintain trover to recover the value of timber cut and removed by a trespasser. A mere statement of elementary principles answers the question in the negative.

In order for a party to maintain trover, he must have such general or special property in the goods in question as entitles him to their immediate possession. *Haskell* v. *Jones*, 24 Maine, 222; *Ames* v. *Palmer*, 42 Maine, 197; *Ekstrom* v. *Hall*, 90 Maine, 186.

The plaintiff's claim of title rests wholly on his parol permit, and that is inadequate for the purpose. The legal effect of such a permit has often been defined in the decisions of this court. It does not convey any interest in the land or in the standing trees but is

an executory contract for the sale of timber after it shall have been severed from the soil and converted into personal property, coupled with a revocable license to enter upon the land for the purpose of cutting and removing it. *Emerson* v. *Shores*, 95 Maine, 237; *Pierce* v. *Banton*, 98 Maine, 553. The contract in this case was not exclusive; It did not cover all the timber on the lots; it applied to only such timber as might be cut and removed by the licensee himself or those acting under him during the specified time. The tract upon which he was allowed to enter was a large one but he was given no property in or rights over any timber not embraced in his own operation. He was given the right to enter upon seven lots, but the land owner did not expressly agree to refrain from cutting himself or from permitting others to cut thereon. Perhaps if such cutting by the owner, or by others with the permission of the owner, should interfere with the work of the plaintiff so as to prevent his obtaining what he would otherwise have cut, it might be regarded as to that extent a revocation of the license and the owner might be liable in damages for a breach of the executory contract. But no title to the lumber so cut would thereby be conferred upon the plaintiff. *Gillett* v. *Treganza*, 6 Wis. 343. Had the permit been under seal and exclusive, title would have passed to the permittee as soon as the timber was severed either by himself or a trespasser. Title in such case would pass by reason of the executory contract and not because the permittee himself did the cutting. This was decided in *Freeman* v. *Underwood*, 66 Maine, 229. In that case the permit was under seal, the right granted was exclusive and the property in the berries picked even by a trespasser was held to be in the licensee. In the case at bar the permit was not under seal, the right granted was not exclusive and herein lies the distinction.

It follows therefore that the cutting by a mere trespasser upon one of the plaintiff's permitted lots did not give the plaintiff any property in the logs when severed. They still belonged to the land owner to whom the trespasser and not the plaintiff was liable for the stumpage. The plaintiff's contract did not cover them.

The only case cited by the plaintiff in support of his contention is *Keystone Lumber Co.* v. *Kohlman*, 94 Wis. 465, 69 N. W. 165, but that decision, even if accepted as sound doctrine, is not in point. In that case the Wisconsin Central Railroad Company had conveyed to the plaintiff's assignor, the right to cut and remove for its own use, during the period of twenty years, all the pine timber standing on certain lands for a full consideration which was paid in advance. Subsequently the Railroad Company conveyed the lands to the defendant Kohlman, reserving to itself all the pine timber standing thereon with the right to enter and remove the same. The defendant, without right, cut and removed the timber and manufactured it into lumber, and the plaintiff, after demand, brought replevin to recover the property, which suit was sustained by a majority of the court. The ground of the decision was that the trespasser admittedly had no title and the licensor had no just claim for he had sold it and received his pay. He was not injured. "To preserve the fiction of legal title in him, beyond the severance can have no other effect than to obstruct justice. In justice, the severed timber should belong to the licensee who has bought and paid for it." The opinion further holds that the plaintiff could waive the defendant's tort and adopt his wrongful act in severing and removing the timber; but he must adopt all his acts, if any, and therefore should be allowed to recover the lumber only upon reimbursing the defendant for all expenses connected with its enhanced value.

Chief Justice Cassoday, in his dissenting opinion, points out with clearness and vigor the anomolies in this decision where merely the question of legal title in a replevin suit and not an equitable accounting was in issue. Without adopting or rejecting the decision of the majority of the court, it is sufficient to note that the license was exclusive and the decision rested upon the full advance payment by the plaintiff for all the standing timber on the land. For this reason the court attempted to work out certain equities in the plaintiff's favor.

The case at bar lacks this fundamental fact, and therefore the equities. The plaintiff has never paid the stumpage on the timber

cut by the trespasser Worster but the defendant did pay it to the land owner who knew of the trespass when he received his pay. Moreover the evidence is clear that the plaintiff's operation did not reach within one mile of lot 9, so that Worster's cutting in no way interfered with him or embraced timber which he could by any possibility have cut himself. It would have remained uncut when his permit expired.

The plaintiff has failed to show any legal title enabling him to maintain this suit, and the entry must be,

Judgment for defendant.

STATE OF MAINE *vs.* JAMES RIGLEY, Appellant.

Washington. Opinion February 24, 1909.

Intoxicating Liquors. Search and Seizure. Complaint. Allegations. Intent. Revised Statutes, chapter 29, sections 47, 49.

A complaint for having in possession intoxicating liquors "with intent that the same be sold in this state in violation of law" contains a sufficient allegation of the intent under Revised Statutes, chapter 29, section 47.

On exceptions by defendant. Overruled.

Complaint against the defendant for having in his possession intoxicating liquors with intent to sell the same contrary to the provisions of Revised Statutes, chapter 29, section 47. The complaint is as follows:

"STATE OF MAINE.

"Washington, ss.

"To the Recorder of the Calais Municipal Court holden at the City of Calais within and for said County of Washington. Ferd E. Stevens of Lewiston in County of Androscoggin, said State, in behalf of the State of Maine, on oath complains that James Rigley

of Calais in said County of Washington, on the eleventh day of July in the year of our Lord one thousand nine hundred and eight at Calais in the County of Washington unlawfully did have in his possession a certain quantity of intoxicating liquor, to wit— one bottle containing five gills of whiskey one bottle containing one quart of wine with intent that the same be sold in this State in violation of law against the peace of the State, and contrary to the form of the statute in such case made and provided.

"Therefore, said complainant prays that said Accused may be apprehended and held to answer this Complaint, and further dealt with relative to the same as the law directs.

(sig.) FERD E. STEVENS."

On this complaint a warrant in due form of law was issued and the defendant was duly apprehended thereon. The record does not disclose what disposition of the matter was made by the Municipal Court, but presumably judgment was for the State and the defendant then appealed to the Supreme Judicial Court, Washington County. The defendant demurred to the complaint and the matter was heard at the October term, 1908, of said Supreme Judicial Court. The demurrer was overruled and the defendant excepted and was granted leave to plead anew if his exceptions were overruled.

The case is stated in the opinion.

C. B. Donworth, County Attorney, for the State.

R. J. McGarrigle, for defendant.

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

EMERY, C. J. By R. S., ch. 29, sec. 47, it is provided that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the State in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale." By section 49 it is provided that "if any person competent to be a witness in civil suits makes sworn complaint before any judge of a municipal or police court or trial justice, that

he believes intoxicating liquors are unlawfully kept or deposited in any place in the State by any person and that the same are intended for sale within the State in violation of law," the court shall issue a warrant to search the place and if liquors are there found to arrest the person named as so keeping the liquors, etc. In the case before us it was alleged in the complaint that the respondent unlawfully did have in his possession intoxicating liquors "with intent that the same be sold in this State in violation of law," etc. There was no other allegation of intent. The respondent contends that the complaint does not sufficiently allege the intent in that it does not state whether the intent was that the liquor should be sold by the respondent himself, or by some other person, or to aid or assist some other person to sell.

It was not necessary so to particularize. The gist of the offense was in the intent itself, the intent of unlawful sale, not in the proposed mode of execution. The offense, the intent, was the same whichever and whatever way it was to be carried out. It was the intent, not the execution of it, that constituted the offense, and that intent was sufficiently alleged. *State* v. *Kaler*, 56 Maine, 88; *State* v. *Connelly*, 63 Maine, 212.

Exceptions overruled.
Demurrer overruled.
Respondent to plead over as per stipulation.

WINFIELD S. PHILBRICK *vs.* INHABITANTS OF WEST GARDINER.

Kennebec. Opinion February 24, 1909.

Ways. Alleged Defect. Assumption of Risk.

1. The doctrine of assumption of risk applies to actions against towns for injuries received through defects in ways.
2. If a traveler sees horses standing crosswise the road while feeding, and undertakes to pass behind them, he assumes the risk of injury from such horses.
3. While the plaintiff was undertaking to pass behind some horses feeding on the road, one of them by backing or kicking frightened the plaintiff's horse to his injury. *Held:* That the risk of fright from such backing or kicking was assumed by the plaintiff, and he cannot recover of the town.

On motion and exceptions by defendants. Sustained.

Special action on the case under Revised Statutes, chapter 23, section 76, against the inhabitants of the town of West Gardiner, to recover damages for personal injuries alleged to have been received by the plaintiff on a public way in said town known as the "Pond Road," and caused by the alleged defective condition of said way. Plea, the general issue. Verdict for plaintiff for $658.12. The defendants then filed a general motion for a new trial and also excepted to several rulings made by the presiding Justice during the trial.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Heath & Andrews, and Anson M. Goddard, for defendants.

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

EMERY, C. J. The evidence for the plaintiff showed the following: The road commissioner of the defendant town with a road machine and several men and four or more horses was engaged in repairing one of the highways in that town, but during the noon hour the work was suspended, the machine drawn out near one side

of the road, the horses unharnessed and led to the side of the machine to feed from it. While thus feeding they stood crosswise the road their hind quarters being only some twenty inches from the outer edge of the traveled part of the road. The commissioner and his men were near-by eating their dinner. The place was upon or near a culvert.

This situation was clearly seen by the plaintiff as he approached in a wagon drawn by one horse. He slowed to a walk as he came near and without asking to have the feeding horses removed from the road, or to have room made for him to pass, he undertook to pass by turning out round and close to them. When his horse had got behind the feeding horses one of the latter suddenly backed, or kicked, or switched his tail and so frightened the plaintiff's horse that he suddenly bolted throwing the plaintiff out upon the ground to his injury. The plaintiff could not have turned further out without incurring some risk upon the other side.

Ignoring the question whether any defect in the road was the proximate cause of the injury, and ignoring some other questions raised by the defendant, we consider only the question whether the plaintiff assumed the risk incurred in undertaking to pass so close behind the feeding horses. We think he did. He was acquainted with horses, their habits, temperament and uncertainties. He was chargeable with knowledge that unharnessed feeding horses are liable to back, or kick, or switch their tails when anything comes near them from behind. He was also chargeable with knowledge that his own horse might be frightened by such movements so near him. The situation, its temporary nature, and the risk of undertaking to pass so near the feeding horses were seasonably known. He did not ask to have the horses moved out of the way. He did not wait till they could be so moved, but immediately undertook to pass by them as they were. He took upon himself the risk of the evident danger in so doing, and it having gone against him he must himself bear the consequences. *Merrill* v. *No. Yarmouth*, 78 Maine, 200; *Lane* v. *Lewiston*, 91 Maine, 292.

Motion and exceptions sustained.
Verdict set aside.

In Equity.

LYDIA A. BODFISH et als. *vs.* SAMUEL G. BODFISH et als.

Piscataquis. Opinion February 26, 1909.

Wills. Construction. Rules of Interpretation. Life Estate. Power of Disposal.

It is a well established rule in Maine that when a testator gives to the first taker an estate for life only by certain and express words, the question whether a power to dispose of the remainder is annexed to the conventional life estate, depends upon the construction of the instrument under which the power is claimed.

In construing a will the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase especially involved in the inquiry, provided no settled rule of law or principle of sound public policy is thereby violated.

In construing a will the intention of the testator must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning.

In case of ambiguity, it is well settled that all the surrounding circumstances of the testator, his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of his will.

A testator's will contained the following provisions:

"First. I give, bequeath and devise unto my wife Lydia A. Bodfish of said Elliottsville all the property, real, personal and mixed which I shall own or be possessed of at the time of my decease, for and during the term of her natural life.

"Second. After the decease of said Lydia A. Bodfish, I give, bequeath and devise unto my son, John I. Bodfish lot number (1) in the third range of lots in the Vaughan Tract in said Elliottsville, and called the Major Sawyer lot, and containing one hundred acres more or less.

"Third. After the decease of said Lydia A. Bodfish I give, bequeath and devise unto my son Samuel G. Bodfish, lot number six (6) in said third range of lots, in said Vaughan Tract and called the Wilbur lot.

"Fourth. I give and bequeath unto my daughter Marion A. White, widow of Flavius E. White the sum of two hundred dollars, to be paid to her within one year after the decease of my said wife, Lydia A. Bodfish.

"Fifth. I give, bequeath and devise to my son Rodney R. Bodfish and my daughter Sarah E. Bodfish in equal shares in common and undivided all the rest, residue and remainder of the property which shall be left after the decease of my said wife. And should either my said daughter Sarah E. Bodfish or my son Rodney R. Bodfish die before the decease of my said wife, Lydia A. Bodfish, then his or her part of the property described in this fifth clause of my will shall go to the husband or the wife of the said Sarah E. Bodfish or Rodney R. Bodfish if the said Sarah E. Bodfish or the said Rodney R. Bodfish shall have a husband or wife living at the time of their decease, if not then the whole property described in this fifth clause of my will shall go to the survivors of the said Sarah E. Bodfish or Rodney R. Bodfish upon the death of either.

"This bequest and devise to said Sarah E. Bodfish and Rodney R. Bodfish is made on the condition that they remain at home and care for said Lydia A. Bodfish while she shall live and that they pay to said White the two hundred dollars bequeathed to her by the fourth clause of this will."

Held: That the testator intended to give to his wife Lydia A. Bodfish a simple life estate in all his property with the further provision for her care and comfort contained in the fifth paragraph of the will, and that it was not his purpose to annex to this life estate the power to dispose of any part of the property.

In equity. On appeal by defendants. Sustained.

Bill in equity brought to obtain a judicial construction of the last will and testament of Nymphas Bodfish late of Elliottsville. An answer was duly filed by the defendants. A hearing was then had on bill, answer and evidence before the Justice of the first instance who sustained the plaintiffs' contentions and made and entered a decree to that effect. The defendants then appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

The case is stated in the opinion.

J. S. Williams, for plaintiffs.

Hudson & Hudson, for defendants.

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

WHITEHOUSE, J. This is a bill in equity brought to obtain a judicial construction of the following will of Nymphas Bodfish of Elliottsville in the county of Piscataquis, dated April 19, 1904.

First. I give, bequeath and devise unto my wife Lydia A. Bodfish, of said Elliottsville, all the property, real, personal and mixed, which I shall own or be possessed of at the time of my decease, for and during the term of her natural life;

Second. After the decease of said Lydia A. Bodfish, I give, bequeath and devise unto my son John I. Bodfish, Lot No. One in the Third Range of lots in the Vaughan tract in said Elliottsville, and called the Major Sawyer lot, containing one hundred acres more or less;

Third. After the decease of said Lydia A. Bodfish, I give, bequeath and devise unto my son Samuel G. Bodfish lot No. Six in said Third Range of lots in said Vaughan track, and called the Wilbur lot;

Fourth. I give and bequeath unto my daughter Marion A. White, widow of Flavius E. White, the sum of two hundred dollars, to be paid to her within one year after the decease of my said wife, Lydia A. Bodfish;

Fifth. I give, bequeath and devise unto my son Rodney R. Bodfish and my daughter, Sarah E. Bodfish in equal shares, in common and undivided all the rest, residue and remainder of the property that shall be left after the decease of my said wife, and should either my said daughter, Sarah E. Bodfish, or my said son, Rodney R. Bodfish, die before the decease of my said wife Lydia A. Bodfish, then his or her part of the property described in this 5th clause of my will, shall go to the husband or the wife of the said Sarah E. Bodfish, or the said Rodney R. Bodfish, if the said Sarah E. Bodfish, or the said Rodney R. Bodfish shall have a husband or wife living at the time of their decease; if not, then the whole property described in this 5th clause of my will shall go to the survivor of the said Sarah E. Bodfish, or the said Rodney R. Bodfish upon the death of either. This bequest and devise to said Sarah E. Bodfish and Rodney R. Bodfish, is made on the condition that they remain at home and care for said Lydia A. Bodfish while she shall live, and then they pay to the said White the $200 bequeath to her by the fourth clause of his will.

Sixth. I appoint Edmund F. Drew executor of this my last will and testament."

The testator died June 17, 1904 at the age of eighty-two years.

The plaintiffs in this bill are Lydia A. Bodfish, the widow, Rodney R. Bodfish one of the sons, Sadie E. (Bodfish) Drew, the younger daughter of the testator, and Edmund H. Drew, husband of Sadie E. Drew and executor of the will. The defendants are Samuel G. Bodfish and John I. Bodfish sons, and Marion A. White, the elder daughter of the testator.

The homestead of the deceased was situated on Long Pond Stream in Elliottsville, Piscataquis county, distant about twelve miles by the highway from Monson Village, and five miles across Onawa Lake to Onawa Station on the Canadian Pacific Railway.

The estate of the deceased was appraised as follows:

Home farm consisting of 200 acres of land and buildings,	$2000.
400 acres of timber land,	800.
100 acres of timber land, called the Wilbur lot,	200.
100 " " " Sawyer lot,	200.
	$3200.
Personal estate consisting principally of household furniture and farming implements,	$438.55
with "rights and credits appraised at	212.00

It is admitted that the amount of the debts left by the testator, as shown by the executor's first account, is $223.01.

It appears from the bill and answer and is not controverted in testimony, that by consent of the widow, the executor of the will and husband of Sadie E. Drew, one of the residuary devisees in the will, gave to one Gilbert a permit to cut the lumber from the Wilbur lot devised to Samuel G. Bodfish in paragraph three of the will, by virtue of which, lumber of the value of $400 was taken from that lot by Gilbert; and that this stumpage is claimed both by the widow and by the defendant Samuel G. Bodfish.

The plaintiffs contend that by the terms of the will, the widow Lydia A. Bodfish took a life estate with a power of disposal of all the property real and personal, including the Sawyer lot and the

Wilbur lot specifically devised in items two and three of the will, and hence had an undoubted right to cut the wood and lumber or sell stumpage from any or all of the timber lands which belonged to the estate at the death of the testator. On the other hand the defendants earnestly contend that when all the provisions of the will are considered together and viewed in the light of the nature and value of the property, the testator's relations to the several beneficiaries and all of the conditions which may fairly be supposed to have been in his mind at the time of the execution of the will, the conclusion is irresistible that he intended to give the widow precisely what he did give her in clear and explicit terms in the first paragraph of the will, viz: "All of his property, real, personal and mixed," "for and during the period of her natural life," with the further provision in the fifth paragraph, devising the remainder, after the termination of the life estate, to his two children Rodney and Sarah, on condition that they remain "at home and care for said Lydia A. Bodfish while she shall live" and then pay to Mrs. White the $200 bequeathed to her in item four of the will. The defendants accordingly claim that the widow's life estate was not coupled with a power of disposal as to any part of the property, and that if it should be held otherwise, they insist that such power of disposal could not in any event extend to the Sawyer and Wilbur lots specifically devised in paragraph two and three of the will.

The presiding Justice sustained the plaintiffs' contentions and entered a decree that the power of disposal was annexed to the widows' life estate as to all of the property belonging to the estate at the death of the testator. The case comes to this court on the defendants' appeal from that decree.

It is undoubtedly an established rule in this State, uniformly recognized by the decisions of this court from *Ramsdell* v. *Ramsdell*, 21 Maine, 288 to *Young* v. *Hillier*, 103 Maine, 17, that when the testator gives to the first taker an estate for life only by certain and express words, the question whether a power to dispose of the remainder is annexed to the conventional life estate, depends upon the construction of the instrument under which the power is claimed. In construing wills for the purpose of determining this question as

well as all others, the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase especially involved in the inquiry, provided no settled rule of law or principle of sound public policy is thereby violated. This intention must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning. *Wentworth* v. *Fernald*, 92 Maine, 282; *Shaw* v. *Hussey*, 41 Maine, 495; *Young* v. *Hillier*, 103 Maine, 17. Furthermore, in case of ambiguity, "it has long been well settled and indeed it is a principle so consonant to reason that the only wonder is that it should ever have been questioned, that all the surrounding circumstances of a testator,—his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of his will." Postlewaite's Appeal, 68 Pa. St. 477. "In view of the circumstances under which the testator made his will, as to his property, or his family, the meaning of his words may be plain when otherwise it would be uncertain." Follweiler's Appeal, 102 Pa. St. 583.

In the case at bar it has been seen that after giving to his wife a simple life estate in all of his property, and then specifically devising to his son John the Sawyer lot and to his son Samuel the Wilbur lot after the decease of the widow, and giving to the elder daughter a legacy of $200 payable in one year after the death of the widow, the testator uses the following language in the fifth paragraph of the will, viz: "I give, bequeath and devise to my son Rodney R. Bodfish and my daughter Sarah E. Bodfish in equal shares in common and undivided, all the rest, residue and remainder of the property which shall be left after the decease of my said wife . . . . on condition that they remain at home and care for said Lydia A. Bodfish while she shall live and that they pay to said White the $200 bequeathed to her by the fourth clause of the will."

It is not claimed by the plaintiffs that either by force of this language in the fifth paragraph or that of any other provision of the will, a power of disposal is expressly annexed to the life estate. But it is claimed that by the use of the words "rest, residue and remainder of the property that shall be left after the decease of my said wife," interpreted with reference to the other parts of the will and to existing circumstances, a power of disposal is given to the widow by implication. It is not contended, however, that this devise of the "remainder of the property that shall be left" necessarily creates a power of disposal in favor of the widow as a matter of law. On the contrary, it is conceded that whether or not such a result will follow from the use of the language quoted, must depend upon the intention of the testator as disclosed by all of the provisions of the will examined in the light of such attending circumstances and manifest objects as may reasonably be supposed to have been in the contemplation of the testator at the time of making the will, such as the condition of his family, and the situation and amount of his property.

There are several familar cases in this State and Massachusetts in which it has been held that language of similar import to that used in the residuary clause in the case at bar, considered in relation to the peculiar facts and circumstances existing in each instance, justified the inference that the intention of the testator was to give the widow a life estate coupled with a power of disposal. But in the examination of each case that arises it must be remembered that it is not the function of the court to substitute its judgment for that of the testator in determining what is a suitable and sufficient provision for the widow but to disclose what the real purpose of the testator was with respect to that question.

In the early case of *Scott* v. *Perkins*, 28 Maine, 22, the testator gave to his wife all of his property to be used and disposed of by her for her convenience and comfort during her life "and divided among his children" "what may remain" after the decease of the wife. Here the use of the words "to be used and disposed of by her" left no uncertainty as to the intention of the testator in the use of the word "what may be left" in the residuary clause.

In *Shaw* v. *Hussey*, 41 Maine, 495, a leading case in this State, the testator placed all of his personal property at the disposal of the wife and provided that at her decease "all of the real estate that may be unexpended by her" should be divided among the devisees named. The court held that the power of disposal extended to the real estate, and for the purpose of explaining the significance of the words "that may be unexpended by her" quoted from the opinion of the court in *Harris* v. *Knapp*, 21 Pick. 412, as follows:

"The words 'whatever shall remain,' necessarily mean, that portion of the property bequeathed, which shall be undisposed of at her decease; but there is no allusion in the will to any mode, by which the sum thus given, is to be diminished, excepting the disposition thereof, to be made by Mrs. Harris, and therefore the implication is inevitable."

So also in *Warren* v. *Webb*, 68 Maine, 133, the testator gave all of his property to his wife during her life "for her proper use, benefit and support, and after her decease" said property, or the residue and remainder thereof "to be divided among his children." The court said: "This language necessarily implies the liability of the estate to be diminished while in the hands of the devisee; and as there is no provision in the will for its diminution except through her agency, her right of control, and even of disposal, is inescapable."

It has been seen that in this respect there is a vital distinction between the cases last cited and the case at bar, for in the latter case the property comprised in the life estate given to the wife, was to be diminished by the two specific devises of the Sawyer lot and of the Wilbur lot to the sons John and Samuel respectively and the legacy of $200 to the daughter Mrs. White.

In *McGuire* v. *Gallagher*, 99 Maine, 334, the testator gave all of his property to his wife, during her life "to be used by her according to her desire" and then directed that "all the property remaining" be divided among her brothers and sisters. This language was interpreted in connection with the terms of the first clause and with the fact that the income of the estate was "manifestly insufficient for her support." Again in the recent case of

Young v. *Hillier*, 103 Maine, 17, where the testator gave to his wife, all of his property real and personal "for her use during life," and to his daughter "whatever may remain of said estates," there was no reference to any other mode of diminishing the "estates" except by the wife's use of the property, and inasmuch as the income of the estate was palpably insufficient for the support of the widow and she was possessed of no other means, the court reached the conclusion that the testator intended to give her a power of disposal.

In the case at bar the property of the testator was appraised at $3850. In addition to the home farm consisting of 200 acres of land with the buildings, the estate embraced 600 acres of timber lands and its market value was doubtless in excess of the appraisal. It includes highly productive intervale land which is enriched by the fertilizing deposits of the adjacent hills, and in the year 1907 cut forty tons of hay, a product which has a ready market and commands high prices for lumbering operations in that vicinity. But in view of the limited right of a life tenant to cut timber from the life estate, the testator did not wish to leave his widow dependent for her maintainance solely upon the rental of the property, but made what he evidently considered a further very important provision to insure her support and comfort during her life by devising "all the rest, residue and remainder of the property that shall be left" at the termination of the life estate, to the two younger children Sarah and Rodney "on condition that they remain at home and care for the said Lydia A. Bodfish while she shall live." It is true that they were not required to give any bond for the support of their mother. But the testator had lived on the home farm for 78 years and by the fruits of his labor had supported a wife and five children, and added 600 acres of timber lands to his possession. His wife was then sixty-three years of age and it probably never occurred to his mind that such an obligation was necessary. He undoubtedly believed that the residuary devisees would be willing and glad to accept 600 acres of land with the house in which he and his family were then living and the other buildings which he was then occupying, for the sole consideration of remaining at home

and caring for "their own mother during the few years of life remaining to her." As tending to show also, a desire and purpose on his part to keep the entire property in the family at least during the lifetime of his wife and to provide a home for her on the premises, there is great significance in the care with which he explicitly provides in the same paragraph of the will, that in the event of the decease of the daughter before the death of her mother, her share of the property shall go to her husband, and in the event of the death of Rodney before the decease of his mother, his share of the property should go to his wife, but if Sarah should leave no husband or Rodney no wife, then upon the death of either, the whole property devised to them should go to the survivor.

But it is said that the buildings were in a dilapidated condition and that a large amount must be expended in repairing the house and rebuilding the barn. Here again the situation must be considered from the standpoint of the testator. He knew the style of life to which his wife had been accustomed, and knew that her wants would be few and simple. He knew that there was an abundance of timber in the 400 acre lot not devised to John and Samuel, that would be available for all necessary repairs, and understood that by agreement between the mother and the children Sarah and Rodney, stumpage could be sold from the 400 acre lot without objection from the other heirs, to procure all the material required for such repairs and improvements.

It is conceded that there is clearly discernable through the several provisions of the will a purpose on the part of the testator not only to make a suitable and sufficient provision for the support of the widow but to place the devises and bequests to his children on a basis of equality as far as practicable. He gives to the elder daughter a legacy of $200, and to John and Samuel each a lot of land of the value of $200, and all that is left of the property, after taking out this legacy and the specific devises, he gives to Sarah and Rodney on the conditions specified. But it is obvious that if an unqualified right to dispose of all the property is vested in the widow, as claimed by the plaintiff, she would have the power to defeat these specific devises and the legacy to Mrs. White at her

discretion, and nullify these explicit provisions of the will. It has been seen that she and the residuary devisees have already attempted to exercise such a power by selling the stumpage from the Wilbur lot. Such a construction of the will would also render its provisions contradictory and inoperative in another respect. A general power of disposal in the widow would enable her to sell and convey the homestead to a stranger and thus prevent Sarah and Rodney from remaining at home and caring for their mother and wholly deprive them of the opportunity to perform the condition upon which the remainder of the property was devised to them.

When therefore all parts of the will are considered with reference to each other so as to give to every phrase and clause the meaning and effect which it was clearly designed to have, and the instrument is critically examined in the light of the situation and the amount of the testator's property, the thoughtful provisions actually made for the care and comfort of the widow, on the homestead farm, his manifest desire and purpose to make just and equal devises and bequests to his children, and all of the memories and associations connected with the history of this property, it is impossible to resist the conclusion that the testator intended to give to his wife Lydia A. Bodfish a simple life estate in all of his property with the further provision for her care and comfort contained in the fifth paragraph of the will, and that it was not his purpose to annex to this life estate the power to dispose of any part of the property.

It is accordingly the opinion of the court that the certificate must be,

Appeal sustained.
Decree below reversed.
New decree in accordance with the opinion.

In Equity.

WILLIAM C. STAPLES *vs.* OLIVER R. BOWDEN.

Waldo. Opinion February 26, 1909.

Resulting Trust. Equity. Appeal. Decree.

It is a familiar principle in equity that the beneficial estate attaches to the party from whom the consideration comes. Hence when property is purchased and the conveyance of the legal title is taken in the name of one person and the purchase money is paid by another generally a resulting trust will be presumed in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him.

The plaintiff purchased certain real estate with his own money and had the conveyance made to his sister the wife of the defendant. The plaintiff claimed that he intended that the title to the real estate should be held in trust by the sister for his benefit. The sister died intestate and the legal title to the real estate descended to her husband, the defendant, and her son and only child. Subsequently the son conveyed his interest in the real estate to the defendant. On a bill in equity brought by the plaintiff praying that it be decreed that the defendant held the real estate in trust for him and be ordered to convey the same to him, the jury found that it was not the intention of the plaintiff that the conveyance to the sister should be a gift to her but that it should be held in trust by her for his benefit. These findings were confirmed by the decree of the single Justice and the defendant was ordered to convey the real estate to the plaintiff. On appeal from this decree, *Held:* (1) That the burden was upon the defendant to show that the decree was clearly erroneous. (2) That it is not shown that the decree was manifestly wrong. (3) That the appeal be dismissed.

In equity. On appeal by defendant. Dismissed.

Bill in equity praying that it be decreed that the defendant held certain real estate in trust for the plaintiff and that he be ordered to convey the same to the plaintiff.

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

"Wilson C. Staples, of Stockton Springs, in the County of Waldo, and State of Maine, complains against Oliver R. Bowden of said Stockton Springs, and says:

"1. That the plaintiff on the seventh day of April, A. D. 1887, purchased from William Hichborn, of said Stockton Springs, the following described real estate, to wit:—(Description omitted in this report) and paid the said William Hichborn therefor the sum of six hundred and seventy-five dollars of his own money, and caused the legal title of said real estate to be conveyed to his sister, Orilla Bowden, since deceased. Said deed is dated the seventh day of April, A. D. 1887, and recorded in Waldo Registry of Deeds, Book 215, Page 452, a copy of which deed is hereto annexed, marked "Exhibit A." (Exhibit omitted in this report.)

"2. That no part of the purchase price of said real estate was paid by said Orilla Bowden or any other person, except the plaintiff, and said conveyance to said Orilla Bowden was not intended as a gift, but was intended that the legal title should be held by her in trust for the use and benefit of the plaintiff, all of which was well known by the said Oliver R. Bowden and by Leonard H. Bowden, son of said Orilla Bowden, hereinafter mentioned.

"3. That the said Orilla Bowden died on the day of July, A. D. 1906, seized of said legal title to said real estate, leaving a husband, the said Oliver R. Bowden, and one son Leonard H. Bowden of Stockton Springs, as her only heir at law, to whom said legal title to said real estate descended.

"4. That on the tenth day of September, A. D. 1906, the said Leonard H. Bowden gave the said Oliver R. Bowden a quitclaim deed of all his right, title and interest in said real estate, which deed is recorded in Waldo Registry of Deeds, Book 280, Page 215, a copy of which deed is hereto annexed, marked 'Exhibit B'. (Exhibit omitted from this report.)

"5. Said Oliver R. Bowden now claims to own said real estate absolutely in fee simple, and refuses to convey the same to the plaintiff or to recognize the plaintiff's equitable ownership thereof, and claims that the plaintiff has no right, title or interest therein."

"Wherefore, the plaintiff prays:

"1. That it may be decreed that the said Orilla Bowden took the legal title to said real estate in trust for the use and benefit of said plaintiff.

"2. That it may be decreed that the said Oliver R. Bowden now holds the legal title to said real estate under a resulting trust in favor of the said plaintiff, and that he be ordered to convey said real estate to said plaintiff by a good and sufficient deed of conveyance.

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

To this bill the defendant filed an answer which, omitting formal parts, is as follows:

The answer of defendant, who answers and says:

"First. The defendant says that the conveyance of plaintiff to Orilla Bowden was intended as a gift and that it was not intended that the legal title should be held by her in trust for the use and benefit of the plaintiff.

"Second. The defendant says that the plaintiff never called for a conveyance from Orilla Bowden nor has he called for a conveyance from defendant nor has he ever claimed an equitable ownership thereof."

The plaintiff then filed a replication which, omitting formal parts, is as follows:

"The replication of the plaintiff Wilson G. Staples to the answer of Oliver R. Bowden.

"The plaintiff says that the allegations contained in his bill are true and those in the defendant's answer are not true, and this he is ready to prove.

"And the plaintiff prays that issues of fact may be directed to be framed for the purpose of submitting to a jury the following questions:

"1. Was the money paid by the plaintiff for the real estate described in the bill, intended as a gift by the plaintiff to Orilla Bowden?

"2. Was the conveyance of the real estate, described in the bill by William Hichborn to Orilla Bowden intended by the plaintiff as a gift to her?

"3. Was it the intention of the plaintiff, at the time said conveyance was made, that said Orilla Bowden should hold the legal title to said real estate in trust for his use and benefit?"

The cause was then heard on bill, answer, replication and evidence and the issues of fact as specified in the replication were submitted to the determination of the jury. The jury answered the first two questions in the negative and the third question in the affirmative. Thereupon the presiding Justice ordered, adjudged and decreed as follows:

"1. That the verdicts rendered by the jury be confirmed.

"2. That the bill be sustained with costs.

"3. That Orilla Bowden, named in said bill, took the legal title to the real estate described in said bill, in trust for the use and benefit of the plaintiff.

"4. That the said defendant, Oliver R. Bowden, now holds the legal title to said real estate in trust for the plaintiff.

"5. That the said Oliver R. Bowden be, and hereby is, ordered and decreed to convey said real estate to the plaintiff, by a good and sufficient deed of conveyance within thirty days from this date."

The defendant then appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

The case appears in the opinion.

Dunton & Morse, for plaintiff.

William P. Thompson, for defendant.

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

WHITEHOUSE, J. This is a bill in equity in which the court is asked to decree that the defendant holds the real estate described in the bill in trust for the plaintiff and that the defendant be ordered to convey the property to the plaintiff. It is claimed in the bill that the plaintiff purchased the real estate in question with his own money in the year 1887 and had the conveyance made to his sister "Orilla" (Aurelia) Bowden, the defendant's wife, intending that the title should be held by her for his benefit. Orilla Bowden died in 1906 leaving the defendant and one son as her only heirs to whom

the legal title of this property descended. Subsequently the son quitclaimed his interest to the defendant who now claims absolute title to the property.

In his answer the defendant does not deny that the property was purchased by the plaintiff with his own money and alleges that the conveyance to Orilla Bowden was intended as an absolute gift and denies that the legal title was held by her in trust for the plaintiff.

Upon issues of fact framed for their determination, the jury found that it was not the intention of the plaintiff that the conveyance to Orilla Bowden should be a gift to her but that it should be held in trust by her for the plaintiff's benefit. These findings of the jury were confirmed by the decree of the single Justice and the defendant ordered to convey the property to the plaintiff. The case comes to the Law Court on appeal from this decree.

It is a familiar principle in equity that the beneficial estate attaches to the party from whom the consideration comes. Hence when property is purchased and the conveyance of the legal title is taken in the name of one person and the purchase money is paid by another, generally a resulting trust will be presumed in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. But this presumption exists only when the transaction is between parties where there is neither legal nor moral obligation for the purchaser to pay the consideration for another. The rule is reversed in its application between husband and wife and also between father and child. *Wentworth* v. *Shibles*, 89 Maine, 167, and cases cited.

In the case at bar it is not in controversy that the consideration for the property was paid by the plaintiff out of his own money and it is not suggested that there was any legal or moral obligation on his part to make this payment for his sister. The burden is now upon the defendant to show that the decree of the single Justice is clearly erroneous.

Neither the defendant nor his son was called to testify as a witness and the plaintiff himself who was the only living person who knew what his intention was respecting the conveyance to his sister, was excluded from testifying.

The defendant relies upon the evidence showing the friendly relations between the parties and certain declarations alleged to have been made by the plaintiff who was an unmarried man, tending to show that he caused the conveyance to be made to his sister as a gift with the intention of making his home with her and it appears that when not absent at work, he did make his home with his sister until his death, and frequently and habitually furnished large quantities of supplies for the household.

The testimony of Edith Moody was introduced by the defendant to the effect that six years after the purchase of the place the plaintiff said, speaking of Orilla, that "He had given the place to her—it was hers."

Frank Dickey also testifies that he had a conversation with the plaintiff in 1907 and the plaintiff said "he gave the place to Rilla," meaning Mrs. Bowden. Thomas P. Moody also testified for the defendant, that he heard the plaintiff say that he bought the place and gave it to his sister with the understanding that he should have a home there and that after his sister died, Bowden kicked him out.

But the plaintiff's counsel calls attention to the fact that the conversations by the two witnesses last named appear to have been after the commencement of this suit in equity and after the plaintiff had been informed of his legal and equitable rights and accordingly insist that it is wholly improbable that he made the statements in the precise form stated by the witnesses, as he understood perfectly well that if it was an absolute gift to her, she did not hold it in trust for him.

In behalf of the plaintiff it appears from the assessors' books that the property was taxed to the plaintiff for five years after it was purchased by him, that he made extensive repairs upon the buildings at his own expense and paid for painting and papering up to and including the year 1905, and the plaintiff contends that the fact that he made this house his home when not away at work from 1887 to 1906 when his sister died, strengthens the plaintiff's contention rather than the defendant's. After 1892 the property appears to have been taxed to the defendant Oliver R. Bowden by some arrangement made at that time which appears to have been

satisfactory to the parties. But as it had never been taxed to his sister Orilla, it is claimed that the assessment to the defendant is very significant evidence that there was originally no intention to make an absolute gift to the sister Orilla in 1887, when the deed was made.

In *Young* v. *Witham*, 75 Maine, 536, a case closely analogous to the one at bar, the court said, "On appeal the burden lies upon the appellant. There is good reason for the rule in our practice. Cases are now heard before a single judge mostly on oral evidence. When the testimony is conflicting the judge has an opportunity to form an opinion of the credibility of the witnesses not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly upon the stand and well on the record."

Applying this rule the court does not feel justified in saying that the decision of the single Justice affirming the findings of the jury was manifestly wrong. The certificate must therefore be,

Appeal dismissed.
Decree below affirmed with costs.

INHABITANTS OF KINGMAN, Petitioners,

vs.

COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

Penobscot. Opinion February 26, 1909.

Ways. County Commissioners. Return. Certiorari. Legislative Resolves. Resolve, 1907, chapter 36. Revised Statutes, chapter 23, sections 4, 9, 39.

When a highway has been laid out by county commissioners they must state in their return when the work of building the same shall be done. The language of the statute, R. S., chapter 23, section 4, "shall state in their return when it is to be done" is mandatory, not simply directory.

When a highway has been laid out by county commissioners but their return contains no statement when the work of building the same shall be done, such record would form no legal basis for proceedings under Revised Statutes, chapter 23, section 39, to cause the work to be done by an agent when it was not done by the town within the time prescribed therefor.

Where a highway located partly in a town and partly in a plantation, was laid out by county commissioners but there was an entire absence of any statement or provision in the return of the commissioners showing that any decision was made respecting the time within which that portion of the road in the plantation should be completed, *Held:* That this omission was a failure to comply with a mandatory requirement of the statute, and an error which materially concerned the town.

A petition for a writ of certiorari was filed in behalf of the plaintiff town against the county commissioners of Penobscot county to quash their records for errors alleged to have been committed in laying out a highway located partly in the plaintiff town and partly in Drew Plantation in that county, *Held:* That the writ should issue.

Ordinarily courts do not notice legislative resolves unless produced in evidence.

On report. Petition for writ of certiorari. Writ to issue.

Petition for a writ of certiorari in behalf of the town of Kingman against the county commissioners of Penobscot county to quash their records and proceedings for errors alleged to have been committed in laying out a highway located partly in the town of Kingman and partly in Drew Plantation in said county. By agreement

of the parties the certified copy of the record of the doings of the county commissioners in the premises was taken as the answer of the defendants.

The matter was heard before the Justice of the first instance without a jury and at the conclusion of the evidence, and by agreement of the parties, the cause was reported to the Law Court for determination upon so much of the evidence as was "legally competent and admissible."

The case is stated in the opinion.

Hugo Clark, for plaintiffs.

H. H. Patten, County Attorney, for defendants.

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

WHITEHOUSE, J. This is a petition for a writ of certiorari in behalf of the town of Kingman against the county commissioners of Penobscot county to quash their records and proceedings for errors alleged to have been committed in laying out a highway located partly in the town of Kingman and partly in Drew Plantation in that county. By agreement of the parties the certified copy of the record of the doings of the county commissioners in the premises is to be taken as the answer of the defendants. This record consists of a copy of the original petition for the road, the order of notice thereon and the return of the commissioners of their doings in attempting to locate and establish a way. The petitioners allege eight causes of error, the fifth and sixth of which are as follows; namely:

Fifth: Because it appears by the said return of the said commissioners and by the records thereof, that said commissioners state that a term of one year from the twenty-fourth day of September, 1907 is allowed to the town of Kingman, through which said road is located, to open and make the same, without stating, adjudging or designating in said return, or the records thereof, that any portion whatsoever of said county road or highway is to be opened, or that any portion whatsoever of the work or expense

thereof is to be done or borne by said Drew Plantation, and without limiting the portion of the same to be done by your petitioner, the said town of Kingman, to that portion of said county road or highway situate within its territorial limits, although it appears by the said return and the records thereof on the files and records of said commissioners in said matter in the custody of their said clerk, and it is a fact, that a considerable portion of said county road or highway passes through and is situate in said Drew Plantation.

Sixth: Because said commissioners do not state in their said return of their said doings, nor does it appear by the records thereof, when said way is to be done."

In the return of their doings the commissioners say: "We proceeded to locate and establish said highway as prayed for, by metes and bounds as follows, namely: "Commencing at Sprague's mill in said Drew Plantation on the northwest bank of the Mattawamkeag river at a hemlock stake marked C. R.," etc. Thereupon they continue to give numerous courses and distances of the way as located throughout its entire length both in Drew Plantation and in the town of Kingman, and respecting the metes and bounds and time for opening the way conclude their return as follows:

"And we do further adjudge that said road shall be four rods wide, all the monuments at the angles thereof in the foregoing description named being the center of said road; and a term of one year from the twenty-fourth day of September 1907, is allowed to the town of Kingman through which said road is located, to open and make the same."

It is provided by section 4 of chapter 23, R. S., that the county commissioners "shall make a correct return of their doings, signed by them, accompanied by an accurate plan of the way and state in their return when it is to be done, the names of the persons to whom damages are allowed, the amount allowed to each and when to be paid;" and section 9 of the same chapter declares that "a time not exceeding two years shall be allowed for making and opening the way."

It requires no argument to show the wisdom and necessity of this provision requiring the commissioners to state in their return when the work of building the road shall be done. It may obviously be of great consequence to all who are likely to have occasion to use the projected way for travel and transportation. Important contracts for the transportation of lumber and other merchandise would naturally be made with reference to the time fixed for the opening of such a road. It is also important that towns having the burden of contributing to the expense of building the road should have definite information in regard to the time of performing the work in order to make seasonable tax levies and appropriations for that purpose. The language of the statute is imperative; commissioners "shall state in their return when it is to be done." The requirement is not simply directory, it is mandatory.

It has been seen that the county commissioners in the case at bar, made an adjudication as shown by their return, that "a term of one year from the 24th day of September 1907 is allowed to the town of Kingman through which said road is located, to open and make the same."

It is contended in behalf of the town of Kingman that strictly construed this statement in the return requires Kingman to build the entire road as located, including that portion of it in Drew Plantation as well as that within its own limits, and that the doings of the commissioners must for that reason be held unauthorized and void.

On the other hand it is contended by the county attorney in behalf of the commissioners that "it ought to be plain that Kingman had one year to build that part of the road located in the town of Kingman." He further insists "that it ought to be assumed that the part of the road located in Drew plantation had some provision for the construction of the same or it would have appeared in the record of the county commissioners," and he cites chapter 36 of the Resolves of Maine for 1907, being a "Resolve in favor of Kingman and Drew plantation." This resolve provides "that the sum of $2000 be and hereby is appropriated to aid in building a road from Kingman Village to Sprague's mill in Drew plantation. Said sum

to be drawn by and expended under the direction of the county commissioners of Penobscot county." But this private legislation was not pleaded by the defendants or introduced or offered in evidence, and "ordinarily courts do not notice resolves, unless produced in evidence." *Simmons* v. *Jacobs*, 52 Maine, page 158. But even if it be assumed that the court can properly take judicial notice of this resolve, it is manifest that it contains nothing either to supply the deficiency in the proceedings of the commissioners or to aid the return of their doings respecting the time within which the work of building that portion of the road located in Drew Plantation must be completed. In order to effectuate the intention of the commissioners, the language of their return may properly be construed to require the town of Kingman to build only that portion of the way located within its own territorial limits. There is then an entire absence of any statement or provision in the commissioners' return showing that any decision was made respecting the time within which that portion of the road in Drew Plantation should be completed. This omission is clearly a failure to comply with a mandatory requirement of the statute, and an error which materially concerns the interests of the town of Kingman. There would be no justice or propriety in compelling Kingman to build its part of the road in one year, and at the same time give Drew Plantation an indefinite time subject only to the limitation of two years allowed by section 9 of chapter 23.

Furthermore, such a record of the doings of the county commissioners would form no legal basis for proceedings under section 39 of the same chapter, to cause the work to be done by an agent when it is not done by the town within the time prescribed therefore.

It is accordingly the opinion of the court that the proceedings of the county commissioners are invalidated by this error and must be quashed. This conclusion in regard to the fifth and sixth errors above considered renders it unnecessary to pass upon the other errors assigned. The certificate must therefore be,

Writ of certiorari to issue.

JOSEPH B. HIGNETT *vs.* INHABITANTS OF NORRIDGEWOCK.

Somerset. Opinion February 26, 1909.

Ways. Defects. Notice. Issue of Fact. Damages.

The plaintiff brought an action against the defendant town to recover damages for personal injuries sustained by him while riding horseback along a town way in the defendant town, by reason of his horse stepping into a hole in the traveled part of the way, and recovered a verdict for $441.67. The defendant town contended (1) that the plaintiff's proof located the alleged defect at another and different place in the way than that described as its location in his written notice to the defendant town after the accident; (2) that there was not sufficient proof of the twenty-four hours' actual notice of the defect prior to the accident, as required by statute; (3) that the plaintiff was not in the exercise of due care at the time of the accident; (4) that the damages awarded were excessive.

Held: (1) That it was an issue of fact for the jury whether the plaintiff's injuries were caused by the defect described in the notice and the jury having found for the plaintiff on that issue, no sufficient reason is shown for disturbing that finding.

(2) That the verdict shows that the jury must have found that the defect existed and that the person acting as substitute for the road commissioner had the necessary twenty-four hours' actual notice of the defect, and that such finding was justified by the evidence.

(3) That the jury were authorized by the evidence to find that the plaintiff was in the exercise of due care at the time of the accident.

(4) That the damages awarded were not excessive.

On motion by defendants. Overruled.

Special action on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff while riding horseback along a town way in the defendant town, by reason of his horse stepping into a hole in the traveled part of the way. Plea, the general issue. Verdict for plaintiff for $441.67. The defendants then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

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

"In a plea of the case for that heretofore, to wit, on Monday, the fourth day of June, A. D. 1906, there was a certain public highway, legally established, in said town of Norridgewock, said

highway is known as the River road and leads from Norridgewock to Madison, on the south side of the Kennebec river, which said highway the said defendants were then and there bound by law to keep in repair so as to be safe and convenient for travelers with horses, teams and carriages; and the plaintiff avers that on the said fourth day of June, A. D. 1906, he was lawfully traveling over and along said highway, riding upon a safe and kind horse, near the culvert at the foot of Yeo Hill, so-called. And the plaintiff says that said defendants did not keep said highway in repair so that it was safe and convenient for travelers with horses, teams and carriages, but on the contrary, said highway was unsafe, inconvenient and defective; that there was a hole about a foot square and one and one-half feet deep in the traveled part of the road, occasioned by the dirt part of the road sinking into the drain of said culvert, at or near the foot of said Yeo Hill; that said culvert was defectively built and maintained, so that the road caved into the drain of the culvert, on the south side of the culvert, making a dangerous and unsafe place in the road and that said highway, at that point, had been dangerous, unsafe and defective, for a long time prior to the said fourth day of June, A. D. 1906, to wit, for more than twenty-four hours. And the plaintiff says that while riding along said highway, upon said safe and kind horse, and while in the exercise of due care and caution, and when near said culvert at the foot of said Yeo Hill, the horse stepped into said hole in the traveled part of said highway on the south side of said culvert, and violently threw the plaintiff upon the ground, striking upon his shoulder and right side, all of which was due solely to the carelessness, negligence and fault on the part of the said defendants, and with no fault, negligence or want of due care on the part of the plaintiff, and the plaintiff says that he was severely injured thereby, and received a sprained shoulder, that the edges of the bone of the right shoulder were broken, his hips and back were wrenched and strained, and he was injured internally, so that he has spit blood since the accident, and received other injuries, the full extent and nature of which cannot be ascertained at the present time, or specified more clearly; that he received a severe shock to

his system, and was greatly lamed and hurt, and has suffered great bodily pain and mental anxiety and distress for a long period of time, and has been compelled to pay out large sums of money for medical attendance, care and nursing, and that he is now incapacitated for performing his usual duties and labor. And the plaintiff further avers that within fourteen days after receiving said injury, to wit, on the seventeenth day of June, A. D. 1906, he notified the municipal officers of said town of Norridgewock, in writing, setting forth his claim for damages, specifying the nature of his injuries, and the nature and location of the defect which caused said injury; and the plaintiff further avers that the municipal officers and road commissioner of said town of Norridgewock, had twenty-four hours' actual notice of the defective condition of said highway, at said culvert, as heretofore specified, whereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to have and recover of said defendants, for the damage and injury so to him sustained as aforesaid, to the damage of said plaintiff, (as he says) the sum of two thousand dollars."

Forest Goodwin, for plaintiff.

LeRoy R. Folsom, and Augustine Simmons, for defendants.

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

KING, J. Action to recover damages for personal injuries alleged to have been sustained by the plaintiff while riding horseback along a town way in the defendant town, by reason of his horse stepping into a hole in the traveled part of the way. The case is before this court on defendants' motion to set aside a verdict for the plaintiff.

1. The first, and perhaps chief, contention in support of the motion is that the plaintiff's proof located the alleged defect at another and different place in the way than that described as its location in the required written notice to the town after the accident.

The language of the written notice, as to the location of the defect, is: "The particular place on said road where I was injured was at or near the foot of the Yeo Hill, so-called, at a culvert that

runs across the water course at that point. There was a hole about a foot square and one and one-half feet deep in the traveled part of the road caused by the dirt part of the road sinking into the drain of said culvert. The culvert was defectively built and maintained, so that the road caved into the drain of the culvert on the south side, making a dangerous and unsafe place in the road."

The record discloses the following facts and conditions:

The accident occurred at a culvert crossing the road between two hills—that on the north called Yeo Hill, and that on the south Hignett's Hill. These hills are neither very steep nor long. From the place of the accident to the top of Hignett's Hill is stated to be 753 feet, and to the top of Yeo Hill about 300 feet. There are two other culverts crossing the road at or near the bottom of these hills—one 213 feet north, and the other 203 feet south of the middle culvert.

It seems a fair conclusion, from all the evidence, that the middle culvert was at the lowest point between the hills, and that there was a slight decline from the northerly to the middle culvert.

The defendants contended that the location of the defect described in the written notice was thereby necessarily limited to the northerly culvert, because that was the culvert "at or near the foot of the Yeo Hill." The plaintiff's evidence established the fact that his injuries were occasioned by a hole, such as described in his notice, located at the middle culvert. No claim was made that there was a similar hole at the northerly culvert.

It was, therefore, an issue of fact for the jury whether the plaintiff's injuries were caused by *the* defect—the same defect, described in the notice, or, in other words, if the culvert described in the notice was the middle culvert. This issue was sharply tried out, and the jury decided it in the plaintiff's favor. A careful examination of the record fails to satisfy us that that finding was not justified by the evidence.

The jury may have found, and we could not say that such a finding would be manifestly wrong, that the location of the defect proved answered accurately the general descriptive words of the notice: "The particular place . . . where I was injured was

at or near the foot of the Yeo Hill." But this general description of the location is limited by the more specific words: "at a culvert that runs across the water course at that point."

Was the middle culvert the one "across the water course?" If it was, that fact necessarily determined in the plaintiff's favor the issue whether the defect at the middle culvert, which caused the injury, was the same defect described in the notice. Upon this question the evidence was somewhat conflicting. The defendants claimed that the northerly culvert ran across a water course also. But it fairly appears, we think, that the water course at the middle culvert was the larger, and at the lowest point between the hills; that it was the outlet of a well defined stream, draining a large area, and that water flowed in it during the whole, or practically the whole year. True, there was also a water course under the northerly culvert, through which water flowed in times of freshets and heavy rains, but, while it was claimed that this water course drained a small ravine or springy spot outside the highway, it was not shown that any well defined stream of water passed through it, and it was admittedly dry during a considerable portion of the year.

It is of significance, we think, on this point, that two of the defendants' witnesses, Mr. Savage, the selectman, and Mr. Tuttle, the substitute for the commissioner, spoke of the middle culvert as the "bridge."

We think the evidence preponderated in support of the conclusion that the water course over which the middle culvert crossed was "the water course"—the only natural and well defined water course, between those hills. But this was a question of fact for the jury to pass upon. They have passed upon it, after seeing and hearing the witnesses, and must have found, under appropriate instructions, that the middle culvert was the one mentioned in the written notice "that runs across the water course at that point." We find no reason to disturb that finding.

2. The defendants further urge that there was not sufficient proof of the twenty-four hours' actual notice of the defect prior to the accident, as required by statute. The plaintiff claimed that Mr. Tuttle, who was at the time acting as a substitute for the road

commissioner, had such notice. Mr. Tuttle denied it. It was claimed by the defendants that the plaintiff's horse broke through the road and the hole was thereby made. The plaintiff testified that he did not see the hole when his horse fell, as he was then looking at some men plowing nearby, but saw it after he got up. There was, however, sufficient evidence to justify the jury in finding that there was a hole, prior to the accident, at the place in question. Several witnesses so testified. Mr. Gillin stated that prior to the accident his horses broke two holes at this middle culvert, one on each side of the road; that he personally notified Tuttle of the holes several times; that they were not fixed; and that on the 31st day of May, four days before the accident, he saw the same hole on the east side of the road at the place of the accident. Mr. Creighton testified that he notified Tuttle, prior to the accident, of a hole at this culvert on the east side of the road. Mr. Williams testified that he passed over the culvert on the 31st of May and saw a hole at the point of the accident. He said: "I had to get off the democrat and walk the horse one side to get by the hole." This witness stated that he was in the field nearby looking at the plaintiff when his horse fell, and that he saw the horse step his off forward foot into this hole. He went to the plaintiff's assistance and found the hole, into which the horse stepped, was at the same place as the one he saw and avoided a few days before. The jury heard and considered all the evidence upon this disputed point.

No question is raised that they were not fully and explicitly instructed as to the requirements of the statute relating to the proof of actual notice of the particular defect. Their verdict shows that they must have decided that the defect existed, and that Tuttle had the necessary twenty-four hours' actual notice of it. We think their decision was justified by the evidence.

3. The jury were authorized by the evidence to find that the plaintiff was in the exercise of due care at the time of the accident. He said he had no knowledge of the defect or of any other hole in the road. He had a right to assume, with no knowledge to the contrary, that the traveled part of this town way in the month of June would be safe for driving thereon on horseback. He, and all

the witnesses who saw him at the time his horse fell, testified that he was not driving immoderately.

4. Excessive damages. The verdict was $441.67. It will serve no useful purpose to incorporate here any extended statement of the evidence introduced to establish the plaintiff's damages. The defendants contended that his injuries were very slight, and the resulting disabilities limited. But, on the other hand, it appeared that the plaintiff received a very violent fall, being thrown over his horse's head on to the road, and the horse fell upon him, where he lay, dazed or partly unconscious, till assisted up by Mr. Yeo and Mr. Williams. In his notice to the town within fourteen days after the accident he stated: "I received a sprained shoulder, the edges of the bone of the shoulder being broken, my hips and back were wrenched and strained, and I was injured internally and have been spitting blood since the accident."

Dr. Smith, a witness for the defense, was called to the plaintiff the day of the accident and could find "no dislocation or fracture" of the shoulder. He was notified again that night, "that there was certainly something broken in his shoulder and he wanted me to come back again. I went back and went through as careful an examination as I could give him and decided I couldn't find any fracture or dislocation, and told him so." On the 7th of June, Dr. Dascombe was called in consultation and no fracture or dislocation of the shoulder was found.

On July 24th, Dr. Bean, who was at the plaintiff's house, made a slight examination of the shoulder finding it "considerably swollen." "He said that there was great pain when I moved the arm." The plaintiff testified that he was in bed "about ten days;" and that he carried his arm in a sling "somewhere about five or six months;" that he spit blood "quite a little" after the accident, and that at the time of the trial, a year and a half after the accident, his shoulder still troubled him. Dr. Dascombe stated that in an examination of the plaintiff the night before the trial "I found restricted movement of the right arm, right shoulder joint, and at the acromial end of the clavicle a slight enlargement, more so than on the other side." The Doctor further said: "Of course, it won't get well in one week,

or may not in one year. He may never be able to extend the arm above the head as he can the other. The left arm he could raise up so that it came in close proximity to his head, the other one no nearer than six or eight inches, at the office last night."

From an examination of all the evidence bearing upon the nature of the plaintiff's injuries, and the extent of his resulting disabilities, it is the opinion of the court that the amount of damages awarded by the jury is not excessive. The entry will be,

Motion overruled.
Judgment on the verdict.

EDWIN G. BURNHAM *vs.* MARY C. FRETZ AUSTIN.

Hancock. Opinion February 26, 1909.

Waiver. Same a Matter of Intention. How Waiver may be Proved.

Waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declaration; it may be inferred from the acts of the party and most often is shown by his action or non-action.

Waiver may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was the intention and purpose to waive.

The defendant gave the plaintiff a written permit dated December 21, 1906 to enter upon certain lands owned by her and to cut and remove therefrom wood to be manufactured into staves, expressly reserving all cedar and pine. The stave wood was to be all removed before April 1, 1907, at which time the agreement was to terminate. The plaintiff was to pay stumpage at the rate of one dollar per cord, the first payment to be made when 500 cords had been cut. The plaintiff entered and began operations when on December 31, 1906, he was notified in writing by defendant that he had broken his contract, that his cutting after January 1, 1907, would be wholly at her sufferance and that all his crews must leave the premises on or before January 10, 1907, unless they confined themselves to cutting and

hauling fir, and such spruce as her agent Clark might designate. This notice the plaintiff read to his crews and from that time on he operated in compliance with these restrictions. Payments for stumpage were made by the plaintiff to the defendant as each 500 cords were cut, as provided in the contract, the last payment being in March, 1907. September 24, 1907, the plaintiff brought an action against the defendant for breach of the contract.

Held: That if on December 31, 1906, the plaintiff had any right of action the evidence so clearly shows a waiver on his part that a recovery is precluded. The things that the plaintiff did and the things that he failed to do can be reconciled on no other theory than that either he claimed no right of action or voluntarily relinquished it.

On exceptions by plaintiff. Overruled.

Action of assumpsit to recover damages for an alleged breach of a written contract in the form of a logging permit. Plea, the general issue, with brief statement setting up certain alleged equitable defenses. At the conclusion of the evidence, the presiding Justice directed a verdict for the defendant and thereupon the plaintiff excepted.

The case is stated in the opinion.

John A. Peters, for plaintiff.

Deasy & Lyman, for defendant.

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

CORNISH, J. In this action of assumpsit the plaintiff seeks to recover damages for breach of a written contract in the form of a logging permit dated December 21, 1906. At the close of the testimony the presiding Justice directed a verdict for the defendant, and the case comes before this court on plaintiff's exceptions to this ruling.

The permit in question gave the plaintiff the right to enter upon certain lands owned by her in the town and county of Hancock, and "to cut and remove therefrom, wood to be manufactured into staves." . . . All cedar and pine wood growing upon said land was expressly reserved. Said stave wood was to be all removed before April 1, 1907 at which time the agreement was to terminate. The plaintiff was to pay stumpage at the rate of one dollar per cord,

the first payment to be made when five hundred cords had been cut. This written agreement was the result of certain prior conversations between the parties and at the time of its execution, the plaintiff had already placed his crews upon the defendant's land and had commenced the operation. He continued cutting both spruce and fir for ten days after the contract was signed, when on Dec. 31, 1906 he was notified in writing by the defendant that he had broken his contract, that his cutting after January 1, 1907 would be wholly at her sufferance, and that all his crews must leave the premises on or before January 10, 1907 unless they confined themselves to cutting and hauling fir, and such spruce as her agent Willard Clark, might designate. This notice the plaintiff read to his crews and from that time on he operated in compliance with these restrictions. Payments for stumpage were made by the plaintiff to the defendant as each five hundred cords were cut, as provided in the contract, the last payment being in March, 1907.

This suit for breach of contract was brought September 24, 1907. The legal rights of parties under such contracts have been frequently defined by this court. A permit of this sort constitutes an executory contract for the sale of the wood or timber after it shall have been severed from the soil and converted into chattel property, together with a license in the permittee to enter upon the land for the purpose of cutting and removing it. This license is revokable on the part of the land owner as to the wood or timber not severed from the land, but such revocation without legal cause works a breach of the contract. *Emerson* v. *Shores*, 95 Maine, 237; *Pierce* v. *Banton*, 98 Maine, 553.

The defendant in the case at bar sets up as her reason for revocation, an agreement on the part of the plaintiff not to cut any spruce suitable for manufacture into long lumber and his violation of this agreement by cutting all spruce in the path of his operation.

In her plea the defendant alleged that this provision was omitted from the written contract by mistake and inadvertence, and asked to have the contract reformed so as to embrace that condition, but this equitable defense is not now insisted upon.

Instead, while admitting that the written contract allows the cutting of all spruce, the defendant relies upon the same parol agreement, as existing independent of and collateral to the written agreement, and provable under and enforceable through the rules of law. The plaintiff replies that the contract between the parties was reduced to writing and that parol evidence cannot be introduced to vary or contradict it.

Whether such an independent agreement was made was a question of fact for the jury. The defendant and her husband testify positively to its existence. The plaintiff fails to remember accurately what was said in regard to the spruce. Were this the only point in defense we should hesitate to say that the case should have been taken from the jury and that a verdict in favor of the plaintiff on this issue would not be allowed to stand. If such collateral agreement was made its legal effect would be for the court and we are not inclined to extend the doctrine of independent collateral agreements as expressed in *Neal* v. *Flint*, 88 Maine, 72, beyond its legitimate sphere. See *Chaplin* v. *Gerald*, 104 Maine, 187. But upon another point raised in defense, the plaintiff fails, and that is the question of waiver. If on December 31, 1906 he had any right of action the evidence so clearly shows a waiver on his part that recovery is precluded. Waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declaration; it may be inferred from the acts of the party and most often is shown by his action or non-action. *Peabody* v. *Maguire*, 79 Maine, 572; *Stewart* v. *Leonard*, 103 Maine, 128. It is the voluntary relinquishment of a known right, which, but for such waiver the party would have enjoyed. "It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive." *Farlow* v. *Ellis*, 15 Gray, 229-231.

The things that the plaintiff here did and the things that he failed to do can be reconciled with no other theory than that either he claimed no right of action or voluntarily relinquished it. When

the defendant wrote him the letter of revocation ten days after the contract was executed, he seemed to accept the situation for he went at once to his different crews, read the notice to them and explained that thenceforth the work must be done under the direction of Willard Clark, the defendant's agent. From that time without objection on his part the spruce was cut just as Clark dictated. The plaintiff did not leave the work and claim damages for breach of contract but saw fit to remain and operate under the new arrangement. The work continued without a day's suspension and without a word of protest on his part. He saw the defendant and her agent several times but never claimed or intimated that the contract of December 21st was subsisting, or that she had broken the same and that he claimed damages therefor. His first demand was the service of this writ. He made payments and settlements with her under the new regime without a murmur of dissent.

But his own letter written to the defendant soon after the revocation is conclusive on this point. In this he pleads for the privilege of continuing work and practically admits the justice of the defendant's position. He says "No matter what is being told you, I am using every effort to cut just as you want it done . . . I think about all the spruce that has been hauled was cut before we had the men shown just how they should cut; I have been with Willard among the crews and I thought they all talked as though they would do the right thing, and I want to have it done, but of course they never around here cut timber only just as they had a chance to cut all before them; I am willing to go at all times with Willard or any one you designate and we will do all we can to further your interest."

Such language gives color to the defendant's contention as to the contract itself, and is utterly inconsistent with the existence of a legal claim which the writer intended to enforce. "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is what was said or written and whether what was said indicated the alleged intention. The plaintiff had a right to act on the natural interpretation of the corres-

pondence, and the defendant's conduct in reference to it. The secret understanding or intent of the defendants or their agents could not effect his rights." *West* v. *Platt*, 127 Mass. 367. In the case at bar the evidence of even a secret intent is lacking for not even at the trial did the plaintiff state that he had such intent nor did he attempt to explain his words and acts, tending to show the contrary.

Under such circumstances the ruling of the presiding Justice in directing a verdict for defendant was correct, as the evidence presented was insufficient to support a verdict for the plaintiff. *Day* v. *B. & M. R. R.*, 97 Maine, 528.

Exceptions overruled.

JAMES H. WALKER,

Administrator de bonis non with will annexed of estate of Mercy Follett, Appellant from decree of Judge of Probate,

vs.

ESTATE OF MERCY FOLLETT.

York. Opinion February 26, 1909.

Executors and Administrators. Wills. Devise. Unpaid Legacy. License to Sell Real Estate Refused. Devisee must Resort to Equity, When.

The will of Mercy Follett was proved and allowed October 4, 1852, and Robert Follett Gerrish, a nephew, was appointed executor on the same date. The inventory filed in March, 1853, showed real estate appraised at $7050, and personal estate appraised at $3620. The executor's first and only account, allowed in October, 1853, showed a balance of $911.14 of personal estate in his hands. By the terms of the will, after the payment of all debts and funeral charges and with such exceptions and bequests as the testatrix thereinafter made, Robert Follett Gerrish was given a life estate in all the property both real and personal "to have, use and enjoy the income and profit thereof during his, the said Robert's natural life." The will then further provided, among other things, that at "my said Executor's decease I hereby give and bequeath of my said property or estate one thousand

dollars to be invested in real estate or permanent and profitable stock, the income of which shall be annually appropriated for the support of Congregational preaching, for, and in the "First Congregational Church and Parish," in Kittery "as long as said Parish shall exist." On July 23, 1874, said Robert Follett Gerrish conveyed by warranty deed and without license of court, to his wife Sarah C. Gerrish all the real estate left by said Mercy Follett, and on April 18, 1881, said Robert Follett Gerrish and Sarah C. Gerrish conveyed a part of the same to one Ichabod Goodwin. The balance of the real estate is still held by the heirs at law of Robert Follett Gerrish and Sarah C. Gerrish. Robert Follett Gerrish died Oct. 25, 1882, and there was no further administration of the Mercy Follett estate until Sept. 1, 1903, when the appellant, James H. Walker, was appointed administrator de bonis non with will annexed upon the petition of the said First Congregational Church and Parish of Kittery. On October 6, 1903, the said administrator filed an inventory in the Probate Court showing no personal property but real estate appraised at $10532.66, being the identical parcels enumerated in the original inventory filed in 1853. After a futile demand upon the heirs of Robert Follett Gerrish for any property in their possession belonging to the estate of Mercy Follett, the administrator filed a petition in the Probate Court for license to sell all the real estate inventoried for the purpose of paying the legacy of one thousand dollars to the said First Congregational Church and Parish, which said legacy had never been paid. The Probate Court refused to grant the license and the administrator appealed.

Held: 1. That the appeal must be dismissed. The real estate is not in the custody or control of the administrator but in that of third parties who hold under recorded deeds, and that no such power is given by statute to administrators de bonis non as is claimed in this case.

2. That if the title to the real estate is to be attacked it should be by the party in interest, the Kittery Parish, and the remedy should be sought by a bill in equity.

3. That whether the legacy created a charge upon the real estate of the testator, which follows it into the hands of the present holders, and whether such a right if once existing has been lost through laches of the Parish, are questions which cannot be determined in the present proceedings but can be under a bill in equity. All the facts can then be presented to the court and under its elastic procedure, the court, if the bill is sustained, may also designate the particular real estate which shall in the first instance be reached, because the equitable rights of the present holders may vary.

On agreed statement. Decree of Probate Court affirmed.

The plaintiff in his capacity as administrator de bonis non with will annexed of the estate of Mercy Follett, filed a petition in the Probate Court, York County, for license to sell certain real estate.

License was refused and the plaintiff appealed to the Supreme Court of Probate. When the cause came on for hearing in the appellate court, an agreed statement of facts was filed and the case was reported to the Law Court to render such judgment as the law and the facts required,

The case is stated in the opinion.

Samuel W. Emery, and Geo. F. & Leroy Haley, for plaintiff, James H. Walker.

Frink & Marvin, and George C. Yeaton, for defendant, Estate of Mercy Follett.

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

CORNISH, J. The appellant is administrator de bonis non with will annexed of the estate of Mercy Follett and appealed from a decree of the Judge of Probate dismissing his petition for license to sell real estate. The will of Mercy Follett was proved and allowed October 4, 1852, and Robert Follett Gerrish, a nephew, was appointed executor on the same day. The inventory filed March 7, 1853, showed real estate appraised at $7050 and personal property appraised at $3620, a total of $10670. The executor's first and only account was allowed October 3, 1853, showing a balance of $911.44 of personal property in his hands. By the terms of the will, after the payment of all debts and funeral charges and "with such exceptions and bequests" as the testatrix thereinafter made, Robert Follett Gerrish was given a life estate in all the property both real and personal "to have, use and enjoy the income and profit thereof during his, the said Robert's natural life." At his decease, his oldest son, if any, was to have a similar life estate, and after various other provisions designed to meet the possible contingencies of heirship, the estate was to vest absolutely in the grandchildren or if no grandchildren, two-thirds was given to the First Congregational Church and Parish in Kittery and one-third to the Maine Missionary Society.

Then follows this clause:

"The exceptions to the disposal of my estate as above named, willed and bequeathed are these, to wit. It is my will that, and I hereby give and bequeath annually after my decease the sum of twenty five dollars of the said profits or income of my said property for the support of an intelligent and pious ministry of the Congregational denomination, in and for the said Congregational Church and Parish, said twenty five dollars to be annually paid to the acting Clergyman of said Parish by my said Executor hereinafter named, during said Executor's natural life. Then at his, my said Executors' decease I hereby give and bequeath of my said property or estate one thousand dollars to be invested in real estate or permanent and profitable stock, the income of which shall be annually appropriated for the support of Congregational preaching, for, and in said First Congregational Church, and Parish, as long as said Parish shall exist, and should said Parish become extinct, I hereby will, give and bequeath, said one thousand dollars to the aforenamed Maine Missionary Society to be used by said Missionary Society for the spread of the knowledge and glory of God, and the moral religious, social and intellectual elevation of mankind. Said one thousand dollars to be disposed of in such a manner as the Directors of said Missionary Society shall deem best adapted to the ends designed."

Robert Follett Gerrish died Oct. 25, 1882, and there was no further administration of the Follett estate until September 1, 1903, when James H. Walker was appointed administrator de bonis non with will annexed upon the petition of the First Congregational Church and Parish of Kittery. The case does not show whether the executor paid to the Church the annuity of $25 during his lifetime, but since his decease the legacy of one thousand dollars has not been paid. On July 23, 1874, said Robert F. Gerrish conveyed by warranty deed and without license of court, to his wife Sarah C. Gerrish all the real estate left by Mercy Follett, and on April 18, 1881, said Robert F. and Sarah C. Gerrish conveyed a part of the same to one Ichabod Goodwin. The balance of the real estate is still held by the heirs at law of Robert F. and Sarah C.

Gerrish. On October 6, 1903, Mr. Walker the administrator filed an inventory in the Probate Court showing no personal property but real estate appraised at $10532.66, being the identical parcels enumerated in the original inventory filed March 3, 1853. After a futile demand upon the heirs of Robert F. Gerrish for any property in their possession belonging to the estate of Mercy Follett, the administrator filed a petition in the Probate Court for license to sell all the real estate inventoried, for the purpose of paying the legacy of one thousand dollars to the First Congregational Church and Parish of Kittery. From the denial of that petition this appeal was taken.

We think the appeal must be dismissed. Whatever rights the Parish may have, can be secured in another form of proceeding but not in this. The real estate in question is not in the custody or control of the appellant but in that of third parties who hold under recorded deeds, and we can find no such power given to administrators de bonis non by statute as is claimed here. The appellant asks for license to sell ten thousand dollars worth of real estate standing in the name of third parties in order to pay a legacy of one thousand dollars. This is far beyond his domain. If the title is to be attacked it should be by the party in interest, the Kittery Parish, and the remedy should be sought by bill in equity.

The appellant contends that the legacy of one thousand dollars created a charge upon the real estate which followed it into the hands of the present holders. This the respondents deny. The authorities would seem to favor the appellant. The general rule is that after certain legacies are given without any express provision of means of payment, a residuary gift blending the real and personal property of the testator creates a charge of the legacies upon the entire estate. 3 Jarman on Wills, 426-427; *Reynolds* v. *Reynolds*, 16 N. Y. 257; *Additon* v. *Smith*, 83 Maine, 551. The respondents further say that if the legacy was originally a charge upon the land, the laches of the Parish in not seeking to enforce its rights for the twenty-one years that elapsed between the death of the executor and the appointment of the administrator is a bar to recovery.

Whether or not such laches exists would depend upon all the facts connected with the delay and perhaps explanatory of it, none of which are before this court.

It is not necessary to decide either of these questions here. They can be met if the case comes to this court on a bill in equity brought by the legatee against the present holders of the land, which has been held to be the proper form of remedy in such cases. This was decided in the early case of *Bugbee* v. *Sargent*, 23 Maine, 269. In *Merritt* v. *Bucknam*, 78 Maine, 504, the question was re-examined and the court held the remedy to be in equity and prescribed the method of enforcing it. See also *Whitehouse* v. *Cargill*, 86 Maine, 60; *Same* v. *Same*, 88 Maine, 479; 2 Red. Wills, page 209; *Harris* v. *Fly*, 7 Paige, 421.

A court in equity has power not only to decree the legacy to be a charge upon the real estate, if the will can be so construed, but with its elastic procedure it can also provide the method of securing the same, and designate the particular real estate which shall in the first instance be reached, because the equitable rights of the present holders may vary. 2 Red. on Wills, page 210; *Astor* v. *Galloway*, 3 Ired. Eq. 126.

It is clear that the license to sell should not be granted and the entry must be,

Appeal dismissed.
Decree of Probate Court affirmed.

STATE OF MAINE *vs.* FRANK MORRILL.

Cumberland. Opinion February 27, 1909.

Criminal Law. Statutes. Conviction. Sentence. Statute, 1905, chapter 106. Revised Statutes, chapter 135, section 26.

Revised Statutes, chapter 135, section 26, as amended by chapter 106, Public Laws, 1905, provides that "sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged."

Held: 1. That the verdict of guilty, or the decision overruling the demurrer, is the conviction meant by the statute.

2. That the statute so construed is constitutional, and if the exceptions are overruled the sentence is to be executed.

On exceptions by defendant. Overruled.

The defendant was indicted in the Superior Court, Cumberland County, for a felonious assault on a woman, and upon trial was found guilty. He then filed a motion for a new trial which was overruled. He also filed a motion in arrest of judgment which was also overruled and to this ruling he excepted. The presiding Justice then sentenced the defendant to imprisonment in the State Prison for two years, and to the imposition of sentence before his prior exceptions were determined, the defendant also excepted.

The case is stated in the opinion.

Revised Statutes, chapter 135, section 26, as amended by Public Laws, 1905, chapter 106, reads as follows:

"Section 26. Sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged. Questions of law may be reserved on a report signed by the presiding Justice, and in such case, and where exceptions are allowed, the defendant may, when the offense charged is bailable, recognize with sureties, in such sum as the court orders, with conditions substantially as follows: 'The condition of this recognizance is such that, whereas there is now pending in the court, within and for the

county of , an indictment against the said for the offense of , in the course of the proceedings upon which, questions of law requiring the decision of the justices of the supreme judicial court have arisen; now if said shall personally appear before said court, to be held in and for said county, from term to term, until and including the term of said court next after the certificate of decision shall be received from said justices, and shall abide the decision and order of said court, and not depart without license, then this recognizance shall be void.' If he does not so recognize, the court, on request of the defendant upon whom sentence is imposed may allow stay of execution of sentence, in which case commitment shall be to await final decision; otherwise, such commitment shall be in execution of sentence. When a verdict of guilty is rendered against any person for an offense punishable by imprisonment in the state prison, or any person is committed pending decision on report or exceptions, as herein provided, and remains imprisoned after the adjournment of court, he shall be admitted to bail only by the justice trying him, by some person by him appointed therefor, or by some justice of the supreme judicial court. If a person shall be so admitted to bail after commitment in execution of sentence, as above provided, such admission to bail shall vacate the effect of the original commitment, and the full term of imprisonment shall commence from the date of commitment after final decision."

Joseph E. F. Connolly, County Attorney, for the State.

D. A. Meaher, for defendant.

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

EMERY, C. J. The defendant was upon trial found guilty of felonious assault. He then filed a motion for a new trial which was overruled. He also filed a motion in arrest of judgment which was also overruled. To this latter ruling exceptions were filed and allowed. The court then, notwithstanding the exceptions allowed, sentenced the defendant to imprisonment in the State prison for two

years, but allowed a stay of execution of sentence upon the defendant's recognizing to abide the decision of the court. To this imposition of sentence before his prior exceptions were determined, the defendant also excepted. This latter exception is the only one argued, the former being abandoned.

Revised Statutes, chapter 135, section 26, as amended by chapter 106 of the Public Laws of 1905 provides that "sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged." The defendant contends that there can be no conviction until his exceptions are overruled. We think it evident, however, that the verdict of guilty is the conviction meant by the statute.

The defendant further contends that the statute so construed is unconstitutional. No provision of the constitution is cited which forbids such legislation and we have found none. The statute therefore must be adjudged constitutional. *Com.* v. *Brown*, 167 Mass. 144.

Exceptions overruled.
Mittimus to issue in execution of sentence.

STATE OF MAINE *vs.* ARTHUR MESSIER et als.

Androscoggin. Opinion February 27, 1909.

Scire Facias. Recognizance. Non-joinder. Ignis Fatuus Principal.

The defendant was formally accused of an offense but another person was arrested upon the complaint and recognized under the defendant's name and defaulted the recognizance.

Held: 1. That scire facias upon such recognizance could not be maintained against the defendant.

2. Nor against the sureties because of the non-joinder of the real principal.

On report. Judgment for defendants.

Scire facias on a defaulted recognizance in a liquor nuisance matter. When the cause came on for hearing, an agreed statement of facts was filed and the case was then reported to the Law Court to determine whether or not the action was maintainable.

The case is stated in the opinion.

Frank A. Morey, County Attorney, for the State.

Louis J. Brann, for defendants.

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

EMERY, C. J. A complaint was made in the Lewiston Municipal Court against Arthur Messier for maintaining a liquor nuisance and a warrant issued against him. Upon this warrant the officer arrested, not Arthur Messier, but another person, Oscar Messier, and brought him, Oscar, before the court for trial. In the Municipal Court, Oscar Messier pleaded not guilty, waived examination, and recognized with sureties for his appearance at the Supreme Judicial Court to answer to the State. He did all this under the name of Arthur Messier, the name in the complaint. In the Supreme Judicial Court an indictment was returned against Arthur Messier in the same case upon the same facts. Upon calling Arthur

Messier to answer to the indictment and save himself and sureties from default, he did not appear, the recognizance was defaulted, and this writ of scire facias issued against Arthur Messier and the sureties in the recognizance, and served upon him and them. It is admitted that Arthur Messier at the time of issuing the warrant was not maintaining any nuisance, had no connection with the place described as a nuisance, but was in Massachusetts during all these proceedings.

It is evident that upon the facts admitted by the State there can be no judgment against Arthur Messier. He did not recognize nor enter into any obligation to appear. Can there be a judgment against the sureties in the recognizance? Not in this suit. They recognized, not with Arthur Messier, but with Oscar Messier and for the latter's appearance only. They were not the only conusors. Oscar was also a conusor and indeed the principal in the recognizance, He should have been joined in the suit and served with process, with a recital of his alias. For want of such joinder this suit must fail. *State* v. *Chandler*, 79 Maine, 172.

Oscar Messier may be guilty of the common law offense of false personation and so not escape punishment, or perhaps he may be arrested and convicted upon the indictment, he having assumed the name of Arthur, but this suit against the real Arthur cannot be maintained, and according to the stipulation there must be,

Judgment for the defendants.

STATE OF MAINE *vs.* NELSON W. BARTLETT.

Somerset. Opinion February 27, 1909.

Criminal Prosecution. Who may Conduct Same.

A defendant in a criminal case has no legal right to have the prosecution conducted by the official prosecutor. As to the defendant, the court may recognize any unofficial member of the bar to conduct the prosecution and a conviction in such case is not thereby rendered invalid.

On exceptions by defendant. Overruled.

Search and seizure process originating in the Municipal Court of Skowhegan, Somerset County. On his arraignment the defendant pleaded not guilty but on trial was found guilty and sentenced to pay a fine of $100 and costs. He then appealed to the Supreme Judicial Court in said county. In the appellate court, Amos K. Butler, claiming to be Special Attorney for the State for said county, moved to proceed to trial. The defendant then filed a motion "praying that he be not ordered to trial by the court, on the ground that the said Amos K. Butler had no lawful right or authority to prosecute said case, to which motion the Special Attorney for the State filed an answer." The presiding Justice overruled the motion. The defendant then withdrew his plea of not guilty, pleaded guilty and then filed a motion in arrest of judgment based on the same ground as the former motion. This motion was also overruled.

The defendant then excepted to each of the aforesaid rulings.

The case is stated in the opinion.

Amos K. Butler, Special Attorney, for the State.

Forrest Goodwin, for defendant.

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

EMERY, C. J. The respondent was convicted in the Skowhegan Municipal Court of the offense of unlawfully keeping intoxicating

liquors, and appealed to the Supreme Judicial Court for Somerset County. In the appellate court, Amos K. Butler, not the county attorney but claiming to be Special Attorney for the State for Somerset County, undertook to appear and prosecute the case for the State. The respondent objected, but the court ruled that Mr. Butler might act as counsel for the State. Thereupon the respondent withdrew his plea of not guilty, pleaded guilty, and then filed a motion in arrest of judgment upon the same ground, viz, that Mr. Butler was allowed to prosecute for the State. This motion was also overruled. To each of the rulings the respondent excepted.

Passing the question whether after a general plea of guilty a respondent, without withdrawing his plea, can be heard to complain of errors preceding his plea, we consider the question whether the respondent was legally prejudiced by the case against him being conducted by Mr. Butler instead of by the regular county attorney. We think he was not. Who should conduct the case for the State was not a question between the State and the respondent, but solely a question between the State and Mr. Butler, or between the regular county attorney and Mr. Butler.

It does not appear that the county attorney undertook to, or claimed the right to, conduct this case for the State, but it does appear that the court recognized Mr. Butler as prosecuting attorney for this case, and no one but the respondent appears to have objected. It is difficult to see how the respondent was prejudiced, what difference it could make to him who acted as prosecuting attorney. He would have the same rights in the trial and after the trial, neither more nor less, whoever conducted the case on the other side. The only possible difference to him would be the difference in the efficiency and faithfulness of the prosecuting attorney, but of course no such difference can be assumed or allowed to be shown. If it be suggested that the regular county attorney might have granted a continuance or a nolle prosequi or a stay of sentence, the answer is that there is no such suggestion in the case. It does not appear that the county attorney undertook or desired to do either or in any way to interfere.

That the court has power to recognize unofficial attorneys of the

court to conduct a criminal case for the State is well established. *Com.* v. *Knapp*, 10 Pick. 477; *Com.* v. *Conn. River R. R. Co.*, 15 Gray, 447. If the official prosecutor does not object, the respondent has no legal ground for objection.

Exceptions overruled.

INHABITANTS OF ORONO *vs.* SIGMA ALPHA EPSILON SOCIETY.

Penobscot. Opinion March 2, 1909.

Taxation. Exemptions. Literary and Scientific Institutions. University of Maine. Resolves, 1875, chapter 100. Private & Special Laws, 1865, chapter 532; 1866, chapter 59; 1866, chapter 66; 1867, chapter 372; 1871, chapter 281; 1897, chapter 551; 1903, chapter 223; 1903, chapter 393; Statute, 1863, chapter 210; 1878, chapter 44; 1887, chapter 119; Revised Statutes, 1871, chapter 11, sections 83, 87; 1903, chapter 9, sections 2, 3, 6, paragraph II; chapter 15, sections 109-115; chapter 116, section 12.

The general rule is that all real property within the State is subject to taxation, and an exemption which is an exception to the general rule must always be construed strictly.

Not all the real estate of literary and scientific institutions is exempt from taxation under the provisions of Revised Statutes, chapter 9, section 6, paragraph II, but only such real estate as is "occupied by them for their own purposes or by any officer thereof as a residence."

Although the University of Maine is chartered by the State and fostered by the State, yet it is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State.

By virtue of the provisions of chapter 551 of the Private and Special Laws of 1897, the name of the corporation then known as the "Trustees of the State College of Agriculture and the Mechanic Arts" was changed to the "University of Maine" but it was also expressly provided that "the said University of Maine shall have all the rights, powers, privileges, property,

duties and responsibilities, which belong or have belonged to the said trustees." This change of name did not change the status of the Institution or work its adoption as a part of the State or make its property the property of the State, but it remained the same distinct corporation as before.

The defendant, a Greek letter fraternity, is a corporation organized under the general laws of the State for the purpose of "erecting and maintaining a chapter house on the campus of the University of Maine, and to hold and dispose of all such real estate and personal property by purchase, lease, sale or otherwise as may be necessary for all such purposes and any and all other acts and things incident thereto and necessary, proper and convenient to the transaction of any such business of said corporation." In accordance with its chartered rights, the defendant coporation in 1904, under a parol license granted to it by the trustees of the University, erected upon land of the University, in Orono, a frame building, called a chapter house, with properly equipped dining room, kitchen, study and sleeping rooms, reception rooms and the like, the funds therefor being provided by issuing its corporate notes to the amount of ten thousand dollars, guaranteed by the trustees of the University. On April 1, 1907, this building was used and occupied by about thirty students of the University, who were members of an unincorporated branch or chapter of the defendant corporation known as Alpha Chapter of Sigma Epsilon Fraternity, and who had entire charge and management of the building, the furnishing of food and the hiring of servants. The house was used as such chapter houses usually are, as a home where the students lived while attending the University. No officer or professor of the University lived in the building or had any control or management of it other than the general supervision and control exercised over the general student body. The expenses of maintenance including board, fuel, service, repairs and a certain installment of indebtedness was apportioned among the active members of the chapter, no income or profit being divided among the stockholders, and no rental for the use of the land was exacted by the University. On April 1, 1907, the plaintiff town taxed the chapter house as real estate, under the provisions of Revised Statutes, chapter 9, section 3, which tax the defendant refused to pay on the ground that the property was exempt from taxation.

Held: 1. That the corporate purposes of the defendant are neither literary nor scientific, but rather they are domestic in the nature of a private boarding house and such is the business it carries on.

2. That the defendant is entitled neither to exemption from taxation as an educational or scientific institution, nor immunity as an agency or instrumentality of the State, but that its property was subject to taxation in the plaintiff town.

3. That the tax assessed against the defendant was not a tax against the University of Maine but against a separate and independent corporation.

On report. Judgment for plaintiffs.

Action of debt to recover a tax for the year 1907, assessed by the plaintiff town against the Sigma Alpha Epsilon Society, a corporation located in the plaintiff town. When the action came on for trial, an agreed statement of facts was filed and the case was reported to the Law Court upon the same with the stipulation that "if upon such facts the court is of opinion that the action is maintainable judgment is to be entered for the plaintiffs for the sum of $84.00 with interest as claimed in the writ, otherwise, the plaintiffs are to be nonsuit."

The material facts are stated in the opinion.

Charles J. Dunn, and George E. Thompson, for plaintiffs.

Gould & Lawrence, for defendant.

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

CORNISH, J. This is an action of debt for a municipal tax for the year 1907 and comes to this court on an agreed statement of facts. The defendant admits that the assessment of the tax and all of the proceedings connected therewith are regular in form, but denies liability on the ground that the property is exempt from taxation. It appears from the agreed statement that the defendant, a Greek letter fraternity, is a corporation organized November 13, 1903, under the general laws of this State for the purpose of "erecting and maintaining a chapter house on the campus of the University of Maine, and to hold and dispose of all such real estate and personal property by purchase, lease, sale or otherwise as may be necessary for all such purposes and any and all other acts and things incident thereto and necessary, proper and convenient to the transaction of any such business of said corporation."

In accordance with its chartered rights, the defendant corporation in 1904, under a parol license granted to it by the trustees of the University, erected upon land of said University in Orono, a frame building, called a chapter house, with properly equipped dining room, kitchen, study and sleeping rooms, reception rooms and the

like, the funds therefor being provided by issuing its corporate notes to the amount of ten thousand dollars, guaranteed by the trustees of the University under authority of chapter 393 of the Private and Special Laws of 1903, to which reference will be made hereafter. On April 1, 1907, when the tax in suit was assessed this building was used and occupied by about thirty students of the University, who were members of an unincorporated branch or chapter of the defendant corporation, known as Alpha Chapter of Sigma Epsilon Fraternity, and who had entire charge and management of the building, the furnishing of food and the hiring of servants. The house was used as such chapter houses usually are, as a home where the students lived while attending the University. No officer or professor of the University lived in the building or had any control or management of it other than the general supervision and control exercised over the general student body. The expenses of maintenance including board, fuel, service, repairs and a certain installment of indebtedness was apportioned among the active members of the chapter, no income or profit being divided among the stockholders. The University exacted no rental for the use of the land.

Under these circumstances was the defendant corporation subject to taxation for this chapter house, which was taxed as real estate, under Revised Statutes, chapter 9, sec. 3?

1. The general rule is that all real property within the State is subject to taxation. R. S., ch. 9, sec. 2. Among the exemptions is "the real estate of all literary and scientific institutions occupied by them for their own purposes or by any officer thereof as a residence." R. S., ch. 9, sec. 6, par. II. Clearly the case at bar does not fall within this exception to the general rule. This is not a tax against the University of Maine, which is conceded to be a literary and scientific institution. The University does not own the property which is the subject of taxation here. This property is owned by an independent corporation and the owner is the party taxed and sued. The corporate purposes of the defendant are neither literary nor scientific. They are rather domestic in the nature of a private boarding house, and such is the business that it carries on.

In *Phi Beta Epsilon Corporation* v. *Boston*, 182 Mass. 457, the plaintiff, a corporation, with chartered purposes "to encourage and pursue literary and scientific work and to provide for its members a place for holding literary and scientific meetings, as well as a place for study while students, owned and maintained a fraternity house, not on land of the Institute, for students of the Massachusetts Institute of Technology. The claim of exemption as being a literary or scientific institution was there set up, but the court found that the dominant use of the property was that of a boarding house for the students and therefore held that the exemption did not apply. The opinion makes the distinction in these words. "The housing or boarding of students is not of itself an educational process any more than is the housing or boarding of any other class of human beings. The nature of the process, so far as respects its educational features, is not determined solely by the character of those who partake of its benefits. Suppose a number of students of the Institute of Technology should conclude to provide lodging and board for themselves on some co-operative plan and for that purpose should buy and occupy a house not in any way connected with the grounds or property of the institution, could it be said that such a house was used for an educational purpose? Suppose again, that these students were incorporated for the purpose of providing board and lodging for themselves and others while students, could it be said that the use of the real estate for such purposes was an educational process?" And see *People Ex rel Delta Kappa Epsilon Society* v. *Lawler*, 74 N. Y. App. Div. 547, affirmed in 179 N. Y. 535, 71 N. E. 1136.

It is true that in these cases cited the land itself was owned by the fraternity, while in the case at bar, the land was owned by the University. This fact, however, makes no legal difference in the result. Not all the real estate of literary and scientific institutions is exempt from taxation. It is only such as is "occupied by them for their own purposes or by any officer thereof as a residence." The lot on which this building was erected was occupied neither by the University nor by any officer thereof, but by an independent corporation for its own purposes and therefore it lost the privilege

of exemption which might under other conditions attach to it. Suppose for illustration the University had leased a lot to a citizen of Orono who erected a boarding house or a store for students thereon, could it be contended that the boarding house or store could escape taxation, merely because it rested on land that might have been used by the University for its own purposes but in fact was not? The exemption, which as an exception must always be construed strictly, does not go so far. *St. James Ed. Inst.* v. *Salem*, 153 Mass. 185; *Foxcroft* v. *Straw*, 86 Maine, 76; *Foxcroft* v. *Campmeeting Assoc.*, 86 Maine, 78.

2. But the defendant goes further and claims not merely an exemption, but an immunity from taxation on the ground that the University of Maine is a branch of the State government an instrumentality of the State itself and therefore its property is public property, no more subject to taxation by the town of Orono than a jail, a court house or an insane hospital, and still further that the relations between the University and the defendant are such that the immunity reaches to it. The doctrine of such immunity is everywhere acknowledged when the facts present an apposite case. "No exemption is needed for any public property held as such," says the court in *Directors of Poor* v. *School Directors*, 42 Penn. St. 25. The same principle is recognized in *People* v. *Salomon*, 51 Ill. 52; *People* v. *Doe*, 36 Cal. 222; *Worcester County* v. *Worcester*, 116 Mass. 193; *Camden* v. *Camden, Vill. Corp.*, 77 Maine, 530; *Goss Co.* v. *Greenleaf*, 98 Maine, 436.

The necessary facts, however, are lacking here. The University of Maine, while chartered by the State and fostered by it especially in recent years, is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State. The defendant seeks to class it as a State institution in the same sense as are the public schools or the normal schools, but such is not its legal status.

A comparison with the normal schools of the State is a fair one to illustrate the difference. The State maintains at the present time four normal schools, one each at Farmington, Castine, Gorham

and Presque Isle. This system originated in 1863 when a public act was passed providing for the appointment of commissioners to establish two normal schools. Pub. Laws 1863, ch. 210. This act also prescribed the qualifications for admission, the principles upon which the schools should be conducted, the course of study and made the State superintendent their superintendent under the approval of the Governor and Council. Four half townships of wild land were appropriated for their benefit, the proceeds from the sale to be deposited in the State treasury to the credit of the normal school fund. In this way the State itself took on a new form of public service and the educational system thus adopted became in fact an instrumentality of the State. No corporation was created, no separate entity was brought into existence, but the State simply put out its own beneficent hand in a new direction, and the title to the property was taken in the name of the State. Private and Special Laws, 1867, ch. 372; Private and Special Laws 1871, ch. 281. In the Revision of 1871, the normal school system took its place alongside the common school and free high school system. Rev. St. 1871, ch. 11, secs. 83, 87. In 1873, these schools were placed under the direction of a board of trustees, the governor and superintendent of schools to be members ex officio, and the others to be appointed by the Governor and Council. In 1878 the Gorham Normal School was established, Pub. L. 1878, ch. 44, and in 1903 the normal school at Presque Isle, Priv. & Spec. Laws 1903, ch. 223. The entire system is now regulated under Rev. St. 1903, ch. 15, secs. 109-115, and is an apt illustration of what is known as an instrumentality or agency of the State.

Contrast now the history and the legal status of the University of Maine. By an act approved July 2, 1862, Congress donated a certain quantity of public lands to such States as might provide colleges for the benefit of Agriculture and the Mechanic Arts, the money to be received from the sales thereof to be invested as a perpetual fund and the income thereof to be appropriated by each State acting as trustee, to the endowment, support and maintenance of at least one such college. Acting under this offer from the general government, the State of Maine by ch. 532 of the Priv. &

Spec. Laws of 1865, created certain persons therein named a body politic and corporate by the name of the Trustees of the State College of Agriculture and Mechanics Art, with power to establish and maintain such a college as was authorized by the act of July 2, 1862, to purchase and hold real estate and, through its trustees to have the general management of the institution. A separate and distinct corporation was established and the separation between the college and the State thus created by the charter has always been observed and maintained. By chap. 59, the town of Orono and by Chap. 66 of the Priv. & Spec. Laws of 1866 the city of Old Town were authorized to grant aid to the college. No appropriation was made by the State to the institution for ten years after its incorporation, but by chapter 100 of the Resolves of 1875, the sum of $10500 was donated on condition that the trustees should "not under any circumstances contract any further debts in behalf of said college." Annual appropriations have been made since that time with the exception of 1879 and in varying amounts, the appropriation for 1880 and 1881 being $3000 and $3500 respectively, and for 1907 and 1908 $110,000 each. Such gifts, however, cannot change the character or legal status of the institution, any more than smaller gifts to academies and private hospitals could make them a part of the sovereign State. In 1897 the name of the corporation was changed from the "Trustees of the State College of Agriculture and the Mechanic Arts" to the University of Maine, but it was expressly provided that "the said University of Maine, shall have all the rights, powers, privileges, property, duties and responsibilities, which belong or have belonged to the said trustees." Ch. 551, Priv. & Spec. Laws of 1897.

This change of name did not change the status of the institution or work its adoption as a part of the State or make its property the property of the State. It remained the same distinct corporation as before.

Nowhere in the Revised Statutes is the University of Maine mentioned except in connection with the compensation of its trustees, R. S., ch. 116, sec. 12, and with the duties imposed upon the Experi-

ment Station which was established by ch. 119 of the Pub. Laws of 1887. It is nowhere recognized as a part of the educational system of the State. Even when power was conferred upon the trustees by ch. 393 of the Priv. & Spec. Laws of 1903 to guarantee loans for the construction of fraternity houses, it was expressly provided that "nothing herein contained shall be construed as binding the State of Maine to pay said loans, or any of them, or any part thereof, or any interest thereon; and provided further that no appropriation therefor shall be hereafter asked of the State of Maine." No language could more plainly recognize the distinction between the corporation and the State. The legal status of this institution has been and is the same as that of the other colleges in Maine, chartered by Massachusetts or by Maine, Bowdoin College, Colby College and Bates College. They are each doing excellent work along the lines of higher education, but not one of them is a component part of the State's educational system.

The difference between the relation of the normal schools and of the University of Maine to the State is paralled in the difference between the various so called public or general hospitals of the State, and the two hospitals for the insane. The former are doing a necessary and charitable work and are recipients of the bounty of the State, but the latter alone represent the State itself in its sovereign capacity along charitable lines. The former are apart from the State, the latter a part of the State. Actions at law would lie against the former as against any other corporation, but not against the latter as no suit lies against the sovereign power.

The defendant calls attention to the case of *Auditor General* v. *Regents of the University of Mich.*, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376, where the court held that property owned by the defendants was owned by the State and therefore exempt from taxation under a statute exempting all public property belonging to the State. The court, however, in that case based their decision upon the fact that by the constitution of Michigan the Regents of the University are made an agency of the State. "By these provisions" say the court, "the body corporate, which was at first the creation

of the legislative will, has received the sanction of the constitution and has become a part of the fundamental law and in some respects is not subject to legislative control or interference. It is not, however, independent of, but is a part, of the State, a department to which the education of literature, science and the arts is confided." This strikingly different situation readily distinguishes that case from the one at bar. That decision is in entire harmony with this opinion.

3. The second step by which the defendant corporation seeks to appropriate any such immunity from taxation as might belong to the University is equally difficult of accomplishment under the facts as they exist, but it is unnecessary to consider the reasons at length, because the first step is itself, impossible.

The defendant corporation is entitled neither to exemption as an educational or scientific institution, nor immunity as an agency or instrumentality of the State. Its property was subject to taxation by the plaintiff town and in accordance with the stipulation of the parties the entry must be,

Judgment for the plaintiffs for $84, with interest as claimed in the writ.

STATE OF MAINE *vs.* OMAR POULIN, alias OMAR POOLER.

Somerset. Opinion March 2, 1909.

Statutes. Same Presumed Constitutional. Same to be Obeyed until Declared Invalid. Same not Necessarily Void Ab Initio, When Declared Unconstitutional. Officers De Facto and De Jure. Public Policy. Public Laws 1905, chapter 92, section 8.

An indictment does not require the signature of the attorney for the State.

Declaring a statute unconstitutional does not necessarily render it void ab initio.

The constitutionality of a statute is to be presumed until the contrary is shown beyond a reasonable doubt.

An office created or authorized by the legislature should be treated as de jure until otherwise declared by a competent tribunal.

The presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid, hence it follows that the public and individuals are compelled, by judicial construction, to assume, toward a legislative enactment, precisely the same attitude, whether it be constitutional or unconstitutional.

Every Act of the Legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the chair of private judgment, and if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes as law, until questioned in and set aside by the court.

It is an axiom of practical wisdom, coeval with the development of the common law founded upon necessity, that de facto acts of binding force may be performed under presumption of law.

The de facto doctrine is exotic and was engrafted upon law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law.

To protect those who deal with officers, apparently holding office under color of law, in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to them, although not officers de jure they are officers in fact, whose acts public policy requires to be construed as valid.

Under the provisions of section 8, chapter 92, Public Laws of 1905, Amos K. Butler was appointed "special attorney of the state" for the county of Somerset. Under the aforesaid statute it was the duty of Mr. Butler, after his appointment, to supercede the attorney for the State for said county, in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, including his presence with the grand jury presenting the evidence and administering oaths to witnesses. During the time Mr. Butler was acting in his capacity as "special attorney for the state," the defendant was indicted in said county as a common seller of intoxicating liquors, tried and found guilty. The defendant then filed a motion in arrest of judgment alleging in substance the following reasons why the judgment against him should be arrested: 1. Because Mr. Butler was unlawfully present in the grand jury room, and unlawfully aided, assisted, counselled and advised the grand jury in receiving and deliberating upon the evidence. 2. Because the witnesses who testified before the grand jury were not lawfully sworn. 3. Because they were sworn by Mr. Butler who was not authorized by law to administer the necessary oath to the witnesses and that no other oath was administered to them. 4. Because while the grand jury were receiving and considering evidence against the defendant and found and returned the indictment upon which he was convicted, Thomas J. Young was the duly elected and qualified attorney for the State for said county, and was in attendance upon said term of court willing and able to perform his duties with the grand jury in the matter before them, as required by law, and was unlawfully hindered and prevented from attending upon the grand jury. This motion was overruled and sentence was then imposed on the defendant. The real purpose of filing the aforesaid motion was to test the constitutionality of the aforesaid statute. But after the defendant had been indicted, tried, found guilty and sentenced as aforesaid, the aforesaid statute in another and separate proceeding, *State* v. *Butler*, was held to be unconstitutional and without any force of law.

Held: That declaring said section 8 unconstitutional did not necessarily end the State's case nor peremptorily require a conclusion in favor of the defendant's motion.

2. That the office of "special attorney for the state," in said county, should be regarded and treated as de jure, until the same was otherwise declared, and not as invalid ab initio.

3. That the indictment against the defendant was lawfully found and returned by the grand jury.

On exceptions by defendant. Overruled.

Indictment against the defendant as a common seller of intoxicating liquors, found and returned by the grand jury at the September term, 1908, Supreme Judicial Court, Somerset County. Before being arraigned the defendant moved to quash the indict-

ment, which motion was overruled, to which ruling exceptions were taken and allowed, whereupon the defendant was ordered to plead to the indictment and upon his arraignment pleaded that he was not guilty, and the matter went to the jury. The defendant offered no evidence and a verdict of guilty was returned, whereupon after trial and verdict of guilty and before judgment the defendant moved in arrest of judgment, which motion was also overruled and sentence imposed. To the overruling of this motion the defendant also excepted. The reasons alleged in support of the motion in arrest of judgment were the same as set forth in the motion to quash.

The case is stated in the opinion.

NOTE. In connection with the case at bar, attention is called to *State, by Information*, v. *Butler*, found on page 91 of these reports, where on January 6, 1909, the Law Court declared the statute under consideration in the case at bar, section 8 of chapter 92 of the Public Laws of 1905, to be unconstitutional.

Amos K. Butler, Special Attorney, for the State.

George W. Gower, for defendant.

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

SPEAR, J. The defendant in this case Omar Poulin alias Omar Pooler, was indicted in Somerset county at the September term of court 1908 as a common seller of intoxicating liquors. A plea of not guilty was entered, a trial had, a verdict of guilty rendered and a motion in arrest of judgment seasonably filed. The motion was overruled and sentence imposed. To the overruling of the motion, exceptions were filed and allowed.

This case arises under section 8, chapter 92, Public Laws of 1905, an act authorizing the governor to create the office of special attorney for the State and appoint thereunder an attorney to perform the duties thereof. No question was made that the office was created and that Amos K. Butler was properly appointed and qualified to perform the duties of the office, in accordance with the act of the legislature. It was the duty of Mr. Butler after his appointment, to supercede the attorney for the State for Somerset county,

in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, including his presence with the grand jury, presenting the evidence and administering oaths to witnesses. He also signed the indictment as special attorney but this act becomes immaterial as the law does not require even the signature of the attorney for the State. In view of the law and the facts as above appears, the defendant in his motion presented the following reasons why the judgment against him should be arrested. Briefly stated they are, first, that Mr. Butler was unlawfully present in the grand jury room, and unlawfully aided, assisted, counselled and advised the grand jury in receiving and deliberating upon the evidence. Second, because the witnesses who testified before the grand jury were not lawfully sworn. Third, because they were sworn by Amos K. Butler who was not authorized by law to administer the necessary oath to the witnesses and that no other oath was administered to them. Fourth, because, while the grand jury were receiving and considering evidence against the respondent and found and returned the indictment upon which he was convicted, Thomas J. Young was the duly elected and qualified attorney for the State for said county; and was in attendance upon said term of court willing and able to perform his duties with the grand jury in the matter before them, as required by law, and was unlawfully hindered and prevented from attending upon the grand jury.

Section 8, chapter 92, Laws of 1905, under which Mr. Butler was appointed special attorney, is as follows: "The governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create to continue during his pleasure, the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof.

"Such an appointee shall, under the direction of the governor, have and execute the same powers now invested in the attorney for the state for such county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof; and shall receive such reasonable compensation for services rendered in vacation and term time

as the justice presiding at each criminal term in the county shall fix, to be allowed in the bill of costs for that term and paid by the county."

The real purpose of filing the motion in arrest of judgment was to test the constitutionality of the above statute. This question has very recently been decided adversely in *State, by Information*, v. *Butler*, 105 Maine, 91.

But this decision does not necessarily end the State's case nor peremptorily require a conclusion in favor of the defendant's motion. Declaring a statute unconstitutional does not necessarily render it void ab initio. It is an axiom of practical wisdom, coeval with the development of the common law, founded upon necessity, that de facto acts of binding force may be performed under presumption of law. There is another rule so uniform in its application that it, too, has become a legal maxim that "all acts of the legislature are presumed to be constitutional." *Lunt's case*, 6 Maine, 412. This rule was confirmed in *Eames* v. *Savage*, 77 Maine, 212, a case in which the plaintiff claimed the statute was made null and void by the Maine Bill of Rights and the Constitution of the United States, but the court said: "The presumption is the other way, in favor of the validity of the statute, and it is a presumption of great strength. All the justices and writers agree upon this. Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch. 87, says 'that to overturn this presumption the justices must be convinced and, the conviction must be clear and strong.' Judge Washington in *Ogden* v. *Saunders*, 12 Wheaton, 270, declared 'that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute.' Chief Justice Mellen in *Lunt's case*, 6 Maine, 413, 'the court will never pronounce a statute to be otherwise (than constitutional) unless in a case where the point is free from all doubt.' This strong presumption is to be constantly borne in mind, in considering the question here presented."

The same rule was reiterated in *Soper* v. *Lawrence*, 98 Maine, 268, in which it is held: "Power of the judicial department of the government to prevent the enforcement of a legislative enactment

by declaring it unconstitutional and void, is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt." See also cases cited.

It logically follows from the rule enunciated in these cases that an act of the legislature is to be regarded as valid until otherwise declared by the court. Directly in point, is *State* v. *Carroll*, 38 Conn. 449, a case undoubtedly presenting the most comprehensive and critical analysis upon the question of de facto offices and officers, to be found in the history of the common law. "Every law of the legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes law, until questioned in and set aside by the court. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge."

These citations clearly demonstrate the strength of the presumption in favor of the constitutionality of legislative enactments when under construction. How absolutely, then, must it prevail in establishing the right and duty of the public and the individual, to act upon and obey them while in force.

The de facto doctrine is exotic, and was engrafted upon the law, as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law. To protect those who deal with officers apparently holding office under color of law, in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to

them although not officers de jure they are officers in fact whose acts public policy requires to be construed as valid. This was not because of any character or quality conferred upon the officer, or attached to him by reason of any defective election or appointment, but as a name or character given to his acts by the law for the purpose of making them valid. This doctrine is thoroughly established and, as said in *State* v. *Carroll*, supra; "If you find a man executing the duties of an office, under such circumstances of continuance, reputation or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to or employ him without taking the trouble to inquire into his title, and the law will hold his acts valid as to you by holding him to be, so far forth, an officer de facto." There is little if any, judicial conflict as to the existence, scope and meaning of the de facto doctrine. Hence the discussion up to this point has been general and confined to the reasons for the introduction of the doctrine.

But now we advance a step and come to the vital issue: "Can there be a de facto officer without a de jure office? Upon this point courts of the highest character differ. The question is new in this State, but not without precedent elsewhere. It therefore becomes our care to meet the issue, and apply the reasons underlying the birth of the de facto doctrine, in an effort to deduce a rule applicable to the case at bar. Generally speaking the de facto doctrine has been applied to a de facto officer in a de jure office, that is, an office existing by virtue of a valid law or statute. In this case, however, the statute authorizing the creation of the office and the appointment of a special attorney to fill it, has been declared unconstitutional and hence not a de jure office in the sense here used.

Was then the incumbent of this office, who appeared in the grand jury room and administered the oath to the witnesses, a de facto officer so that his executed acts became binding upon the State, the public and individual, who had occasion to deal with him in his assumed capacity? Upon this legal issue appear two distinct, well defined, lines of decisions diametrically opposed to each other. Follow one or the other we must. Follow either we may. Our

concern is to discover which the better coincides with the reason for, and the purpose of, the de facto doctrine.

And we may say here, before proceeding to a discussion of these cases, that we are unable to discover any difference, in reason, for declaring an officer to be de facto, whether he holds a de facto or de jure office, if he has occupied it with the usual insignia of a de facto officer. The authorities are in harmony that the de facto doctrine was invented to deal with effects, not with causes. The effects only can be reached. The causes cannot. The official acts are accomplished. If the effects are alike it is immaterial that the causes differ. The effects, whether from a de jure or de facto office, are alike. Hence, the acts of the officer occupying either position should be declared de facto.

The court is of the opinion that an office created or authorized by the legislature should be treated as de jure, until otherwise declared by a competent tribunal. It is certainly true that, under the great weight of authority as established by our own court, the presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid. Hence, it follows that the public and individuals are compelled, by judicial construction, to assume, toward a legislative enactment, precisely the same attitude, whether it be constitutional or unconstitutional. And it also appears, that the very object of introducing the de facto doctrine is to protect the public and individual, in dealing with a public officer, who assumes to occupy an office and whose authority they are bound to respect. These are precisely the circumstances involved in the case before us. To the public and the individual, the special attorney was the attorney for the State to the extent of his powers. He was so regarded by the executive and legislative departments of the State. He was so recognized by the courts. He compelled the public and the individual to acknowledge his authority. The people relied upon him to enforce the law. Individual liberty was obliged to submit to the administration of his office. Judicial notice of their own records show, that fines have been imposed and imprisonment inflicted by the courts, upon prosecutions from his office. If it is possible to find a case presenting stronger reasons for

applying the de facto doctrine, we have been unable to discover it. Can it be possible that an individual who has been indicted, under precisely the same conditions in which the indictment before us was found, if tried, convicted and sentenced, cannot plead that he has once been put in jeopardy? The very object of the de facto doctrine is to say, that he could so plead and be protected from any further prosecution, on the ground that he had a right to regard the office, the officer and his administration of the office, as legal. And it should be here further observed that the de facto doctrine has been applied, on the ground that the public and the individual had a right to presume the legality of official acts. But here the public and the individual had no choice, but were compelled to recognize the office and the officer. Under the circumstances of this case we do not hesitate to declare, that the office of special attorney should be regarded as de jure, until otherwise declared, and not as invalid ab initio. Not only upon reason but upon authority this should be done. A fair analysis of the rule laid down in *Eames* v. *Savage*, *Soper* v. *Lawrence* and *State* v. *Carroll*, supra, sustain this conclusion. The weight of authority also supports it as a brief analysis of the two leading, opposing opinions referred to will sufficiently show.

Upon this issue whether there can exist a de facto officer without a de jure office, Justice Field in *Norton* v. *Shelby County*, 118 U. S. 426, in an exhaustive opinion, adopted without division, seeks to establish the negative of the question, and Chief Justice Gummere of New Jersey in *Lang* v. *Mayor, etc., of City of Bayonne*, N. J. L. 68 A. R. page 90, in an equally elaborate opinion, also adopted without division, holds the affirmative. Justice Field states the de facto doctrine practically as above defined, and then proceeds to say: "But the idea of an officer implies the existence of an office which he holds. It would be a mis-application of terms to call one an officer who holds no office, and a public office can exist only by force of law. . . . Their (counsels') position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. . . .

It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed."

Chief Justice Gummere declares precisely the opposite. "A statute creating an office with prescribed duties has the force of law until condemned as unconstitutional by the courts, and in the meantime the incumbent is an officer de facto, and his acts are as potent so far as the public is concerned as are the acts of any de jure officer."

In attacking the reasoning of Justice Field, he says: "Notwithstanding the great weight which the opinion of so distinguished a jurist carries with it, notwithstanding that *Norton* v. *Shelby County* has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void ab initio, and affords no protection for acts done under its sanction."

It is interesting to note in analyzing these two leading cases that each eminent jurist seeks to trace the source of his opinion to the same source,—*State* v. *Carroll*, 38 Conn. 449. Each expresses his regard for the great ability of the opinion, and each cites it as authority. But it seems clear that the whole intention of this masterly resume by Chief Justice Butler is in support of the contention declared in *Lang* v. *Mayor*, *etc.* Chief Justice Butler defines an officer de facto under four heads, only the last of which is apposite, as follows: "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the officer were exercised, *fourth*, under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. Justice Field interprets this last definition as follows: "Of the number of cases cited by the Chief Justice, none recognizes such a thing as a de facto office, or speaks of a person as a de facto officer, except when he is the incumbent of a

de jure office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to the office legally existing. That such was the meaning of the Chief Justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made."

Chief Justice Gummere meets this interpretation, saying: "The Carroll case is admittedly a leading one upon the question of what is essential to constitute a person a de facto officer. It is referred to by Justice Field as 'a landmark of the law,' 'an elaborate and admirable statement of the law,' and no one can read it without concurring in this encomium upon it. The Chief Justice having first declared that 'an officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and of third persons, where the duties of the office are exercised under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such,' refers to numerous cases, the reasoning of which, in his judgment, supports this proposition. Justice Field perceiving that this statement of what constitutes an officer de facto, if accepted as broadly as it is made, militated against the conclusion which he himself reached, points out that none of the cases cited by Chief Justice Butler 'recognizes such a thing as a de facto office, or speak of a person as a de facto officer, except when he is the incumbent of a de jure office.' Chief Justice Butler did not refer to the cases which he cited as decisions upon the very point embraced in his proposition, but merely for the purpose of showing that by their reasoning they supported it." The above clear, unambiguous and comprehensive quotation of what constitutes an officer de facto and the force of his acts, construed "according to the common meaning of the language," seems a sufficient answer to Justice Field's construction, independent of the judgment of so eminent a jurist as the Chief Justice of New Jersey. But further analysis of the Carroll case will conclusively show that Chief Justice Gummere in his interpretation of the opinion is accurate. It will

be observed that *Brown* v. *O'Connell*, 36 Conn. 432, was a case to the effect that a law passed by the legislature cannot have color of authority unless it appears prima facie to be law and that it cannot so appear if it is manifestly repugnant to the constitution. This case seems to present the precise point involved in this discussion, namely, whether an act of the legislature is to be regarded as law until it is otherwise declared, or whether it is incumbent upon the public and the individual to determine its constitutionality; and, if they neglect to do so, or are erroneous in their conclusion, whether they must act under the statute at their peril. Justice Field says that if they fail to properly interpret such an act, or act under it without any attempt to construe it, "it affords no protection; creates no office; it is, in legal contemplation as inoperative as though it had never been passed." Now Chief Justice Butler in discussing *Brown* v. *O'Connell*, says: "The inferences to be drawn from these assumptions necessarily is, that a manifestly unconstitutional law is without any force whatever, and that whether manifestly unconstitutional or not, and whether it have the appearance and force of law or not, are questions for the private judgment of the citizen." This is precisely what Mr. Justice Field claims to be the law. But the Chief Justice goes on and absolutely negatives this position saying: "If these assumptions were true they would dispose of this case; but they are all novel impressions and fundamentally erroneous." But this is not all. He proceeds to positively enunciate the rule which not only negatives the conclusion of Justice Field but is a perfect precedent for the doctrine asserted in *Lang* v. *Mayor*, *etc.*, and for the conclusion at which we arrive. "Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes as law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society." Then to remove any possible doubt as to his meaning, he specifically applies the doctrine to the office itself. "If then the law of the legislature which creates an office,

and provides an officer to perform its duties, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority." A casual analysis is conclusive that it is the act creating the office "that must have the force of law." There can be no reasonable doubt that the great authority of the *Carroll* case sustains the contention of this opinion that there may exist a de facto office as well as a de facto officer. The *Lang* case in discussing the distinction attempted to be made between a de facto and de jure office also fully confirms our view. "But this it seems to me is a mere verbal distinction. The fact remains that the acts of an incumbent of such so called offices are as potent, so far as the public is concerned, as are the acts of any de jure officer who performs a duty of a legally existing office. In my judgment the same public policy which requires obedience from the citizen to the provisions of the public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally justifies obedience to every other law which the legislature has seen fit to enact, until such has been judicially decided to be invalid."

It may be said that the office of special attorney in the case before us was not created by the legislature itself but by authority conferred by the legislature upon the governor. But we confess our inability to indulge in the hypercritical refinement necessary to make any distinction either in law or reason. As bearing upon the question herein considered, reference may be had to *Brown* v. *Lunt*, 37 Maine, 453; *Hooper* v. *Gordon*, 48 Maine, 79; In *re Ah Li*, 5 Fed. Rep. 899; *Leach* v. *The People*, 122 Ill. 420; 12 N. E. 726; *Meggs Township* v. *Jamison*, 55 Pa. 468; *Diggs* v. *State*, 49 Ala. 311; *Parker* v. *Baker*, 9 Paige, 28; Cyc. 29, 1389, and also the cases cited and analyzed in *State* v. *Carroll*, 38 Conn. 449, 68 Atl. 90.

The full measure of reason and the great weight of authority are precedents for applying the de facto doctrine to the case at bar.

Exceptions overruled.
Judgment for the State.

PATRICK STONE *vs.* FOREST CITY EXPRESS COMPANY.

Cumberland. Opinion March 4, 1909.

Negligence. Evidence. Misconduct of Counsel.

Persons rightfully employed in repairing highways have the same rights therein as travelers.

The doctrine res ipsa loquitur does not apply to collisions of passers in highways.

Actions for damages arising out of collisions between travelers in highways are no exception to the general rule that negligence is not presumed but must be proved.

The negligence of the plaintiff when independent of and preceding the negligence of the defendant cannot be considered the proximate cause of the injury, if the defendant by the exercise of ordinary care might have avoided the consequences of the negligence of the plaintiff.

Impropriety in the argument of counsel in the trial of a cause may be, first, such as may be cured by retraction by offending counsel or by proper instructions by the court or by both, and, second, such as cannot be cured by either court or counsel.

Into which class the conduct of counsel falls is to be determined by the court considering the exceptions or motion for new trial.

If the conduct complained of is of the former class, opposing counsel should object at the time, in order that the trial court may take appropriate action, and failure to so object will be fatal upon either exceptions or motion.

On motions by defendant. Overruled.

Action on the case, brought in the Superior Court, Cumberland County, to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $400. The defendant then filed a general motion and also a special motion to have the verdict set aside. In support of the special motion the defendant alleged "the following reasons:" "Because in his closing argument to the jury at the trial of said action, Dennis A. Meaher, Esquire, counsel for plaintiff, declared that the defendant's team

when it struck the plaintiff was running away from a police officer, which it has done many times before; whereas no evidence concerning or tending to prove said assertion had been adduced."

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

Connellan & Connellan, for defendant.

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

BIRD, J. This is a motion for new trial upon the usual grounds and because of alleged misconduct of attorney of plaintiff in his closing address to the jury.

The declaration alleges an injury to the plaintiff while at work upon Temple Street, a public way in Portland, by reason of his being struck by the team of defendant negligently driven by his servant. The verdict was for plaintiff.

The uncontradicted facts are that defendant's horse, some twenty-four years old, harnessed to an express wagon containing several packages of merchandise was being driven by defendant's servant who was accompanied by an acquaintance; that Temple Street was in process of being macadamized by the municipal authorities, a part of the work being done by a steam roller; that in the latter part of the afternoon of the day of the injury, the steam roller was stationary on the westerly side of the street near the curbstone of the sidewalk and the engineer was about placing it in condition to leave for the night; that a laundry team was standing near the curbstone on the easterly side of the street at a distance of twenty to twenty-five feet northerly and diagonally of the roller; that the street was about thirty-five feet wide from curb to curb; that plaintiff was engaged in spreading broken rocks in the neighborhood of the roller—several feet in front but somewhat easterly of it; that the team of defendant came easterly along Middle Street, turned northerly into Temple Street and came into collision with plaintiff; that plaintiff just before the collision was looking downwards attending to his work and "was not looking for teams that day."

The witnesses for plaintiff are the engineer, a policeman and the plaintiff. The two latter are unable to give any statement as to the manner in which the accident occurred. The engineer is able only to state that he heard the driver cry "Lookout," saw plaintiff raise his hands and saw him immediately thereafter thrown to the ground. In this we find no proof of negligence on the part of defendant's driver. Negligence must be proved; *Nason* v. *West*, 78 Maine, 253; *Cleveland* v. *Bangor Street Ry.*, 86 Maine, 232; *Pellerin* v. *Paper Co.*, 96 Maine, 388, 391. The doctrine of res ipsa loquitur does not apply to collisions of passers in highways: 1 Bev. Neg. 129 (3d Ed.); *Wadsworth* v. *Railway Co.*, 182 Mass. 572, 574. In such cases negligence is not presumed; 1 Bev. Neg. 544.

While the plaintiff being rightfully employed in repairing a highway, had the same rights as a traveler: *Quirk* v. *Holt*, 99 Mass. 164, 166: See also *Coombs* v. *Purrington*, 42 Maine, 332; there was sufficient evidence for the jury to find that he was not in the exercise of the care which his position required.

Does the evidence produced by the defendant show negligence or present facts from which the jury could find negligence enabling plaintiff to recover despite his contributory negligence which we will assume the jury to have found?

The witnesses for defendant were the driver of the carriage, the person riding with him, and a third person not shown to be connected in any way with either party. The driver and his companion testify substantially that, as they proceeded slowly up Temple Street, the horse when a short distance from the rear of the roller became suddenly frightened and that, although the driver used persistent efforts to stop the horse and although the plaintiff was warned by cries, the horse and wagon came into collision with plaintiff. The third witness who stood on the easterly side of the street a short distance southerly of Federal Street confirms the testimony of the driver and companion in all essential particulars. The driver also states that the plaintiff on approach of the horse seized the right rein near the bit.

There was evidence upon which the jury may have found the distance between the place where the horse became frightened and the point where plaintiff was at work was forty feet or more. The street was unobstructed save for the laundry team, five feet wide, on the easterly side of the street near the curb. The plaintiff was in plain view of the driver who, as already stated, for avoidance of a collision relied upon outcries to warn plaintiff and endeavors to stop the horse. The driver testifies that he was unable to guide the horse when the plaintiff seized the right rein, because he then lost control of that rein while admitting he had control of the other. Upon this evidence we cannot say that the jury was not warranted in drawing the inference that prior to the plaintiff's seizing the rein the driver had sufficient control of the horse to direct his course and that the driver was not in the exercise of due care in guiding the horse during the time elapsing between his taking fright and the collision. Had the course of the horse been deflected but slightly to the east the accident would have been avoided. Although the plaintiff may not have been in the exercise of due care, defendant's servant was not relieved from making proper effort to avoid him: *Conley* v. *R. R. Co.*, 95 Maine, 149, 152, 153; *Atwood* v. *Railroad Co.*, 91 Maine, 399, 405; *Ward* v. *Railroad Co.*, 96 Maine, 136, 145; *Coombs* v. *Mason*, 97 Maine, 270, 274; See *Neal* v. *Rendall*, 98 Maine, 69, 74, 77.

In the course of his closing argument to the jury counsel for plaintiff made use of the following words: "There was a policeman around the corner, and the wagon was coming around the corner, there was merchandise in the wagon and the driver started up the horse, and that was not probably the first time that express wagon went quickly under circumstances like that." Respondent specially moves for a new trial because of the alleged improper conduct of counsel in so doing.

Impropriety in the argument of counsel in the trial of a cause may be, first, such as may be cured by retraction by offending counsel or by proper instructions by the court or by both and, second, such as cannot be cured by either court or counsel. Into which class the conduct of counsel falls is to be determined by the

court considering the exceptions or motion for new trial: See *Armour & Co.* v. *Kollmeyer*, 161 Fed. 83, and cases cited. If it is of the former class, opposing counsel should object at the time that the trial court may take appropriate action and, if it then refuses or fails to cover the subject and afford any or adequate redress, take exceptions.

If, however, the conduct complained of is such that its pernicious effect cannot be cured either by action of offending counsel or of the court, or both, the party aggrieved may obtain redress by motion, whether seasonable objection was made or not, but as it cannot be known in which class the court hearing the motion will place the conduct in question, it is the only absolutely safe course always to seasonably object. *Rolfe* v. *Rumford*, 66 Maine, 564, 565-568; *Powers* v. *Mitchell*, 77 Maine, 361, 368; *Sherman* v. *M. C. R. R. Co.*, 86 Maine, 422, 424-425; *State* v. *Martel*, 103 Maine, 63; See 29 Cyc. pp. 774-778 where authorities are collected and arrayed.

In the present case, this court is of the opinion that the effect of the conduct of plaintiff's counsel was not incurable upon objection and proper action by the trial court. The record does not show that objection was made at any time by defendant's counsel. The special motion must therefore be overruled. *Powers* v. *Mitchell*, ubi supra.

Motion overruled.
Special motion overruled.
Judgment on the verdict.

GEORGE H. CHADWICK, Executor, *vs.* ASBURY C. STILPHEN.

Kennebec. Opinion March 5, 1909.

Wills. Foreign Wills. Executors and Administrators. Ancillary Administration. Statutes. Construction. Probate Courts. Plea in Abatement. Revised Statutes, chapter 65, section 7; chapter 66, sections 8, 10, 13, 16.

The probate of a will does not determine the person to whom, or the time when, letters testamentary shall issue.

It is a well settled rule in Maine that the power of an executor to act in the settlement of the estate of a testator, is not derived wholly from his nomination in the will. His authority is not complete until there has been a compliance with all of the prerequisites named in Revised Statutes, chapter 66, section 8, namely: The will must be proved and allowed; the executor named therein must be legally competent in the opinion of the judge of probate; the executor must accept the trust and give bond to discharge the same when required, and must receive letters of administration.

When its proceedings have all been regular with respect to any matter within the authority conferred upon it by law, the decrees of the probate court when not appealed from, are conclusive upon all persons and cannot be collaterally impeached.

The provisions of the statutes of Maine authorizing the granting of ancillary administration on the estate of non-residents who die leaving property to be administered in Maine, were obviously enacted in recognition of the familiar principle of the common law that the authority of an executor over the estate of a deceased person is "confined to the sovereignty by virtue of whose laws he is appointed."

Revised Statutes, chapter 66, section 13, provides as follows: "Any will executed in another state or country, according to the laws thereof, may be presented for probate in this state, in the county where the testator resided at the time of his death, and may be proved and allowed, and the estate of the testator settled, as in case of wills executed in this state." Section 16 of the same chapter provides as follows: "After allowing and recording any will as aforesaid, the judge of probate may grant letters testamentary, or of administration with the will annexed thereon, and proceed in the settlement of the estate found in this state, in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country. . . . The provisions of section 10 of this chapter apply to such proceedings." Said section 10

provides as follows: "Letters testamentary may issue, and all acts required by law or otherwise under the provisions of the will may be done and performed by the executor without giving bond, or by his giving one in a specified sum, when the will so provides; but when it appears necessary or proper, the judge may require him to give bond as in other cases." *Held:* That when section 16 is construed in connection with section 10 and 13, it becomes obvious that a foreign will may be proved and allowed and the estate of the testator settled as in case of a will executed in the State of Maine.

Where two executors were named in the will of a testator whose residence was in New York State and the will was executed in that State according to the laws thereof and was duly proved and allowed in that State, and letters testamentary were issued in that State to the two executors and at the same time one of the executors filed a petition, signed by himself alone, in the Probate Court, in Kennebec County, Maine, representing that the testator left estate in that county on which the will might operate and asking that the will be allowed in Maine and that letters testamentary be issued to him and the will was allowed by the Probate Court in said county and letters testamentary issued to the petitioning executor alone, and not jointly with the co-executor named in the will, and no appeal was taken, *Held:* That the petitioning executor to whom the letters of administration were issued was the legal executor of the will in Maine and had authority over the estate to be administered in Maine and that the co-executor named in the will was not qualified to act in Maine.

Where a will executed in New York State was proved and allowed in that State and letters testamentary in that State were issued to the two executors named in the will, and ancillary administration on the estate was granted in Maine on petition therefor by one of the executors without the joinder of his co-executor and letters testamentary were issued to the petitioning executor alone, and such executor afterwards in his capacity as executor brought an action to foreclose a mortgage of land in Maine, given to the testator by the defendant, a resident of Maine, and the defendant filed a plea in abatement to the writ because the co-executor named in the will appointed in New York State as co-executor with the plaintiff, was not joined in the writ nor in the probate proceedings whereby ancillary administration was granted in Maine, *Held:* That the plea in abatement must be adjudged bad.

On exceptions by plaintiff. Sustained.

Real action to foreclose a mortgage. The defendant filed a plea in abatement to the writ. To this plea the plaintiff filed a demurrer which was joined by the defendant. The presiding Justice overruled the demurrer, sustained the plea in abatement and ordered the writ and declaration to be quashed. To this ruling the plaintiff excepted.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Asbury C. Stilphen, pro se.

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

WHITEHOUSE, J. This is a writ of entry brought by the plaintiff, as executor of the will of Nathaniel K. Chadwick late of Catskill in the State of New York, for the purpose of obtaining possession of the premises therein described situated in the county of Kennebec and State of Maine, in order to foreclose a mortgage thereof given by the defendant to the plaintiff's testator.

Nathaniel K. Chadwick died in May, 1906. By his will he appointed his wife Celia S. Chadwick and his son George H. Chadwick, the plaintiff in this action co-executors of the will. They accepted the trust and received letters testamentary issued to them as co-executors by the surrogate's court of New York, November 10, 1908, but neither gave bond, the will providing that no bond should be required.

In May, 1907, the plaintiff George H. Chadwick, filed in the probate court of Kennebec county an authenticated copy of the will and of the record of the probate thereof in the surrogate's court of New York, and of the letters testamentary issued by that court to Celia S. Chadwick and George H. Chadwick, as co-executors. At the same time the plaintiff filed a petition signed by himself alone representing that the testator at the time of his decease left estate in the county of Kennebec and State of Maine upon which the will might operate and asking that the will be allowed in this State and that letters testamentary be issued to him. After due notice and hearing upon this petition it was ordered that the will be allowed in this State, and that a copy of it and of the probate thereof be recorded and filed and that letters testamentary be issued to the petitioner, George H. Chadwick. In accordance with this decree letters testamentary were issued to George H. Chadwick alone as executor, and not jointly with Celia S. Chadwick, the co-executor named in the will. No appeal was taken from this decree of the

probate court of Kennebec county in this State, and July 20, 1907, the plaintiff commenced this action.

The defendant seasonably filed a plea in abatement to the writ, because Celia S. Chadwick who was named in the will and appointed by the court in New York as co-executor with the plaintiff, was not joined in the plaintiff's writ and declaration in this case, nor in the probate proceedings in the county of Kennebec in this State.

To this plea the plaintiff filed a demurrer which was joined by the defendant. The presiding Justice overruled the demurrer, sustained the plea in abatement and ordered that the writ and declaration be quashed. The case comes to the Law Court on exceptions to this ruling.

In approaching the consideration of the question presented for the decision of the court in this case it is proper to be reminded that courts of probate are wholly creatures of the legislature, and are tribunals of special and limited jurisdiction. *Tuber* v. *Douglass*, 101 Maine, 363; *Snow* v. *Russell*, 93 Maine, 362; *Smith* v. *Howard*, 86 Maine, 203.

The provisions of our statute specially involved in this inquiry are as follow, viz: Section 7 of chapter 65 provides that

"Each judge may take the probate of wills and grant letters testamentary or of administration on the estates of all deceased persons who at the time of their death. . . . not being residents of the state, died leaving estate to be administered in his county."

The statutes relating to foreign wills are found in chapter 66 and section 13 provides that "Any will executed in another state or country, according to the laws thereof, may be presented for probate in this state, in the county where the testator resided at the time of his death, and may be proved and allowed and the estate of the testator settled as in case of wills executed in this state."

Section 16 reads as follows: "After allowing and recording any will as aforesaid, the judge of probate may grant letters testamentary, or of administration with the will annexed thereon, and proceed in the settlement of the estate found in this state, in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country. . . . The

provisions of section 10 of this chapter apply to such proceedings."

Sections 8 and 10 of the same chapter prescribe the duties of the judge of probate in granting letters of administration and in requiring a bond of the executor, as follows:

Section 8. "When a will is proved and allowed, the judge of probate may issue letters testamentary thereon to the executor named therein, if he is legally competent, accepts the trust and gives bond to discharge the same when required, but if he refuses to accept on being duly cited for that purpose or if he neglects for twenty days after probate of the will so to give bond, the judge may grant such letters to the other executors, if there are any capable and willing to accept the trust."

Section 10 reads as follows: "Letters testamentary may issue, and all acts required by law or otherwise under the provisions of the will may be done and performed by the executor without giving bond, or by his giving one in a specified sum, when the will so provides; but when it appears necessary or proper the judge may require him to give bond as in other cases."

These provisions of our statutes authorizing the granting of ancillary administration on the estate of non-residents who die leaving property to be administered in this State, were obviously enacted in recognition of the familiar principle of the common law that the authority of an executor over the estate of a deceased person is "confined to the sovereignty by virtue of whose laws he is appointed." *Brown* v. *Smith*, 101 Maine, 545.

It has been seen that section 16 declares that after allowing any foreign will and granting letters testamentary, the judge of probate shall "proceed in the settlement of the estate found in this State, in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country," and makes applicable to such proceedings the provisions of section 10 relating to wills executed in this State, which authorize the judge of probate to require an executor to give bond "when it appears necessary," even when the will provides that no bond shall be required. When therefore section 16 is construed in connection with sections 10 and 13, it becomes obvious that a foreign will may be proved

and allowed and the estate of the testator settled as in the case of a will executed in this State, and that the question raised in the case at bar is the same as if the testator had been a resident of Kennebec county and the will had originally been presented for probate there.

In accordance with the obvious scope and purpose of these statutory provisions, it is a well settled rule in this State that the power of an executor to act in the settlement of the estate of a testator is not derived solely from his nomination in the will. His authority is not complete until there has been a compliance with all of the prerequisites named in section 8 of the statute above quoted. The will must be proved and allowed; the executor named therein must be legally competent in the opinion of the judge of probate; the executor must accept the trust and give bond to discharge the same when required, and must receive letters of administration from the judge of probate. "The probate of the will does not determine the person to whom, or the time when, letters testamentary shall issue." *Gurdy, Executor, Apt.*, 101 Maine, 73; *Millay* v. *Willy*, 46 Maine, 230.

It has been seen that Celia S. Chadwick did not join in the petition of George H. Chadwick for the probate of the will in this State. It does not appear that in the opinion of the judge of probate she was competent to act as one of the executors. There is no evidence that she ever signified her willingness to accept the trust in this State. For aught that appears she may have been required to give bond and refused, and finally she never received letters testamentary from the court in this State.

In *Gilman* v. *Gilman*, 54 Maine, 453, the defendant pleaded in abatement the non-joinder of certain persons named in the will as executors, who had never given bonds as required by our statutes, but had qualified as executors in the State of New York under the law of that State, and entered upon the discharge of the trust there. The plaintiff replied that the complainants were the only executors who had been duly qualified under the laws of this State, and on this ground the plea in abatement was adjudged bad. See also *Rubber Co.* v. *Goodyear*, 9 Wall. 788.

It thus satisfactorily appears that George H. Chadwick is a legal executor of the will in question having authority over the estate of the testator to be administered in this State and that Celia S. Chadwick is not an executrix of the will qualified to act in this State.

But the decree of the probate court in this State, granting letters testamentary to George H. Chadwick, from which no appeal was taken, is itself conclusive upon this point. When its proceedings have all been regular with respect to any matter within the authority conferred upon it by law, the decrees of the probate court when not appealed from, are conclusive upon all persons and cannot be collaterally impeached. *Taber* v. *Douglass*, 101 Maine, 363. In the case at bar the probate court not only had jurisdiction of the subject matter but the record of its proceedings under the statutes of this State clearly shows its authority and power to grant letters testamentary to George H. Chadwick without appointing Celia S. Chadwick as co-executor, and conclusively establishes the validity of its decree. Whether or not Celia S. Chadwick was a competent person for the trust, and whether it appeared necessary to require her to give bond would be matters properly addressed to the sound judgment and discretion of the judge of probate in this State and no appeal being taken, his determination of such questions would be final.

Furthermore there is no allegation in the defendant's plea in abatement that Celia S. Chadwick was legally competent to act as executor in this State, or was willing to accept the trust and to give bond if a bond was required, or that she ever complied with any of the prerequisites to qualify her to act as executrix in this State.

The certificate must therefore be,

Exceptions sustained.
Demurrer sustained.
Plea in abatement adjudged bad.

WILSON STREAM DAM COMPANY *vs.* BOSTON EXCELSIOR COMPANY.

Piscataquis. Opinion March 5, 1909.

Statutes. Construction. "And" Construed as "Or." Tolls. Stream Improvements. Evidence. Private and Special Laws, 1899, chapter 64, sections 2, 3; 1905, chapter 205.

The plaintiff brought an action against the defendant to recover toll on logs driven in 1906 down Wilson Stream, which flows into Sebec Lake, based on a provision in its charter which authorized the plaintiff to "demand and receive a toll for the passage of logs driven over their dams and improvements." In 1900, the plaintiff built a dam in Wilson Stream eighteen or twenty miles from the outlet of the stream into Sebec Lake. The logs upon which the plaintiff claimed a toll were driven out of Davis Stream, a tributary which flows into Wilson Stream about two miles above Sebec Lake. Two years later the plaintiff built another dam at Rum Pond. No dam was built by the plaintiff on Wilson Stream below Davis Stream where the logs were landed.

Held: 1. That the word "and" in the clause in plaintiff's charter reading "driven over their said dams and improvements" may be construed as a convertible term used in the sense of "or" so as to authorize the collection of toll not only on logs that pass over the dams but also on those that actually pass over that part of Wilson Stream on which improvements to facilitate driving have actually been made.

2. That in order for the plaintiff to maintain its action, however, it was not sufficient to show that the defendant was enabled to take advantage of a greater flow of water afforded from time to time by the plaintiff's control of the dams eighteen miles above.

3. That the evidence did not satisfactorily show that the plaintiff had made any improvements in that part of Wilson Stream below Davis Stream except such as are ordinarily and incidently made in clearing out the stream each year to facilitate the annual drive.

4. That a nonsuit must be ordered.

In a charter containing the clause "driven over their said dams and improvments" the word "and" construed as used in the sense of "or."

On report. Plaintiff nonsuit.

Assumpsit on account annexed to recover toll on 819,000 feet of pulp wood driven down Wilson Stream, Piscataquis County, in the

spring of 1906, at 15 cents per thousand feet. The plaintiff claimed to recover under and by virtue of the provisions of sections 2 and 3 of its charter, Private and Special Laws, 1899, chapter 64, and chapter 205, Private and Special Laws, 1905, amendatory of section 3. Plea, the general issue. When the plaintiff had concluded its testimony at the trial of the action, it was agreed to report the case to the Law Court, for decision, with the stipulations that "if the Law Court find that the action is maintainable, judgment to be entered for the amount claimed in the writ with interest. If action is not maintainable nonsuit to be entered."

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

W. A. Johnson, for defendant.

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

WHITEHOUSE, J. In this action of assumpsit the plaintiff company seeks to recover toll on 1638 3-8 cords of poplar making 819,000 feet of pulp wood, driven down Wilson Stream in the spring of 1906, at fifteen cents per thousand.

Section 2 of the Act of 1899 incorporating the plaintiff company, contains the following provisions, viz: "Said corporation may erect and maintain a dam or dams, with side booms and sluices, on Wilson Stream, flowing into Sebec Lake in Piscataquis County, to facilitate the driving of logs and lumber down said stream; and said corporation may remove rocks, excavate ledges, build dams and side dams, and make other improvements for said purpose, except that it shall not blast out or excavate at Lower Greely falls, but shall have the right to smooth up and deepen the channels at the upper Greeley falls, and make such improvements at said falls as may be necessary to facilitate the driving of logs as aforesaid."

Section three of the Act provides as follows: "The said corporation may demand and receive a toll for the passage of logs cut and hauled above the present south line of the town of Greenville and driven over their said dams and improvements, of twenty-five cents

for each thousand feet, board measure, woods scale, and fifteen cents for each thousand feet as aforesaid, of pulp wood and logs intended for pulp wood."

In pursuance of its charter the plaintiff company erected a dam in 1900 in Wilson Stream, at lower Wilson Pond, eighteen or twenty miles from the outlet of the stream into Sebec Lake, and two and a half miles north of the Greenville line. Two years later the plaintiff built another dam at Rum Pond.

It has been seen that by the terms of the original charter the plaintiff company was only authorized to "demand and receive a toll for the passage of logs cut and hauled above the present south line of the town of Greenville and driven over their said dams and improvements;" but by an amendment obtained in 1905, this limitation to "such logs as were cut north of the south line of Greenville" was removed, and the company was authorized to "demand and receive a toll for the passage of logs driven over their said dams and improvements."

It appears that the logs upon which the plaintiff claims a toll in this case were driven out of Davis Stream, a tributary which flows into Wilson Stream about two miles above Sebec Lake.

It appears that no dam was built by the plaintiff company on Wilson Stream below Davis Stream where the logs in question were landed. And among other defenses the defendant company contends that no such "improvements" as were contemplated by the plaintiff's charter as the basis of its right to collect toll on logs passing over them, were ever made by the plaintiff company on that part of Wilson Stream between Davis Stream and Sebec Lake, over which the defendant's logs were driven. The defendant therefore confidently claims that on this ground alone the plaintiff is not entitled to recover toll on logs driven down Wilson Stream from Davis Stream to the lake.

On the other hand it is contended in behalf of the plaintiff in the first place that the greater facilities afforded for driving logs by reason of the head of water raised by the dams eighteen miles above are sufficient to entitle the plaintiff to recover its toll, and that it

was not required to show that the logs were driven immediately over that part of Wilson Stream on which the work of improvement was actually done by the plaintiff.

But it has been noticed that the terms of the charter only authorize the plaintiff to collect toll on logs that are "driven over their said dams *and* improvements." The word "and" may here be construed as a convertible term and used in the sense of "or" so as to authorize the collection of toll not only on logs that pass over the dams but also on those that actually pass over that part of Wilson Stream on which improvements to facilitate driving have actually been made. It is not sufficient, however, to show that the defendant was enabled to take advantage of a greater flow of water afforded from time to time by the plaintiff's control of the dams eighteen miles above. By the express and unambiguous terms of the charter, the plaintiff is entitled to collect toll on logs that are actually driven over the "dams" or over other "improvements" made by the plaintiff company. Again there is no evidence in this case that the dams erected by the plaintiff, or either of them, or the heads of water stored by them were used at all to facilitate the driving of logs in the spring of 1906, or that the defendant received any aid whatever, in driving the logs from any improvements in the condition of the water arising from the plaintiffs dams eighteen miles above. For aught that appears the flow of water in Wilson Stream at the time the defendant's logs came down, was in its natural state in no degree increased by the plaintiff's dams.

But the defendant confidently relies upon its contention that no permanent or substantial "improvements" were ever made by the plaintiff company below Davis Stream, and that in the spring of 1906 its logs were not "driven over any improvements" that entitled the plaintiff to collect toll on them.

The exhibit introduced as evidence entitled "Expenditures of building Wilson pond dam and clearing out stream" comprises items from 1899 to March 31, 1906, but discloses nothing done between Davis Stream and Sebec Lake. The plaintiff was therefore compelled to rely upon the testimony of George Butterfield who had charge of the work of building dams and clearing out the

stream, to prove that in Wilson Stream below Davis Stream the plaintiff had made substantial "improvements" over which the defendant's logs were driven.

But the testimony of Butterfield is so uncertain, indefinite and self-contradictory that it does not satisfactorily show that expenditures to the amount of ten dollars had actually been made by the plaintiff company for "improvements" in Wilson Stream below Davis Stream during all of the years above named.

It is true that in his direct examination Butterfield testifies that the plaintiff company did some work between Davis Stream and Sebec Lake; that some blasting was done on Greeley Falls and that $300 or $400 was expended on the back channel. But it inferentially appears that this back channel was used as a sorting channel for the accommodation of some of the principal shareholders in the corporation, and there is no evidence in the case that the defendant's logs were ever driven through or over this sorting channel. These logs appear to have been one lot and one mark and all for the same destination and the defendant had no use for a sorting channel.

Again Butterfield says the plaintiff company expended $700 or more between Tobie Falls and Sebec Lake; but the location of Tobie Falls is several miles above Davis Stream, and while it appears that $300 or $400 was expended on the back channel, it is nowhere stated or estimated what part of the remaining $300 or $400 was expended between Davis Stream and Tobie Falls, and consequently no statement of the amount claimed to have been expended between Davis Stream and the Lake, except the expense of the back channel not used by the defendants.

In cross examination when repeatedly requested to specify what improvements were actually made below Davis Stream, he makes answer as follows:

A. "I know we worked quite a lot, the men down there, blasting rocks and such work as that. We used to clean out the stream and such work as that, blasting and fix up every point we could."

And in answer to the more general inquiry as to the improvements made on Wilson Stream in addition to the erection of the dams, he says, "I know we had to blast out every year there. We had to

do it right along every year." He adds that he "had a clerk" to keep his books; but it has been seen that the "exhibit" transcribed from the books fails to give any information as to the expense of blasting at Greely Falls or any other point in the two miles between Davis Stream and the Lake, except the sorting channel which does not appear to have been used in driving the defendant's logs. It is not definitely shown that any substantial amount was expended in the permanent improvements in that part of the stream.

Thus when the indefinite character of all of Butterfield's evidence is considered in the light of his frequent reference to what was usually done every year, it does not satisfactorily appear that any "improvements" were made in that part of the stream except such as are ordinarily and incidentally made in clearing out the stream each year to facilitate the annual drive.

It is accordingly the opinion of the court that in accordance with the stipulation in the report, the certificate must be,

Plaintiff nonsuit.

HARRIET E. LORD *vs.* MAINE CENTRAL RAILROAD COMPANY.

GEORGE S. LORD *vs.* SAME.

Sagadahoc. Opinion March 5, 1909.

Common Carriers. Damages. Failure to Transport Goods.

When goods are delivered to and accepted by a common carrier for transportation, no bill of lading or prepayment of freight is necessary in the absence of law or notice to the shipper that such is required by the rules of the common carrier.

Under some circumstances exemplary damages may be assessed in actions for injury to personal property, as where malice, fraud, gross negligence or recklessness is present.

Where a shipper left goods for transportation at the freight depot of the common carrier, delivering the same to a freight handler who was apparently in charge and who was accustomed to receive freight during the absence of the receiving clerk, and the goods were properly packed and tagged with the name of the consignee and the place of destination, and the shipper was not requested to prepay the freight and he left the freight depot supposing nothing further would be required preliminary to the transportation of the goods, and the goods were not shipped, *Held:* That the circumstances and the evidence sufficiently showed that the common carrier accepted the goods for transportation when received by the freight handler and that there was a breach of duty on the part of the common carrier because of failure to transport the goods and that therefore it was liable in damages to the shipper.

Where the plaintiffs delivered certain goods consisting in part of household furniture and household effects, to the common carrier for transportation, and the common carrier accepted and received the same for transportation but did not transport the same, and the goods were not returned to the plaintiffs until several months after they had been received by the common carrier, and when returned to the plaintiffs it was found that the goods had been injured, *Held:* 1. That the common carrier was liable for the actual damage to the goods. 2. That the common carrier was liable in a reasonable amount for the rental value of the remaining goods for the period during which the plaintiffs were deprived of their use. 3. That the common carrier was not liable for exemplary damages.

On motions by defendant. Sustained in each case unless remittitur be made.

Two actions on the case, one by the wife and the other by the husband, to recover damages occasioned by the failure of the defendant company to transport certain goods and chattels as a common carrier. Plea, the general issue in each case with the following brief statement in each case: "And for brief statement to be used under the general issue pleaded said defendant further says that the goods and chattels described in the plaintiff's writ, were never lawfully delivered to it for transportation as a common carrier; that it never received and accepted said goods and chattels, as a common carrier, for transportation, as is alleged in the plaintiff's writ, and that at no time has the liability of a common carrier for the transportation of said goods and chattels ever attached."

The two actions were tried together. In the first entitled action, the plaintiff recovered a verdict for $110 and in the second entitled action the plaintiff recovered a verdict for $175. The defendant company then filed a general motion in each case to have the verdict set aside.

The case is stated in the opinion.

Arthur J. Dunton, for plaintiffs.

White & Carter, for defendant.

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

PEABODY, J. These are two actions on the case to recover damages occasioned by the failure of the defendant company to transport certain goods and chattels as a common carrier. They were tried together and now come to this court on motions of defendant for new trials.

It is the contention of the defendant company in each case that it never accepted the goods for transportation, so that the liability of a common carrier was not assumed, and that the damages assessed by the jury were excessive.

It appears from the evidence that on the sixth day of December, 1906, the goods in question were left by the plaintiffs' agent at the freight depot of the defendant company in the City of Bath, Maine, being delivered to a freight handler who was apparently in charge and who was accustomed to receive freight during the absence of the receiving clerk. The goods were properly packed and tagged with the name of the consignee, George S. Lord, and of the place of destination, Quincy, Mass. The plaintiffs' agent was not requested to prepay the freight and he left the station supposing nothing further would be required preliminary to the transportation of the goods. The goods were not shipped and no reply was made by the defendant company to a letter of inquiry enclosing stamp for such reply. After remaining at the freight house in Bath for several weeks, the goods were delivered to one Samuel Lord, the father of the plaintiff, George S. Lord, who claimed to have authority to receive them, but had no such authority. They remained in his possession for several months and were finally recovered and returned to the freight house by the defendant company, and were on the twenty-fifth day of April, 1907, delivered to the plaintiff's attorney, the freight agent at the time refusing to admit the liability of the railroad for the delay by ante-dating the shipping receipt as requested to do. The goods were then shipped to their destination by boat and when received were found to be injured.

Much of the injury seems to have been caused by the decay of apples packed with the goods and so was the result of the delay in transportation. Other articles were found to be broken but there is no evidence directly tending to show that this was done while they were in the custody of the defendant. The entire value of such of the goods of Mrs. Lord as were injured was $68 but the evidence does not show a total loss of all these articles. The actual damage to the goods of Mr. Lord was $26. The inconvenience and loss to Mrs. Lord of the use of her goods by detention, and of the furniture of Mr. Lord for several months were also claimed as an element of damage and the jury were warranted in adding something for this.

The verdict for the plaintiff in the case of Harriet E. Lord was for the sum of $110 and in the case of George S. Lord for the sum of $175.

As to the question of liability the circumstances proved by the evidence in connection with the testimony of the freight agent, sufficiently show that the defendant accepted the goods for shipment when received by the freight handler on the sixth day of December, 1906. No bill of lading or prepayment of freight was necessary in the absence of law or notice to the shipper that such was required by the rules of the defendant. *Wilson* v. *Grand Trunk Railroad*, 57 Maine, 138; Am. & Eng. Ency. of Law, (2nd ed.) 187.

The jury were therefore warranted in finding that there was a breach of duty on the part of the defendant.

They were warranted in assessing as damages, 1st, the amount of the actual injury to the goods which could not have exceeded $68 in the case of Mrs. Lord; and $26 in the case of Mr. Lord; and 2nd, a reasonable amount in each case for the rental value of the remaining goods for the period during which the plaintiffs were deprived of their use. There is no clear evidence bearing on the rental value or even on the actual value of the rentable goods except that it appears that only a small lot of furniture and other household effects, largely second hand, were involved in the actions, and that the plaintiffs were deprived of the use of them about four months and a half.

It is apparent from the amount of the verdict that the jury must have added exemplary damages to the loss actually sustained by the plaintiffs. It is claimed by the plaintiffs' counsel that such damages could properly be allowed. Under some circumstances exemplary damages may be assessed in actions for injury to personal property, as where malice, fraud, gross negligence or recklessness is present. 12 Am. & Eng. Ency. 18: 13 Cyc. 117. But no such elements are shown to exist in the present cases. The actual injury to the goods resulted without the knowledge of the defendant company, and it is liable for that injury only because of the nature of its responsibility as a common carrier.

The delay in transportation appears to have been occasioned by the inclination of the railroad officials to enforce in this instance their regulations for prepayment of freight, which, though legally reasonable in themselves, had not been brought to the attention of the shipper at the proper time. The delivery of the goods to the plaintiffs' father upon his representation that he was the owner of them was an error of judgment. While the defendant company was not excused from the consequences of this act, there was nothing in it or in any other act or omission of its agents which would warrant the jury in finding a wrongful intent. 12 Am. & Eng. Ency. (2nd ed.) 21, 22.

Our conclusion is that the damages assessed in each case are excessive.

In the action *Harriet E. Lord* v. *Maine Central Railroad Company*, the entry will be,

Motion sustained, unless the plaintiff within 30 days from the filing of the certificate of decision remits from the amount of the verdict all above $80.

In the action *George S. Lord* v. *Maine Central Railroad Company*, the entry will be,

Motion sustained, unless the plaintiff within 30 days from the filing of the certificate of decision remits from the amount of the verdict all above $70.

OLIVE E. WYMAN *vs.* EDWARD E. NEWLAND, Appellant.

Cumberland. Opinion March 5, 1909.

Appeal. When Same Must be Taken. Entering Appeal. When Appeal may be Allowed. Sureties not Required When not Requested. Statute, 1856, chapter 204, section 6. Revised Statutes, chapter 85, sections 17, 18.

In relation to appeals in civil actions in inferior courts, Revised Statutes, chapter 85, sections 17 and 18, provide as follows:

"Sec. 17. Any party aggreived by the judgment of the justice, may appeal to the next supreme judicial or superior court in the same county, and may enter such appeal at any time within twenty-four hours after the judgment, Sunday not included; and in that case no execution shall issue, and the case shall be entered and determined in the appellate court.

"Sec. 18. Before such appeal is allowed, the appellant shall recognize with sufficient surety or sureties to the adverse party, if required by him, in a reasonable sum, with condition to prosecute his appeal with effect, and pay all costs arising after the appeal."

Held: 1. That the appeal must be entered within twenty-four hours after judgment.

2. That to enter the appeal means to claim it or notify the clerk, if there be a clerk, that an appeal is desired, and is the only appellate act which must be done within the twenty-four hours.

3. That it is not necessary for the appellant to "recognize with sufficient surety or sureties" unless required by the adverse party and if he does not request it the appeal is perfected without.

4. That the allowance of the appeal is a judicial act which may be done, after the acts required to be taken by the appellant are completed, at any time prior to the return term of the appellate court.

5. That if the adverse party requires the appellant to recognize "with sufficient surety or sureties," he may request the trial court to fix a day on or before which the recognizance shall be filed.

Where the Municipal Court of Portland, Cumberland County, rendered judgment for the plaintiff October 1, 1907, and the defendant within twenty-four hours after judgment appealed to the Superior Court in said county at its next term to be held in November, 1907, and sureties were required by the plaintiff and which sureties were furnished October 3, 1907, and copies of the records and all the papers filed in the cause were entered of record in said Superior Court at said November term, and at said term the plaintiff

filed a motion to dismiss on the ground that the appeal was not entered and allowed in the Municipal Court within twenty-four hours after judgment, it was *held* that the appeal was properly taken and allowed in the Municipal Court and that the Superior Court had jurisdiction of the case.

On exceptions by defendant. Sustained.

Action of assumpsit originally commenced in the Municipal Court for the city of Portland where a hearing was had on October 1, 1907, and judgment rendered for the plaintiff from which judgment on the same day the defendant claimed an appeal to the Superior Court of the County of Cumberland, at the term next to be held on the first Tuesday of November, 1907. Special sureties having been required by the plaintiff, the defendant entered into a recognizance with sureties to prosecute his appeal with effect and pay all costs that might be rendered against him arising after the appeal. Sureties were furnished October 3, 1907. Copies of the records and all the papers filed in the cause were entered of record in the Superior Court at the said November term. On the 16th day of December, 1907, the plaintiff filed a motion to dismiss on the ground that the appeal of the action from the Municipal Court, where it was first entered and tried, was not entered and allowed within twenty-four hours after judgment, in accordance with the provisions of the statute and that the action, therefore, was not within the jurisdiction of the Superior Court. The motion was sustained and the appeal dismissed by the Justice of the Superior Court to which ruling the defendant excepted.

The case is stated in the opinion.

Frank H. Haskell, for plaintiff.

Dennis A. Meaher, for defendant.

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

PEABODY, J. This was an action of assumpsit originally commenced in the Municipal Court for the city of Portland where a hearing was had on October 1, 1907, and judgment rendered for the plaintiff, from which judgment on the same day the defendant

claimed an appeal to the Superior Court of the County of Cumberland, at the term next to be held on the first Tuesday of November, 1907. Special sureties having been required by the plaintiff, the defendant entered into a recognizance with sureties to prosecute his appeal with effect and pay all costs that might be rendered against him arising after this appeal. Sureties were furnished October 3, 1907. Copies of the records and all the papers filed in the cause were entered of record in the Superior Court at the November term.

On the 16th day of December, 1907, the plaintiff filed a motion to dismiss on the ground that the appeal of the action from the Municipal Court, where it was first entered and tried, was not entered and allowed within twenty-four hours after judgment, in accordance with the provisions of statute and that the action is not within the jurisdiction of the Superior Court.

The motion was sustained and the appeal dismissed by the Justice of the Superior Court to which ruling the defendant excepted.

Section 17, chapter 85, R. S., provides that "Any person aggrieved by the judgment of the justice may appeal to the next Supreme Judicial or Superior court in the same county, and may enter such appeal at any time within twenty-four hours after judgment, Sunday not included; and in that case no execution shall issue, and the case shall be entered and determined by the appellate court."

Section 18 provides that "Before such an appeal is allowed, the appellant shall recognize with sufficient surety or sureties to the adverse party, if required by him in a reasonable sum with a condition to prosecute his appeal with effect and pay all costs arising after the appeal."

Section 6, chapter 204, of the Public Laws of 1856, establishing the Municipal Court for the City of Portland, provides that "Any person may appeal from a sentence, or judgment against him to the then next term, for civil or criminal business, as the case may require, of the court having jurisdiction within said county, by appeal from justices of the peace; and such appeal shall be taken and prosecuted in the same manner as from a sentence or judgment of a justice of the peace."

The appellant claimed his appeal within twenty-four hours after judgment, but the record shows that he did not furnish a recognizance with sureties within that time.

The question to be decided is whether the recognizance on such an appeal must be made within twenty-four hours after judgment. Such security is only necessary when required by the adverse party, and if he does not request it the appeal is perfected without. *Colby* v. *Sawyer, Appellant*, 76 Maine, 545.

There is no express limitation in the statute to the time for furnishing the recognizance, nor is there any limit within which the adverse party may require it. We do not think that any should be implied from the statute which only limits the time for entering the appeal. Such a construction would violate the rule against injustice and unreason where the statutory requirement of security is only upon request of the appellee. Endlich on Int. Stat. 245. It would enable the appellee by delaying his request until the last minute to prevent the appellant from furnishing recognizance in time to complete his appeal. If it is held that the recognizance must be filed within twenty-four hours, the provisions making it dependent upon the request of the adverse party is useless. The appellant must anticipate the request and furnish recognizance when not intended by the statute.

He would be presumed to know the provision of a statute requiring his action within a time limited and of right could act at the latest moment, but his right would be impaired if delayed by the adverse party's failure to act; while the appellee is protected in every case, as the appeal will not be allowed until the recognizance is furnished, if he requires it, and he may request the trial court to fix a day on or before which it shall be filed. 1 Ency. Pl. & Pr. 986-987.

The cases upon which the appellee relies present similarities to the case at bar, but all differ from it in an essential point; the statutes upon which they are based require a recognizance as a prerequisite to the completion of the appeal, while the Maine statute requires it only upon the contingency that the adverse party requests it.

It is also argued in behalf of the appellee that the entry of an appeal includes its allowance. While this might be so under some circumstances, we think it is not the meaning within the legal interpretation of section 17, chapter 85; but to enter the appeal means to claim it or to notify the clerk that an appeal is desired, and is the only appellate act which must be done within twenty-four hours. The allowance of the appeal is a judicial act which may be done after the acts required to be taken by the appellant are completed, at any time prior to the return term of the appellate court.

The appellant entered his appeal within the statutory time limit and perserved it by doing subsequently what the statute required.

Exceptions sustained.

SEBAGO LAKE, SONGO RIVER AND BAY OF NAPLES STEAMBOAT COMPANY

vs.

SEBAGO IMPROVEMENT COMPANY.

Cumberland. Opinion March 8, 1909.

Navigable Waters. Improvement Corporations. Expenditures. Limitation of Same. Evidence. Private and Special Law, 1893, chapter 481, sections 3, 4, 5, 6.

The defendant company was incorporated under the provisions of chapter 481 of the Private and Special Laws of 1893, with a capital stock of $20,000 and "authorized to improve the Songo river, in the county of Cumberland, its mouths, approaches and tributaries, for the purpose of navigation, and for this purpose to widen, deepen, and remove obstructions from said river, its mouths, approaches and tributaries and to construct dams, canals, locks, breakwaters and piers, and to make such other improvements in said river, its mouths, approaches and tributaries, as may be necessary and proper to facilitate navigation therein." Acting under its charter, the defendant company expended more or less money in improving the river and the navigation thereof. In 1906, however, the plaintiff company

brought an action against the defendant company to recover damages alleged to have been sustained by it through the alleged failure of the defendant company to sufficiently improve the conditions for navigation on the river. The plaintiff company contended, among other things, that even admitting the defendant company had made improvements upon the river under its charter which tended to facilitate navigation, yet it was the duty of the defendant company, regardless of cost, by virtue of its contract with the State, to have made such improvements, even to the extent of constructing a new lock, as to make the river reasonably navigable. As tending to show whether the future improvements sought by the plaintiff, namely, a lock at the mouth of the Songo, was one of the improvements necessary and proper to facilitate navigation, within the meaning of these words as used in the act of incorporation, the defendant offered to show some or all of the following things, namely: 1. The amount of its authorized capital of $20,000 consumed in the economical making of improvements which were made. 2. The amount of this capital paid for flowage rights required for these improvements. 3. The amount of this capital necessarily expended for these improvements, real estate and navigation rights. 4. The cost of the new lock economically constructed. 5. The cost of lowering the lock and dredging the river to the same level economically done. 6. That the running expense for maintaining and operating the lock from the beginning had about equalled the gross receipts. Upon these contentions the Justice presiding declined to admit evidence of any of the offered items of expenditure and cost.

Held: That this evidence should have been admitted, as bearing upon the question whether the defendant, in what it had already done and expended, and in view of what it might cost to make the improvements, suggested by the plaintiff as necessary, had reasonably complied with the terms of its charter.

Where the defendant improvement company was incorporated by a special Act of the legislature, with a capital stock of $20,000, and authorized to improve the Songo River, Cumberland County, and, after the improvements contemplated by the Act of incorporation had been made, to charge and receive reasonable tolls for the passage of steamboats and other boats through its locks, and the Act was silent as to the extent of the improvements required of the defendant improvement company, *held*, that the legislature did not intend that the defendant improvement company should be required to expend for improvements a sum larger than its authorized capital stock and net income.

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

Action on the case to recover damages alleged to have been sustained by the plaintiff through the alleged failure of the defendant sufficiently to improve the conditions for navigation on the

Songo River. Plea, the general issue. Verdict for plaintiff for $3,250. The defendant filed a general motion for a new trial and also excepted to several rulings of the presiding Justice during the trial. The motion was not considered by the Law Court.

The case is stated in the opinion.

NOTE. MR. JUSTICE BIRD having been of counsel for defendant, did not sit in this case.

Foster & Foster, and Charles P. Mattocks, for plaintiff.

Bird & Bradley, and Brandis, Dunbar & Nutter, for defendant.

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

SPEAR, J. This is an action on the case to recover damages alleged to have been sustained by the plaintiff steamboat corporation through the alleged failure of the defendant corporation to sufficiently improve the conditions for navigation on the Songo River.

The defendant corporation was chartered with a capital stock of $20,000 by an act of the legislature dated March 9, 1893, the material parts of which are as follows:

"Section 3. Said corporation is hereby authorized to improve the Songo River in the County of Cumberland, its mouths, approaches and tributaries, for the purpose of navigation, and for this purpose to widen, deepen and remove obstructions from said river, its mouths, approaches and tributaries, and to construct dams, canals, locks, breakwaters and piers, and to make such other improvements in said river, its mouths, approaches and tributaries, as may be necessary and proper to facilitate navigation therein; provided, however, that any dams built or maintained by said company shall contain proper sluiceways for logs.

Section 4. Said corporation is hereby authorized to acquire for the purposes aforesaid by purchase, grant or gift from any person or corporation, and all other corporations are hereby authorized to grant to said Sebago Improvement Company for the purposes aforesaid, and lands, water rights, franchises and other property. Said

corporation may also for the purposes aforesaid take any land or materials upon payment therefor, reasonable compensation to be ascertained in the same manner and under the same conditions as are provided in the cases of laying out public highways. And for any damage by flowage said corporation shall make reasonable compensation to the parties injured, to be ascertained in the same manner as now provided by law in the case of flowing land by erection of dams and mills.

Section 5. After the improvements contemplated by this act shall have been made in said river, its mouths and approaches, the said corporation may demand and receive reasonable tolls for passage through its locks of steamboats and other boats and vessels, but not to exceed the tolls in force in the year A. D. 1891.

Section 6. Nothing in this act contained shall be held to confer authority to either raise or lower the level of Sebago Lake."

The plaintiff corporation was organized on November 14, 1896, and began the business of operating steamboats in 1897. In its declaration it alleges that the defendant was guilty of a breach of duty in failing to make improvements in the Songo river necessary and proper to facilitate navigation therein in accordance with the provisions of its charter whereby the plaintiffs sustained special damages, because it was unable to navigate the river for the carriage of passengers and freight and for the transportation of the United States mail, although under a contract with the U. S. Government and subject to a penalty for failure to do so.

On the other hand, the defendant avers that it made substantial improvements in the Songo river which in fact improved it so as to facilitate navigation therein, and thereafter reasonably maintained such improvements so that steamboats and other vessels were able to navigate the river, and consequently the plaintiff corporation cannot recover the damages which it suffered because it was deprived of the use of the river through the failure of the defendant to make more extensive improvements than were in fact made.

In reply the plaintiff says, even admitting the defendant made improvements upon the river under its charter which tended to facilitate navigation, it was yet its duty, regardless of cost, by

virtue of its contract with the State, to have made such improvements, even to the extent of constructing a new lock, as to make the river reasonably navigable.

To this answer the defendant rejoins that the State in its contract authorized it to issue a capital stock of but $20,000 and therefore could not have intended to impose upon it the duty of making improvements at a cost in excess of its authorized capital and net obtainable income when properly managed.

As tending to show whether the future improvements sought by the plaintiff, namely, a lock at the mouth of the Songo, was one of the improvements "necessary and proper to facilitate navigation," within the meaning of these words as used in the act of incorporation, the defendant offered to show some or all of the following things, namely: 1. The amount of its authorized capital of $20,000 consumed in the economical making of improvements which were made; 2. the amount of this capital paid for flowage rights required for these improvements; 3. the amount of this capital necessarily expended for these improvements, real estate and navigation rights; 4. the cost of the new lock economically constructed; 5. the cost of lowering the lock and dredging the river to the same level economically done; 6. that the running expenses for maintaining and operating the lock from the beginning had about equalled the gross receipts.

Upon these contentions the Justice presiding declined to admit evidence of any of the offered items of expenditure and cost. To these rulings exceptions were taken.

We are of the opinion that this evidence should have been admitted as bearing upon the question whether the defendant, in what it had already done and expended, and in view of what it might cost to make the improvements, suggested by the plaintiff as necessary, had reasonably complied with the terms of its charter. A reasonable compliance was all the duty which the Justice in his able and exhaustive charge imposed upon the defendant. He said: "Now, what had been the previous conditions, the history of the height of water in Sebago Lake, as affecting the knowledge of the defendant as to what should be anticipated, or as affecting its duty

to make provision for it? It is claimed—whether correctly or not is for you to say—that the drought in 1905 was unprecedented within recent memory, at least; that there had been only one year in later years when it anywhere near approached the condition in which it was in 1905. Now, that is one of the conditions in the history of the river which must be taken into account in considering what was expected. What would be reasonable, in other words, because it must be assumed that the legislature expected that the reasonable thing would be done? And also, that anything more than the reasonable thing was not required. Now, in view of the past history of the river, was it or was it not reasonable to require the defendant company to do more than they did do? There has been some talk in your presence that the only practicable remedy for such a condition as existed in 1905 would be the building of a lock at or near the mouth of the Songo River. In view of the amount of navigation and its character and the frequency or infrequency with which such conditions of height of water existed, or might be expected to exist, was it or was it not reasonable in your judgment that they should have anticipated and made provision by the building of a lock for such condition as did exist in 1905? I say, it must be a reasonable interpretation. The defendant company was not a surety or guarantor. It was only obliged to use reasonable means to facilitate navigation. Would it be reasonable, or not, to require the company to build a lock, if there was no reason to anticipate the recurrence of what did occur in 1905? Were such events and such conditions of water liable to happen in the ordinary and usual experience, and if so, how often? Because all these things must be taken into account in determining the reasonableness—and I may specially say so with regard to the trouble which is alleged to have occurred this time, the natural diminution of water from natural causes; but on the whole, it will be for you to say whether the condition which existed in 1905, and which is the condition complained of here, and which caused the damage, as they say, whether that condition was one which the defendant company was reasonably bound to anticipate and provide for, in view of the situation there."

Previous to this, the Justice had said: "While I have excluded evidence in this case of the expenses which the defendant incurred, under its charter in making the various improvements, because it seemed to me it was not really what it cost to do it but what was done,—that if they assumed to do certain things then they were bound to do it, and if the expense would have been prohibitory, they ought not to have engaged in that business."

From these quotations, it appears that the instructions to the jury confined and limited the question of reasonable compliance on the part of the defendant, in the contemplation of the legislature, solely to what the defendant was required to do physically, and not at all to what it was required to do financially, in order to facilitate navigation. We fear this construction is too narrow.

The act itself requires the defendant to do those things which might be necessary and proper to facilitate navigation. It is silent as to the extent of the improvements required. It is evident that navigation in this river might have been facilitated by the expenditure of any sum of money from $100 to $100,000. The legislature said to the defendant that it might raise the sum of $20,000 on its capital stock for this purpose, and no more, except of course what it might derive from its income. The defendant had no authority to raise another dollar by the issue of stock. In view of this legal limitation, can it be said that the legislature contemplated or expected that this defendant should be required to expend fifty or one hundred thousand dollars in the improvement of this river? It seems to us rather that the physical work contemplated was intended to be limited by the authorized expenditure. We are unable to see how the legislature could reasonably expect a larger expenditure than it had authorized. From what source did they anticipate it could come? The capital stock and income always constituted the limit upon corporate resources. A corporation is never legally required, except by express provision of law, to account for more than these sums. We are not aware that a corporate business has ever been conducted upon any other financial method. We hardly think the legislature contemplated that this corporation should pay out more, in the execution of the duties imposed upon it by its charter.

By a reference to the evidence and to that part of the charge to the jury already quoted, it will be seen that the plaintiff contended that a reasonable improvement of this river required the building of a new lock. It does not appear whether this lock would cost $1000 or $20,000. The defendant offered to show what a proper lock reasonably constructed would cost. If the evidence tended to show that such a lock would cost $20,000, the full amount of the capital stock, did the legislature contemplate or expect that, in addition to the other expenditures which the defendant offered to prove, it was required to expend this amount of money? It seems to us if the defendant could prove, as it contends in argument it could, that the building of a new lock, for instance, which the plaintiff claimed to be a reasonable improvement, would extend its total expenditures to the sum of $50,000, it would clearly show that the requirement of such an outlay was unreasonable. On the other hand, if it could be shown that such a lock, in addition to the other expenditures, would come within the amount of the capital stock and net income, then such a structure might be a reasonable requirement. But, as the defendant was not permitted to show the various items of expenditure which it had actually made, and the cost of the proposed lock, we are unable to say whether the construction of the lock as contended for by the plaintiff would be reasonable or unreasonable in view of the expenditure required. Whether such an expenditure is reasonable, we think is a question of fact which should be submitted to the jury. The other legitimate items of expenditure were also admissible.

Exceptions sustained.

ELMER E. BROWN *vs.* J. C. BISHOP.

Piscataquis. Opinion March 9, 1909.

Contracts. Sales of Growing Timber. Title. Revocable and Irrevocable Licenses. Construction.

In seeking the intention of parties in business transactions preference should be given to intelligent and honest purposes rather than the reverse.

It is well settled that growing timber constitutes a part of the realty, but may be separated from the rest by appropriate reservation or grant, and when thus separated from the general ownership of the soil, so long as it remains uncut, it has all the incidents of real estate, and the same rules which govern the title and transfer of such property must apply to it.

It is the settled law of Maine that no present legal title to standing and growing timber passes by virtue of oral, or unsealed written contracts for its sale, to be cut and removed by the purchaser. Such oral or unsealed written contracts are held to be executory, for the sale of timber as personal property as and when it shall thereafter be severed from the soil, together with a license to enter upon the land for the purpose of cutting and removing it.

When a written contract for the sale of standing and growing timber is under seal, the test to be used, in ascertaining whether it is a mere revocable license, or a license coupled with such an interest as renders it irrevocable, is the intention of the parties.

When a contract for the sale of standing and growing timber is in writing and under seal it is to be interpreted and effectuated according to the intention of the parties, as disclosed in the language of the instrument, and the mode in which it was made, considered with reference to the situation of the parties and the purpose to be accomplished, unless some established rule of law will be thereby violated.

October 22, 1906, the plaintiff and the defendant entered into a written contract, under seal, the material parts of which are as follows: "Know all men by these presents, that I Elmer E. Brown of Orneville in the County of Piscataquis, Maine, in consideration of the sum of three hundred and fifty dollars to me paid by J. C. Bishop on or before the first day of February 1907 do hereby agree, covenant and permit J. C. Bishop of Orneville said county and state to cut all hemlock fir spruce pine and cedar on my lot located in said Orneville known as the Whitney lot it being the same lots deeded to me by Dana H. Danforth of Foxcroft, and to enter on said lots with teams and men for the purpose of cutting said timber. It is hereby agreed that the lumber shall be cut this winter if possible and what remains uncut shall be cut the following winter. That the lumber shall be

cut so as to avoid destroying other lumber so far as possible." The specified consideration of $350 was paid within the time provided therefor. The defendant operated upon the land during the winter of 1906-7, but did not cut and remove all the lumber authorized to be cut under the agreement. September 9, 1907, the plaintiff forbade the defendant in writing "entering with teams and men for the purpose of cutting any lumber or doing any work of whatever nature on my lots of land known as the Whitney land." Notwithstanding this notice, however, the defendant thereafter entered upon the land, in the fall of 1907, and yarded 150 M of the lumber specified in the agreement, and thereupon the plaintiff brought an action of trespass quare clausum against the defendant.

Held: 1. That the manifest intention of the parties, as gathered from the language of their contract, interpreted in the light of their situation and the object they had in view, was not the sale and purchase of a mere revocable license to cut the timber, but the sale and purchase of the timber itself as it then stood, to be taken off within the time provided therefor.

2. That although the instrument in which the contract is expressed does not contain in all its parts the technical words customarily used in conveyances of real estate, yet, it being in writing and under seal, it is sufficient to effectuate the original honest intention of the parties, without infringing any established rule of law applicable in this State to the transfer of an interest in real estate between the original parties.

3. That by virtue of that instrument the defendant acquired a present legal title to the growing timber mentioned therein, defeasible, however as to so much thereof as he should not cut during the period provided therefor, and that the express license to enter upon the land for the purpose of cutting and removing it, could not, as between the parties, be revoked by the plaintiff while the contract was in force.

4. That the words "if possible" as used in the contract are to have a reasonable interpretation, having reference to the cutting and removing of the lumber as a business undertaking.

5. That the lumber left uncut on the lot at the end of the winter of 1906-7 was so left because it was not reasonably possible, within the meaning of the contract, to cut it that winter.

6. That judgment must be for the defendant.

On report. Judgment for defendant.

Action of trespass quare clausum brought in the Supreme Judicial Court, Piscataquis County. Plea, the general issue with brief statement as follows: "That any entry upon the lands of the plaintiff or acts complained of in plaintiff's writ and declaration (if any) were done by the defendant by the consent and under the license and permission of the plaintiff."

Tried at the January term, 1908, of said court. At the conclusion of the testimony, the case was reported to the Law Court for decision upon so much of the evidence as was "competent and legally admissible."

The case appears in the opinion.

W. A. Johnson, and Martin & Cook, for plaintiff.

M. L. Durgin, and Ira G. Hersey, for defendant.

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

KING, J. Action of trespass to real estate reported to the Law Court. On October 22, 1906, these parties entered into the following written contract:

"Timberland Permit

Know all men by these Presents, that I, Elmer E. Brown of Orneville in the County of Piscataquis, Maine, in consideration of the sum of three hundred and fifty dollars to me paid by J. C. Bishop on or before the first day of February, 1907, do hereby agree, covenant and permit J. C. Bishop of Orneville, said County and State, to cut all hemlock fir spruce pine and cedar on my lot located in said Orneville, known as the Whitney lot it being the same lots deeded to me by Dana H. Danforth of Foxcroft, and to enter on said lots with teams and men for the purpose of cutting said timber.

It is hereby agreed that the lumber shall be cut this winter if possible and what remains uncut shall be cut the following winter, That the lumber shall be cut so as to avoid destroying other lumber so far as possible.

Sealed with our seals dated this twenty-second day of October, 1906.

Signed, Sealed and Delivered in presence of R. W. BROWN. ELMER E. BROWN (LS)

J. C. BISHOP (LS)"

The specified consideration of $350 was paid within the time provided therefor. Bishop operated upon the land during the winter of 1906-7, but did not cut and remove all the lumber authorized to be cut under the agreement.

On September 9, 1907, Brown forbade Bishop in writing "entering with teams and men for the purpose of cutting any lumber or doing any work of whatever nature on my lots of land known as the Whitney land."

Notwithstanding this notice Bishop thereafter entered upon the land, in the fall of 1907, and varded 150 M of the lumber specified in the agreement, for which acts this action of trespass is brought.

The defendant pleads in justification a right to do the acts complained of by virtue of the written instrument of October 22, 1906. In answer to this justification the plaintiff says: First, that the right granted by this instrument was a revocable license to cut and remove the timber within a specified time, which was revoked by him prior to the trespass; and, Second, that the defendant's right to cut the timber terminated at the end of the winter of 1906-7 because he did not cut all the timber that winter.

I. The determination of the first question presented involves the interpretation of the contract of the parties and the operation to be given to it. Was that contract a mere revocable license to Bishop to enter the plaintiff's land and cut the timber, or a grant of such an interest in the growing timber, during the period for its removal, as precluded Brown from revoking the express license to enter and cut it during that period?

It is well settled that growing timber constitutes a part of the realty, but may be separated from the rest by appropriate reservation or grant, and when thus separated from the general ownership of the soil, so long as it remains uncut, it has all the incidents of real estate, and the same rules which govern the title and transfer of such property must apply to it. *White* v. *Foster*, 102 Mass. 375, *Emerson* v. *Shores*, 95 Maine, 237. It is also well settled, as stated in *Emerson* v. *Shores*, supra, that "a present legal interest in real property can only be granted in this State by an instrument under seal."

Accordingly it is the settled law of this State, and by the weight of authority elsewhere, that no present legal title to standing and growing timber passes by virtue of oral, or unsealed written, contracts for its sale, to be cut and removed by the purchaser. Such oral or unsealed contracts are held to be executory, for the sale of the timber as personal property as and when it shall thereafter be severed from the soil, together with a license to enter upon the land for the purpose of cutting and removing it. *Pease* v. *Gibson*, 6 Maine, 81; *Pierce* v. *Banton*, 98 Maine, 553; *Emerson* v. *Shores*, 95 Maine, 237; *Banton* v. *Shorey*, 77 Maine, 48; *Claflin* v. *Carpenter*, 4 Met. 580; *Drake* v. *Wells*, 11 Allen, 141; *White* v. *Foster*, 102 Mass. 375; *Martin* v. *Johnson*, 105 Maine, 156; *Burnham* v. *Austin*, 105 Maine, 196. Such license, however, while it continues executory, as to all timber not cut under it, is revokable by the licensor.

It is also true, that if the contract expressed in a written instrument is but a mere license to do some act or acts on the licensor's land, without an intention that the licensee is to have possession of any estate therein, the affixing of a seal thereto would not necessarily change the contract to a conveyance of an interest in real estate. If the contract is under seal, then the test to be used, in ascertaining whether it is a mere revocable license, or a license coupled with such an interest as renders it irrevocable, is the intention of the parties.

This contract under which the defendant claims to justify his acts, being in writing and under seal, is to be interpreted and effectuated according to the intention of the parties, as disclosed in the language of the instrument, and the mode in which it was made, considered with reference to the situation of the parties and the purpose to be accomplished, unless some established rule of law will be thereby violated.

It must be conceded, we think, that the subject matter of this contract was "all hemlock fir spruce pine and cedar" then standing on the Whitney lot; and that the purpose of the contract was to effectuate a sale of that timber, as a whole, from Brown to Bishop, for a fixed and definite sum of money to be paid at a near and

definite time. The terms of the contract were all concluded, no details being left to be settled thereafter. No measuring or surveying of the timber was to be done, and Bishop was to have "all" the trees of the kinds specified large or small, he agreeing to cut them within the time provided. We think the words "to cut" as used in the instrument import the same right as "to cut as his own," or as "to have," and accordingly the contract should be held to mean the same as it would if the language used had been "do hereby agree, covenant and permit J. C. Bishop . . . . to have all hemlock fir spruce pine and cedar on my lot . . . . and to enter with teams and men for the purpose of cutting said timber."

We cannot accede to the proposition that these parties in that situation, and thus manifestly agreeing, intended that Bishop was to get, as the only consideration for his money, a mere license to cut the timber which Brown could revoke at any time. To hold such to have been their intention is to discredit both; for if Bishop entered into the contract with that understanding he was wanting in ordinary business intelligence, and if Brown intended to reserve to himself the right to withhold from Bishop that for which his money was to be paid he, too, was wanting in ordinary business integrity. In seeking the intention of parties in business transactions preference should be given to intelligent and honest purposes rather than the reverse.

Obviously, then, the intention of these parties, as gathered from the language of their contract, interpreted in the light of their situation and the object they had in view, was not the sale and purchase of a mere revocable license to cut the timber, but rather the sale and purchase of the timber itself as it then stood, to be taken off within the time provided therefor.

Although the instrument in which the contract of the parties is expressed does not contain in all its parts the technical words customarily used in conveyances of real estate, yet, we are of opinion that it is sufficient to effectuate the original honest intention of the parties, without infringing any established rule of law applicable in this State to the transfer of an interest in real estate between the original parties.

But the language of this instrument is not without significance upon this point. Its beginning and its ending technically conform to that of deeds of conveyance. It is "Signed, Sealed, and delivered" in presence of a witness. It is not acknowleged or recorded, but neither is an essential of the validity of a deed of conveyance between the original parties in this State. It does not contain the words "grant" or "convey," but technical words are not indispensible to constitute a grant, if only such an intention is disclosed, as we have found to be the case here.

This case is clearly distinguished from those, cited for plaintiff, in this and other States, like *Emerson* v. *Shores*, supra, where parol or simple contracts for the sale of growing timber have been construed as not intended by the parties to convey an interest in the growing timber as such, but as executory contracts for the sale of the timber as a chattel after it is severed from the soil, in the important fact that here the contract is under seal. Those cases, therefore, give no support to the plaintiff's position that no interest in the standing trees was here conveyed; but, on the other hand, in so far as they indicate that the want of a seal was the controlling reason for the necessary construction there given, they are in full accord with the conclusion here reached. This distinction between sealed and unsealed contracts for the sale of growing trees is not to be overlooked.

The very fact that a contract was executed under seal is to be regarded in its interpretation and may be decisive of the question whether it conveys an interest in real estate, for, as aptly stated in *White* v. *Foster*, 102 Mass. 379: "It is not true, therefore, as claimed by the demandant, that, if the contract is in writing and under seal, no other or greater interest passes than would pass by the use of the same language in an oral sale. The subject matter of the contract is the same in both, but the contracts themselves may receive a different interpretation."

There are but few cases in this State, to which our attention has been directed, involving the interpretation and effect to be given to contracts under seal relating to the sale of growing timber, and in

none of them do we find any suggestion that such a contract as is now under consideration should be construed as a mere revocable license, between the original parties.

In the early case of *Pease* v. *Gibson*, supra, an unsealed obligation, for the sale of growing timber was expressly referred to in a reservation in a deed of the land. The instrument itself was no more formal than the one now under consideration. The only point decided in the case, however, was that the rights conferred by the obligation did not afford a justification for an entry upon the land almost four years after the expiration of the period allowed for removing the timber. The court said, however: "But if we were at liberty to consider a sale of the timber as proof of the license pleaded, still our opinion would be that it was only a conditional sale; that is, a sale of the timber that Howard or his assignee should cut and carry away within the two years mentioned in the license."

In *Freeman* v. *Underwood*, 66 Maine, 229, the contract was under seal, but much more formal than this, combining with an unequivocal sale of the timber, grass and berries then growing upon the land and all "which may be found or grown thereon for the space of ten years" a lease of the land for that period. The action was trover by the vendee against persons who had received berries picked by trespassers, and it was held that "when the berries were taken from the bush by unauthorized persons they were the property of the plaintiff." In the opinion the late Chief Justice PETERS said: "But we think it clear that the writing amounts to an executory sale of the blueberries, which would make them his when picked from the bush, or perhaps when merely grown."

In *Donworth* v. *Sawyer*, 94 Maine, 242, the instrument was a deed conveying in addition to other real estate "all the pine and spruce timber standing on (land described) to be taken off from time to time to suit their convenience," with the provision that if any of the lots should be sold the timber thereon "shall be removed the next lumbering season after notice is given . . . or as soon thereafter as may be practicable." It was conceded that title to

the standing timber passed, and the question decided was that only the pine and spruce standing on the land at the time of the sale passed.

The plaintiff relies, however, upon authorities in other jurisdictions, citing especially the following cases in which the contract was under seal; *United Society* v. *Brooks*, 145 Mass. 410; *East Jersey Iron Co.* v. *Wright*, 32 N. J. Eq.; 248, and *Fish* v. *Capwell*, 18 R. I. 667.

In *United Society* v. *Brooks*, supra, the action was by the land owner for breach of a contract under seal relating to the sale and purchase of growing timber, the plaintiff claiming that the defendant violated his contract in not cutting as much lumber as he agreed to, and the point decided was that the value of the timber left uncut should not have been included in the damages as the title to it did not pass to the defendant under the contract. It is made clear in the opinion that the court held that no title to the standing trees passed because such was not the intention of the parties as disclosed in their contract, interpreted in the light of their situation and the object in view. In reference to the provisions of the contract it is said: "Then followed provisions as to the quantity to be cut in each year, the prices to be paid per cord for the bark, and per thousand for the hemlock lumber and for the spruce timber, and the time of payments. Measurements were to be made by the plaintiff or its agent, at places specified in the contract, with notice to the defendant in all cases to enable him to be present at them. Other details for proceeding in execution of the contract were inserted . . . . The instrument in all its parts seemed to look to future action and future results, rather than to a present change of title."

This language of the opinion so aptly distinguishes that case from the one at bar that further reasons why it is inapplicable as an authority against the construction which we make of the contract now before us is unnecessary.

Herein is to be found the distinction between the ordinary timber permit or stumpage contract and the one at bar. In this contract the amount of the consideration which the vendee was to receive

was fully fixed, and practically paid, at the execution of the contract, while in the timber permit only the means of determining the amount of the stumpage thereafter is the essential thing agreed upon. Here the vendor has no concern as to how much timber the vendee may cut, but the amount which the licensee may cut under the usual timber permit is the chief concern of the licensor, for the amount of money he will receive depends wholly upon it. In this case the plaintiff parted with all his interest in the subject matter of the contract—the standing timber sold, having no longer any care as to the manner of its cutting. The licensor in the ordinary timber permit still retains a vital interest in the subject matter of the license, for his profits depend upon the efficiency and fairness with which the license is executed. A careful consideration of these important distinctions will show that the case at bar falls entirely without that line of cases involving the rights of parties under the usual stumpage contract or timber permit.

In *East Jersey Iron Co.* v. *Wright*, supra, the action was founded on an agreement under seal granting the right of raising and removing ores from certain lands, the licensee to pay twenty-five cents as stumpage for each ton of good ore so removed. It was held that the license was revocable because no interest in the land passed, and further that the licensee had waived his right. But this case is not applicable here for the reasons above stated, we think. It was a contract in which it was provided that the benefit thereunder to the licensor was to depend upon the acts of the licensee in the exercise of his rights under the contract.

The case of *Fish* v. *Capwell*, supra, is directly in point and flatly in conflict with our views and conclusions as herein expressed. The instrument there employed was under seal containing these words: "I have sold to . . . all the standing wood on a certain lot . . . To have and to hold the same to the said . . . their heirs, executors and administrators, with two years from the date hereof to cut and remove said wood in, they having paid me the sum of Fifty dollars in full for said standing wood."

It was held that the instrument was not to be construed as passing any interest in the land, but as an executory contract or parol

license which was revocable. The decision seems to be put on the ground that any contract for the sale of growing trees should be construed as an "executory contract for trees to be severed from the land." No suggestion was made that the instrument was not sufficient in form to pass an interest in land, for it is said: "In this case there was a written instrument which was substantially a deed of the trees." In the opinion it is said that "the greater number of authorities" support the other view.

Any attempt here to analyze and distinguish the numerous, and somewhat conflicting, decisions involving the construction of contracts for the sale and purchase of growing trees would be impracticable. It will be found that in many of them the only question presented was whether the contract was sufficient to satisfy the statute of frauds; in many others the only point raised was whether the vendee acquired such an absolute title to the trees as would protect him in cutting them after the expiration of the period provided therefor in the contract, or only a title defeasible as to such trees as he did not cut within the specified period. Neither of those questions are involved here. This contract is in writing and under seal, and the alleged cutting was within the period provided therefor. The following are some of the numerous cases where under instruments similar in form to the one now under consideration it has been held that an interest in real estate passed. *Kingsley* v. *Holbrook*, 45 N. H. 318, *Sterling* v. *Baldwin*, 42 Vt. 306, *Williams* v. *Flood*, 63 Mich. 487, *Dennis Simmons Lumber Co.* v. *Corey*, 140 N. C. 462. See also cases collected in the exhaustive note in 6 L. R. A., N. S., 468.

It is the opinion of the court, that by the instrument of October 22, 1906, Bishop acquired an interest in the growing timber mentioned therein, defeasible, however, as to so much thereof as he should not cut during the period provided therefor, and that the express license given to him to enter upon the land for the purpose of cutting and removing it could not, as between the parties, be revoked while the contract remained in force. Such construction gives effect to the manifest intention of the parties, is not contrary

to any judicial authority in this State, and is in harmony with the best-considered cases elsewhere.

2. The contract provides that the timber shall be cut the first winter, "if possible." The justification of the alleged trespass depends upon proof of the fact that it was not possible within the meaning of the contract to cut all the timber the first winter. The burden of establishing that fact is on the defendant.

The lexical meaning of the word "possible" is "capable of being done; not contrary to the nature of things." The condition of this contract as expressed in the words "if possible" is to be interpreted with reference to the thing to be done, the cutting and removing of the trees as timber.

If circumstances over which the defendant had no control obstructed the work, such as no snow on which to do it, or too much snow with no frost in the ground, so that in the nature of the thing it was reasonably incapable of being done, or if done, under those conditions and because of them, it would necessarily be at a cost greater than the value of the lumber, then the condition of the contract was complied with. But if the lumber was left uncut because of the neglect of the defendant to provide necessary teams, men and other equipments for the work, or to prosecute it with energy and skill to completion, then, we think, the condition of the contract was not complied with.

The defendant contends that a considerable portion of the lot—about one hundred acres out of four hundred—was bog or low land, timbered like the rest, from which it was impossible to cut and remove the timber because "There was no frost whatever. We couldn't get teams over it, it was impossible." That the trees left uncut were substantially all on this low land, those left on the higher ground being so situated that they could not be cut except in connection with operating over the low land.

If this contention be true, then, we think, it will satisfy the condition of the contract. The plaintiff, however, takes the opposite position, maintaining that the defendant has much over stated the area of the low land, that there is practically no growth on it which defendant was entitled to cut, that the uncut trees are chiefly on the

higher ground, and that the real reason why the timber was not all cut the first winter is that defendant neglected to procure enough teams and men and properly carry on the work.

Space here will not permit any considerable statement of the conflicting testimony upon this question of fact. Unfortunately we are deprived of the opportunity of seeing and hearing the witnesses, and judging from their appearance of their capacity, fairness and credibility. We must determine the issue from the evidence as it appears on the printed page.

The defendant is corroborated by his son, Morris Bishop, who says: "And we yarded to the swamp or bog as far as we could for the mud and mire; in fact, we yarded one yard on that side of the road that I swamped in the mud, the yard, and couldn't yard only about half of it on account of the mud. We had to leave it. . . . There is a wide ravine that makes down through the lot north and south, some places forty rods wide, that was miry and wet and the horses couldn't go on it."

Lyndon C. Fowles, who hauled some of the lumber, also corroborates the defendant as to the low land and bog, and, as to its character at the time, he says: "One trip we got our horses into the mud and we had to unload our load, get the horses and sled out as best we could, and twitched the logs up one to a time, or two, as we could reach them with the chains, up on to the hard ground to load them."

Charles Green, who worked for the defendant, says: "There was no frost, very muddy low land." James H. Greenleaf, another workman, says: "The swamps wasn't froze and the snow was very deep." John Page says: "they (the swamps) were very muddy and deep snow," and that they were not frozen at any time during the winter. Dustin Page also says: "It wasn't froze . . . Well I can't say as for water, it was all mud."

In answer to this the plaintiff presents the testimony of several witnesses who say, in substance and effect, that the winter of 1906-7 was "a very good winter" for lumbering; that in their operations on other lands they experienced no difficulties from lack of frost or too deep snows; that they have seen the Whitney lot, either since

or before the winter of 1906-7, and saw there no material amount of bog or low land. Mr. Farris, who went to the lot with the plaintiff in the fall of 1907, says: "I saw no places but what I could put a horse at any time and yard logs any time of year. I didn't see any thing to hinder a man."

In considering the conflicting testimony of witnesses of equal capacity and credibility that of those who have had the better opportunity for observing and knowing the actual conditions as they existed at the time is the more satisfactory.

The plaintiff's witnesses disclose the condition of the territory as it appeared to them seen at another time and under different conditions. The defendant and his witnesses describe the actual conditions existing at the time as they saw and experienced them.

We have carefully considered all the evidence upon this question and it is the opinion of the court that the defendant has sustained his burden and established the fact that the lumber left uncut on the lot at the end of the winter of 1906-7 was so left because it was not possible, within the meaning of the contract, for the defendant to cut it that winter.

It follows as the conclusion of the court that the alleged acts of trespass were authorized and justified under the rights acquired by the defendant in the contract of October 22, 1906.

This conclusion is also manifestly equitable. There is no suggestion of any fraud, misrepresentation, or other evil act of the defendant in the procurement of that contract. The plaintiff sold the timber for an agreed price and received his pay. It was in the contemplation of the parties that the cutting and removing of it might from necessity extend over to the second winter. Such necessity, in the opinion of the court, arose; and the result of the conclusion here reached is that the defendant gets only what he bought, and what at the time the plaintiff intended for him to have. Accordingly the entry will be,

Judgment for the defendant.

THOMAS J. GINN, Petitioner, *vs.* AUGUSTUS H. ULMER.

Knox. Opinion March 13, 1909.

Petition to Quiet Title. Form and Requisites. Procedure. Practice. Adverse Claim. Statute, 1907, chapter 150. Revised Statutes, chapter 106, sections 47, 48.

When a petition under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150 of the Public Laws of 1907, is filed for the purpose of requiring the defendant named in such petition to appear and show cause why he should not be required to bring an action to try his title to the premises described in the petition, the proceeding follows the analogies of equity rather than those of law, and the petition being preliminary only to a suit to be brought and prosecuted as seems to the court "equitable and just" is not governed by the same rules as the action itself. The description need not be so particular and definite as in a writ of entry or other action to try the title.

When a petition under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907 is filed for the purpose of requiring the defendant named in such petition to appear and show cause why he should not be required to bring an action to try his title to the premises described in the petition, and the petition sets out all the requirements of the statute; an uninterrupted possession of the premises by the petitioner for ten years, a claim of freehold therein, a sufficient description, and an apprehension of an adverse claim by the defendant which creates a cloud upon the title, and concludes with a prayer that the defendant may be summoned to show cause why he should not bring an action to try title to the premises described in the petition, and these propositions are passed upon by the single Justice his findings are conclusive so far as they involve questions of fact.

Where a petition under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, was filed for the purpose of requiring the defendant named in such petition to appear and show cause why he should not bring an action to try his title to the premises described in the petition and the description was such as to give the defendant notice of at least some part of the land to which the petition referred, the petition was properly held sufficient by the presiding Justice.

Where a petition under the provision of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, was filed for the purpose of requiring the defendant to appear and show cause why he should not bring an action to try his title to the premises described in the petition, and the petitioner used the language of the statute in alleging the adverse claim of the defendant, *held* that it was sufficient.

Where in proceedings under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, the defendant in his answer did not make an unqualified disclaimer such as the statute contemplates, of all right and title adverse to the petitioner, but denied that he had made a claim adverse to the title of the petitioner, *held* that an adverse claim was impliedly asserted by the defendant's statement that "the only difficulty there is between him and the petitioner is the establishment of a line on the northern boundary."

On exceptions by defendant. Overruled.

Petition under Revised Statutes, chapter 106, sections 47 and 48 as amended by Public Laws of 1907, chapter 150, to compel the defendant to bring an action to try his title to a parcel of land in South Thomaston. The petition was inserted like a declaration in a writ of attachment. The defendant filed an answer with a motion to dismiss the petition and also demurred. The motion and demurrer were overruled and the defendant excepted.

The case is stated in the opinion.

The petition is as follows:

"STATE OF MAINE

"KNOX, ss.—To the Supreme Judicial Court in and for the County of Knox and State of Maine:

"Thomas J. Ginn of Auburn, Androscoggin County, in said State, respectfully petitions and gives this Honorable Court to be informed:

"First: That he is the owner and in possession of a certain lot or parcel of land with the buildings thereon, situated in the town of South Thomaston, in said County of Knox, bounded and described as follows, to wit:

"Beginning at a stake and stones at tide water at the west side of Emery's Point formerly so called, now Ginn's Point, near the old brickyard; and in the line of a stone wall running diagonally across said point in a generally northeasterly and southwesterly direction; thence in a generally northeasterly direction across said point by said stone wall and by the line thereof to the waters of Penobscot Bay at the easterly side of said point; thence southerly, westerly and northerly by the said Penobscot Bay to the place of beginning.

"Second: That your petitioner claims an estate of freehold in the whole of said real estate above described and claims to be the absolute owner in fee simple thereof, excepting only therefrom the Hitchcock cottage and lot so called.

"Third: That your petitioner and those under whom he claims have been in uninterrupted possession of said property for more than ten years next preceding the date of this petition, to wit, your petitioner since the 19th day of September, A. D., 1892, and the immediate grantor of your petitioner for many years prior to said date.

"Fourth: That the source of title of your petitioner is as follows: A warranty deed of said premises from Eliza S. Ginn dated September 19, 1892, and recorded Knox Registry of Deeds, Book 93, Page 78.

"Fifth: That an apprehension exists that Augustus H. Ulmer of Rockland in said County of Knox claims, or may claim some title in the premises hereinbefore described, adverse to your petitioner.

"Sixth: That the aforesaid apprehension creates a cloud upon the title of your petitioner to said premises and depreciates the market value thereof, and prevents easy sale of the same.

"Wherefore your petitioner respectfully prays that the said Augustus H. Ulmer may be summoned to show cause why he should not bring an action to try title to the above described premises, and set up his claim therein if any he has.

"Dated at Rockland, Maine, this eighth day of October, A. D. 1907.

THOMAS J. GINN,
By A. S. LITTLEFIELD, his Attorney."

The answer, omitting formal parts, is as follows:

The respondent in the above entitled action having been summoned therein to appear to answer to the petition in such case for an answer says:

"That he does not claim title to all the land described in said petition but only to a very small part thereof if any, because said description is so indefinite, vague and uncertain as to its northern

boundary that he cannot tell whether he claims any part thereof or not and is thereby unable to answer in this respect more fully. Wherefore he will be under the necessity of asking for a more minute description as to the northern boundary of the land described in said petition for, as described, he cannot tell whether he claims any part thereof or not.

"This respondent further says that he makes no claim whatever adverse to the title of said petitioner and never has and the only difficulty there is between him and said petitioner is the establishment of a line on the northern boundary of said petitioner's land and, if said description were more fully given, it might be that there would be no dispute as to the line between the parties hereto and that the land in dispute, if it be in dispute, is not one of title but one of the boundary and involves only a few square rods of rough pasture land and that the title to the petitioner's land so far as this respondent is concerned, when said boundary line shall have been established as aforesaid, will in no way interfere with the plaintiff's title or in any way affect the value thereof.

"That your respondent has no information as to the source of the complainant's title as said title, as alleged in said petition, does not concern him in any way and that the only difficulty there is between the parties hereto, as before stated, is the settlement of a boundary line as above set forth.

"That the apprehension mentioned in said petition in paragraphs 5 and 6 thereof gives no statutory reason why this respondent should be compelled to bring any action to determine the title to the property named in said petition and any order of court compelling him to do so would be inequitable and unjust upon this respondent who makes no such claim as set forth in the petition.

"That your respondent says further that your complainant has abundant remedy against this respondent without compelling the respondent to try his title to said described property and that such remedy is trifling and inexpensive as compared to the trouble that this respondent would be put to if the prayer of said petitioner should be granted.

"Wherefore this respondent moves that this petition be dismissed and he further, for the foregoing reasons and generally, demurs to the foregoing petition and prays that he may be discharged hence from this court with his costs in this behalf sustained."

The decree made by the presiding Justice, omitting formal parts, is as follows:

"In the above entitled cause it having been made to appear that the petition was inserted like a declaration in a writ and duly served upon the respondent, that the allegations in the petition are true, that said respondent has appeared in answer to said petition but has not disclaimed all right and title adverse to the petitioner in the land described in the petition, and that the respondent has not by his answer and upon hearing, shown sufficient cause why he should not be required to bring an action and try such title as he claims to the land or any part thereof described in the petition. It is Ordered, and Decreed, that said respondent bring an action at law against the petitioner to try his title to the land described in the petition, said action to be returnable at the next April Term of this court for Knox County, Maine, 1908."

Arthur S. Littlefield, for plaintiff.

Rodney I. Thompson, for defendant.

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

PEABODY, J. This case is based upon a petition under R. S., chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, to compel the defendant to bring an action to try his title to a parcel of land in South Thomaston in the County of Knox.

The petition was inserted like a declaration in a writ of attachment, and the defendant filed an answer with a motion that the petition be dismissed and a demurrer to its sufficiency for the reasons: first, the question raised is one of boundary only, and on account of the uncertainty in description he does not know whether he claimed any part of the land and therefore cannot have

the benefit of a disclaimer; second, the description is too vague and indefinite to give him notice of the land in question; third, he made no claim adverse to the title of the petitioner; fourth, paragraphs 5 and 6 give no statutory reason why he should bring action against the petitioner. The motion and demurrer were overruled and the case is before this court on the defendant's exceptions.

The petition sets out all the requirements of the statute; an uninterrupted possession of the premises by the petitioner for ten years, a claim of freehold therein, a sufficient description, and an apprehension of an adverse claim by the defendant which creates a cloud upon the title, and it concludes with a prayer that the defendant may be summoned to show cause why he should not bring an action to try title to the premises described. All these propositions were passed upon by the single Justice, and so far as they involve matters of fact, the finding is conclusive. *Proprietors of India Wharf* v. *Central Wharf and Wet Dock Corporation*, 117 Mass. 504.

It is therefore shown that the petitioner had possession of the premises described, a freehold estate, and that he was apprehensive of an adverse claim of the respondent which created a cloud upon his title.

Under the exceptions we are also to consider the questions raised by the demurrer and determine whether the allegations of the petition are sufficient in law.

This statutory proceeding follows the analogies of equity rather than those of law, and the petition being preliminary only to a suit to be brought and prosecuted as seems to the court "equitable and just" is not governed by the same rules as the action itself. The description need not be so particular and definite as in a writ of entry or other action to try the title. *Gurney* v. *Waldron*, 137 Mass. 376; *Slater* v. *Manchester*, 160 Mass. 471; *Oliver* v. *Looke*, 77 Maine, 585.

The land described is so much of a certain point now known as Ginn Point on Penobscot Bay, as is contained within the limits of the waters of the Bay and a stone wall running from tidewater near

an old brick yard diagonally across the point. This must give the defendant notice of at least some part of the land to which the petition refers and was properly held sufficient by the presiding Justice. *Silloway* v. *Hale*, 8 Allen, 61.

The defendant in his answer does not make an unqualified disclaimer such as the statute contemplates, of all right and title adverse to the petitioner. While he denies that he has made a claim adverse to the title of the petitioner, an adverse claim is impliedly asserted by his statement that "the only difficulty there is between him and the petitioner is the establishment of a line on the northern boundary," which in effect means that he has a claim dependent upon the location of this boundary line to be established by a judgment in a proper action between the parties, as in the case of *Monroe* v. *Ward*, 4 Allen, 150. Upon the facts presented by the record the proper action would be writ of entry brought by the defendant against the petitioner who is in possession, and not trespass by the petitioner against the defendant who has not actually interferred with the possession. *Marshall* v. *Walker*, 93 Maine, 532; *Smith* v. *Libby*, 101 Maine, 338; *May* v. *New England Railroad Company*, 171 Mass. 367.

The petitioner used the language of the statute in alleging the adverse claim of the defendant, and we think it is sufficient.

The ruling of the single Justice is not shown to be erroneous. *Oliver* v. *Looke*, supra; *Tisdale* v. *Brabrook*, 102 Mass. 374.

Exceptions overruled.

WEST COVE GRAIN COMPANY *vs.* JAMES A. BARTLEY et als.

Piscataquis. Opinion March 29, 1909.

Jurisdiction. How Same is Acquired. Irregularity of Summons or Notice may be Waived. How Same may be Waived. Disclosure Commissioners. Subpoenas. Where Same Should be Made Returnable. Application for Subpoena by Attorney not Attorney of Record. Substituted Commissioner. Statutes, 1905, chapters 131, 134; 1907, chapter 2. Revised Statutes, chapter 114, sections 19, 23, 35, 65.

There are three essentials to legal jurisdiction, viz: The court must have 1. Jurisdiction of the subject matter. 2. Jurisdiction of the parties. 3. Authority to decide.

Jurisdiction of the subject matter is conferred by the law which organizes the tribunal, and jurisdiction of the person is the power ordinarily obtained by the service of a summons or other proper notice or by an appearance.

The universal rule is that unless the tribunal has jurisdiction of the subject matter, the proceedings are void and the objection that such jurisdiction is not given by law cannot be waived by the parties. But where the court has jurisdiction of the subject matter and from any irregularity of summons or notice, it has not obtained jurisdiction over a party to the controversy, he may waive the objection by appearing and taking any other part in the proceedings than making objection thereto.

Revised Statutes, chapter 114, section 23 as amended by chapters 131 and 134 of the Public Laws of 1905 and by chapter 2 of the Public Laws of 1907, relating to poor debtors, provides as follows:

"Section 23. Such magistrate shall thereupon issue under his hand and seal a subpoena 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 not such magistrate in the town where the debtor, the petitioner or his attorney resides, then in the 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 subpoena. No application or subpoena 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."

Held: That when "there is no such magistrate in the town where the debtor, the petitioner or his attorney resides," and application for a subpoena is made to a magistrate" nearest to the place of residence of the debtor the

petitioner or his attorney," the subpoena should be made returnable before such magistrate in the town where he resides and not in another town, although in the same county, where his office is located.

When a disclosure commissioner having jurisdiction of the subject matter, has issued a summons to a debtor to appear before him and make disclosure and such disclosure commissioner is unable to attend, the Judge of Probate acting ex-officio as disclosure commissioner, may attend at the time and place named in the subpoena and take the disclosure of the debtor.

When an attorney has an execution legally in his hands for collection, it is prima facie evidence of his authority to act for the judgment creditor, and he may as attorney of the judgment creditor, although he is not the attorney of record, apply for a subpoena commanding the debtor to appear before a disclosure commissioner and make disclosure, and the burden of showing that he is not authorized is upon the debtor. The statute does not restrict the attorney who may apply for the subpoena to the creditor's attorney of record or an attorney authorized by power of attorney.

Where a judgment debtor and a disclosure commissioner resided in the same county and the disclosure commissioner having jurisdiction of the subject matter, and on application therefor, issued a subpoena commanding the debtor to appear before him and make disclosure, and which subpoena by law should have been made returnable before the disclosure commissioner in the town where he resided but was erroneously made returnable in another town in the same county where he had his office, and the debtor appeared at the time and place named in the subpoena and submitted to an examination and was examined by the attorney for the creditor and by his own attorney and also by the disclosure commissioner, and at the close of the hearing the debtor's attorney moved that the oath be administered to the debtor, and the oath was refused and a capias was annexed to the execution and the debtor was arrested and thereupon gave bond, *Held:* That the debtor waived all objections to the irregularity of the summons in commanding him to appear before the disclosure commissioner in a town other than that in which the disclosure commissioner resided.

On report. Judgment for plaintiff as stated in the mandate.

Action of debt on a poor debtor's bond, brought by the plaintiff against the defendants, James A. Bartley as principal, and Minnie M. A. Bartley and Mark B. Emery as sureties. When the action came on for trial an agreed statement of facts was filed and the case was reported to the Law Court with the stipulation "that the Law Court may render judgment as it may find the facts authorize, in accordance with the provisions of section sixty-five, chapter one hundred and fourteen, of the Revised Statutes."

The case is stated in the opinion.

W. A. Johnson, for plaintiff.
M. L. Durgin, for defendants.

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

PEABODY, J. This is an action of debt on a poor debtor's bond brought by the plaintiff against the defendant, Bartley, as principal, and the sureties thereon. The bond is dated March 23rd, 1907, and was given to obtain release of the principal from arrest on a capias issued by Calvin W. Brown, Judge of Probate and ex officio disclosure commissioner for Piscataquis County.

The case is before this court on an agreed statement of facts.

The plaintiff, whose place of business was Bangor in the County of Penobscot, recovered judgment against the defendant, Bartley, who was a resident of Milo in Piscataquis County, at the October Term, 1906, of the Supreme Judicial Court, Penobscot County. The judgment was dated October 19th, 1906, and upon it execution issued and an alias execution was issued February 2nd, 1907. B. W. Blanchard of Bangor was attorney of record for the plaintiff and his name was endorsed upon the executions. The execution of February 2nd, 1907 was forwarded by Blanchard to W. A. Johnson, an attorney at law in Milo, for collection with the instructions to institute disclosure proceedings if necessary, who after demand upon the debtor, made an application to Harvey J. Cross of Sebec in the County of Piscataquis, a disclosure commissioner, for a subpoena to command the debtor to appear before him and disclose. Cross had an office at Dover, in the County of Piscataquis, where he did business as a disclosure commissioner. There was no disclosure commissioner in the town of Milo, the place of the debtor's residence, and Sebec is nearer to that town than Dover. Cross issued a subpoena, which was duly served, commanding the debtor to appear before him at his office in Dover, March 22nd, 1907, and at that time and place the debtor appeared.

The disclosure commissioner being unable to be present had requested the Judge of Probate as disclosure commissioner to be

present and take the disclosure, and he appeared at the time and place mentioned in subpoena for that purpose and a hearing was had before him.

The debtor's counsel at the hearing objected that B. W. Blanchard was the attorney of record for the plaintiff, while the petition was signed by W. A. Johnson, as attorney for the plaintiff. The commissioner overruled the objection, and the debtor was then examined by the counsel for the creditor, by the commissioner and by his own counsel. At the close of the hearing the debtor's counsel moved that the oath be administered to the debtor, but the commissioner refused to administer it and issued a capias dated March 22nd, 1907, which was attached to the execution of February 2nd, 1907.

Upon the capias the debtor was arrested and gave the bond upon which this action is brought.

The defense is made upon two grounds; 1. The petition for subpoena to bring the debtor before the disclosure commissioner was void because it was not signed by the creditor or its attorney. 2. The debtor should have been brought before the disclosure commissioner in the town of Sebec where he was a resident and not in a different town where he had his office.

We think the first ground of defense is not tenable. The attorney of record in the original suit prosecuted the claim against the debtor to judgment and placed the execution of February 2nd, 1907, in the hands of a local attorney of the town where the defendant resided, for collection. He demanded payment of the judgment debt and it being refused, he applied as attorney of the plaintiff to the commissioner nearest the town where the defendant resided for a subpoena commanding the debtor to appear at a fixed time and place and to disclose as provided by statute. This commissioner had jurisdiction of the proceeding, and the application being made to him by an attorney at law having in his possession the execution representing the debt of the creditor and assuming to be his attorney, he took action upon it by issuing a subpoena.

The case shows that so far as the attorney of record could appoint the local attorney without express direction of the plaintiff, he had

done so. No protest was made nor any issue as to the fact of the appointment was raised until the time fixed for the disclosure, when the debtor's counsel objected to the validity of the proceedings, because the execution showed that Blanchard was the judgment creditor's attorney of record. This objection the magistrate overruled. The statute does not restrict the attorney who may apply for the subpoena to the creditor's attorney of record or an attorney authorized by power of attorney. The magistrate found as fact that Johnson was the attorney of the creditor, and the finding is not reviewable in this action, provided the disclosure commissioner had jurisdiction at the time and place named in the subpoena which will be later considered. *Cannon* v. *Seveno et als.*, 78 Maine, 307: *Shields* v. *Sheffields*, 79 Ala. 91: *Debavin* v. *Funke*, 142 N. Y. 633. The fact that Johnson had the execution legally in his hands for collection is prima facie evidence of his authority to act as attorney for the judgment creditor, and the burden of showing he was not authorized was upon the debtor. *Mutual Life Insurance Company* v. *Pinner*, 43 N. Y. Eq. 52: *Bonnifield* v. *Thorp*, 71 Fed. Rep. 924.

The second ground of defense involves, 1. the construction of R. S., chapter 114, section 23, as amended by chapters 131 and 134 of the Public Laws of 1905 and the Public Laws of 1907, chapter 2. 2. the question of waiver by the debtor.

The amendment by the Public Laws of 1907, in force at the time of the application for subpoena in this case, seems to have introduced a material change as to disclosure commissioners to whom applications for subpoenas may be made in disclosure proceedings, and the towns in which the debtors are to appear before such magistrate to make disclosure. The language of the amended statute "Such magistrate shall thereupon issue under his hand and seal a subpoena 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 the town where there is such a magistrate

nearest to the place of residence of the debtor, the petitioner or his attorney, at the time and place therein named, to make full and true disclosure, on oath, of all his business and property affairs," fairly indicates that the defendant should have been brought before the magistrate in Sebec; the statute should be construed to mean the town where the magistrate resides rather that where his office is located.

This construction is aided by the associated section 19, providing for the appointment and certain requirements of disclosure commissioners for different localities. "They shall have an official seal which shall have engraved thereon the name of the commissioner, the words 'disclosure commissioner' and the word 'Maine' and the name of the county, and the town or city where the commissioner resides." In this case the commission appointing Cross, named him "Harvey J. Cross of Sebec."

It is contended by the plaintiff's attorney that it is provided by statute that disclosure commissioners have jurisdiction in the county for which they are appointed and that consequently they may summon debtors before them in any town within the county, and that such a construction is not inconsistent with judicial definitions of residence. *Shattuck* v. *Maynard*, 3 N. H. 124: *Tyler* v. *Murray*, 57 Md. 418. But the construction we give to the statute quoted is more consistent with its language and the apparent reason for the amendment. They have jurisdiction of debtors within the county when applications for subpoenas are made to them as required by statute.

We assume then that Mr. Cross, whose residence was in Sebec, the nearest magistrate, had originally jurisdiction of the subject matter of this controversy, and having issued the summons and being unable to attend, there was authority by statute for the Judge of Probate acting ex officio as disclosure commissioner, to attend and take the disclosure of the debtor. R. S., 114, section 35. He had the same jurisdiction as Cross would have had at the time and place named in the subpoena. The subpoena erroneously commanded the debtor to appear before the magistrate in the town of Dover, and it did not by the service upon him give to the magistrate issuing it

or the substituted magistrate jurisdiction over him at that place without his consent. *Stanton* v. *Hatch*, 52 Maine, 244.

There are three essentials to legal jurisdiction. First. The court must have cognizance of the class of cases to which the one to be heard belongs, or in other words jurisdiction of the subject matter. Second. The proper parties must be present or power be had to compel their attendance, or in other words jurisdiction of the parties. Third. There must be authority to decide in substance and effect. 4 Words and Phrases 3883.

Jurisdiction of the subject matter is conferred by the law which organizes the tribunal, and jurisdiction of the person is the power ordinarily obtained by the service of a summons or other proper notice or by an appearance. 17 Am. & Eng. Ency. of Law, 2d Ed. 1060.

The universal rule is that unless the tribunal has jurisdiction of the subject matter, the proceedings are void and the objection that such jurisdiction is not given by law cannot be waived by the parties. *Chase* v. *Palmer*, 25 Maine, 341: *Call* v. *Mitchell*, 39 Maine, 465. But where the court has such jurisdiction and from any irregularity of summons or notice, it has not obtained jurisdiction over a party to the controversy, he may waive the objection by appearing and taking any other part in the proceedings than making objection thereto. *Thornton* v. *Leavitt*, 63 Maine, 384. That was an action commenced in the Municipal Court of Saco which had jurisdiction to hear and decide civil causes where the defendant lived, in York County. The defendant lived in Cumberland County but appeared in answer to the suit and filed an account in set-off at the return term. Later he moved for a dismissal of the action on the ground that the court had no jurisdiction. It was held "The court had jurisdiction over the subject matter of the suit. The general appearance of the defendant and filing an account in set-off gave that court jurisdiction of the person."

In *Fuller* v. *Davis et al.*, 73 Maine, 556, which was an action on a poor debtor's bond, objection was made that the application and citation were insufficient to give the magistrates jurisdiction, but the creditor appeared by his attorney before the justices and

fully examined the debtor; by so doing he was held to have waived all objections on account of defects in the proceedings.

In *Carlisle* v. *Weston*, 21 Pick. 535, the court by Morton, J. say "The general rule upon this subject is, that irregularities and defects may be waived, but mere nulities cannot be cured, or restored to life, inasmuch as they never possessed any legal vitality."

In *Mahon* v. *Harkreader*, 18 Kan. 383, it was held that "Attending and taking part in a trial is a waiver of any objection to the adjournment of a court from a court room to another building."

In *Merchants Heat and Light Company* v. *Clow and Sons*, 204 U. S. 286, the court say "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in the proper sense he submits."

The rule as to jurisdiction by consent is summarized in 12 Ency. of Pleading and Practice, 126, 127, "In other words consent cannot confer jurisdiction of the subject matter but it may confer jurisdiction of the person."

The statement of facts shows that the debtor appeared before a commissioner at the time and place mentioned in the subpoena issued by Cross, submitted to an examination, and at the close of the hearing sought to protect his rights in the disclosure proceedings by a motion for the administration of the oath provided by the statute.

Accordingly it must be held that the defendant, Bartley, waived all objections to the irregularity of the summons in commanding him to appear before the disclosure commissioner in a town other than that in which the commissioner resided.

Judgment for plaintiff against all the defendants for $44.43 with interest from the date of the writ; and special judgment against the principal for a sum equal to interest on said amount at twenty per cent a year, after breach of the bond Sept. 23, 1907, as provided in Sec. 65, Ch. 114, R. S.

FRANCES E. HURLEY, Appellant,

vs.

INHABITANTS OF SOUTH THOMASTON.

Knox. Opinion March 31, 1909.

Statutes. Pari Materia. Construction. Ways. Change in Grade. Abutting Owners. Damages. Liability of Towns. Street Railroads. Liability to Towns for Change in Grade. Revised Statutes, chapter 1, section 6, rules II, XIV; chapter 23, section 68; chapter 53, section 19.

The language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it.

It is a well established rule that all statutes relating to the same subject matter though enacted at different times, are to be deemed in pari materia, and construed with reference to each other.

Section 68, chapter 23, Revised Statutes, relating to ways, and section 19, chapter 53, Revised Statutes, relating to street railroads, read as follows:

"Sec. 68. When a way or street is raised or lowered by a road commissioner or person authorized, to the injury of an owner of adjoining land, he may, within a year, apply in writing to the municipal officers and they shall view such way or street and assess the damages, if any have been occasioned thereby, to be paid by the town, and any person aggreived by said assessment, may have them determined, on complaint to the supreme judicial court in the manner prescribed in section twenty of this chapter. Said complaint shall be filed at the term of the supreme judicial court, next to be held within the county where the land is situated, after sixty days from the date of assessment.

"Section 19. Said railroad shall be constructed and maintained in such form and manner, and with such rails and upon such grade as the municipal officers of the cities and towns where the same are located may direct, and whenever in the judgment of such corporation it shall be necessary to alter the grade of any city, town or county road, said alterations shall be made at the sole expense of said corporation with the assent and in accordance with the directions of said municipal officers. The said corporation may at any time appeal from the decision of such municipal officers determining the form and manner of the construction and maintainance of its railroad

and the kind of rail to be used, to the board of railroad commissioners who shall upon notice hear the parties and finally determine the questions raised by said appeal."

Held: 1. That these two sections are to be considered together as statutes in pari materia, and so construed that when the grade is established by the municipal officers at the request of the railroad company, by virtue of said section 19, it shall be deemed to have been done by a "person authorized" within the meaning of said section 68. In such a case all formal objections and verbal criticisms are obviated by the statutory rules of construction (R. S., chapter 1, section 6, rules XIV and II) under which the word "person" may include a corporation and words of the singular number include the plural.

2. That although said section 68 provides that the damages shall be assessed by the municipal officers "to be paid by the town," while said section 19 declares that "said alterations shall be made at the sole expense of said corporation with the assent and in accordance with the directions of the municipal officers," yet the word "expense" as used in said section 19 may include the damages to the landowners.

3. That damages assessed by the municipal officers under said section 68, if paid by the town, become a part of the "expense" of the alterations by virtue of said section 19, and are legally recoverable by the town against the railroad corporation.

Where, under the provisions of Revised Statutes, chapter 53, section 19, the grade of a street railroad located on the side of a town way was established and fixed by the municipal officers of the town and also, by authority of the municipal officers, the grade of the traveled side of the way was raised so as to conform to the grade of the street railroad and an abutting owner was damaged thereby, *held* that under the provisions of Revised Statutes, chapter 23, section 68, the town was liable for the damages sustained by the abutting owner.

On exceptions by defendants. Overruled.

Appeal from the refusal of the selectmen of the defendant town to assess damages alleged to have been sustained by the plaintiff by reason of the raising of the highway in front of the plaintiff's premises, the proceeding being under Revised Statutes, chapter 23, section 68. The plaintiff recovered a verdict in the appellate court. During the trial the defendant town excepted to several rulings of the presiding Justice.

The case is stated in the opinion.

David N. Mortland, for plaintiff.

Arthur S. Littlefield, for defendants.

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

WHITEHOUSE, J. This is an appeal from the refusal of the selectmen of the defendant town to assess the damages alleged to have been occasioned by the raising of the highway in front of the appellant's premises situated on the east side of the road in the defendant town, near the foot of Ingraham's Hill. The proceeding is based upon section 68 of chapter 23, R. S., which provides that when a highway is "raised or lowered by a road commissioner or person authorized to the injury of an owner of adjoining land," he may have the damages assessed by the municipal officers "to be paid by the town," and "any person aggrieved by said assessment may have them determined on complaint to the supreme judicial court" in the manner therein prescribed.

The Rockland, South Thomaston & Owls Head Street Railway was located and built on the easterly side of the highway in front of the appellant's premises, and it appeared from the uncontradicted testimony of the president of the railway corporation that the "company had the grade of its road at that point established and fixed by the municipal officers of South Thomaston in accordance with section 19 of chapter 53 of the revised statutes." The fill for the sub grade of the railway was made by the company in accordance with the direction of the selectmen, and the remainder of the highway on the traveled side was afterward graded in conformity therewith under the supervision of an agent employed by the selectmen. All of this grading was done before the call for the town meeting at which the following vote was passed, to wit:

"Voted on Article 2nd to instruct the Selectmen to confer and contract with the Rockland, South Thomaston & Owl's Head Street Railway to change and make uniform the grade of Ingraham's Hill with the railroad track, under the direction of the municipal officers, the material to be taken from said hill to be deposited, under the direction of the municipal officers, on the road to the southward of said hill, for a sum not to exceed $500, provided said Rockland,

South Thomaston & Owl's Head Railway will assume all damages, accruing, or which may accrue to the abutters on Ingraham's Hill."

The appeal was tried before a jury, and a verdict was returned in favor of the appellant. The case comes to the Law Court on the appellee's exceptions to the rulings of the presiding Justice.

Section 19 of chapter 53 of the Revised Statutes, above mentioned, provides that street railroads "shall be constructed and maintained in such form and manner and with such rails and upon such grade as the municipal officers . . . may direct, and whenever in the judgment of such corporation it shall be necessary to alter the grade of any city, town or county road, said alterations shall be made at the sole expense of said corporation with the assent and in accordance with the directions of said municipal officers." The remainder of the section provides for an appeal from their decision respecting the manner of construction and maintenance of the railroad and the kind of rail to be used, to the board of railroad commissioners.

At the trial the defendant contended that the town could not be held responsible in any way for the damages sustained by the appellant on account of the raising of the grade of the road, by virtue of the provisions of the foregoing section of chapter 53. Several subordinate questions of law were also raised at the trial and instructions requested by the defendant with respect to the legal location of the railway and the burden of proof relating to that branch of the case. But the counsel for the defendant in his argument before the Law Court expressly waives all the exceptions relating to these minor questions and confines his contentions principally to the fundamental proposition that upon the facts stated the appellant's complaint is not maintainable against the town, either upon the principles of the common law or the provisions of the statutes above quoted. He still contends, however, that if the town is liable at all, a distinction should be observed between the work of grading for the railway track and that done for the traveled portion of the way, and that if the railroad company raised the easterly portion of the way and the town voluntarily raised the remainder of it, it would in any event only be liable for the damages resulting from what it did.

It is argued in behalf of the defendant that by section 19 of chapter 53, the municipal officers are constituted a distinct judicial tribunal to establish the grade for street railroads, and that in performing that duty they do not act as a municipal agency in the interest of the town or as a "person authorized" within the meaning of section 68 of chapter 23 above quoted relating to highways. It is further argued that inasmuch as section 19 of chapter 53 declares that "such alterations shall be made at the sole expense of said corporation," and the word "expense" may properly be construed to include damages suffered by abutting owners, the legislature could not have intended that any action under the statute last named involving a change of grade for the benefit of a street railroad, should render the municipality liable to pay the damages resulting therefrom to abutting owners, either absolutely or in the first instance.

This question has never before been presented to this court, but notice may be taken of the fact that in every case that has arisen since the enactment of section 19 of chapter 53, R. S., in the year 1893, where a change of grade has been made by the municipal officers under this statute at the request of a street railroad corporation, the damages resulting to the owner of the adjoining land, unless adjusted by mutual agreement, have uniformly been assessed by the municipal officers under section 68 of chapter 23 or, if the owner was aggrieved, have been determined on complaint to the Supreme Judicial Court as therein prescribed, and in either event the damages awarded have been paid by the railroad corporation. The practical construction thus placed upon these statutes during a period of fifteen years of extensive street railway construction appears to have been satisfactory to all the parties interested, and is entitled to respectful consideration in the decision of the question. This practical construction was in effect adopted in the rulings and instructions of the presiding Justice in the case at bar.

It has been seen that section 68 of chapter 23 provides that when the grade is changed by a "road commissioner or person authorized," the abutter may have his damages assessed as there provided. The phrase "or person authorized" there found first appeared in the

revision of 1857, when there were no street railroads in this State, and it may be true that the power to fix the grade given to municipal officers by section 19 of chapter 53, was a particular species of authorization not actually present to the minds of the legislators in 1857. But as stated in Endlich on the Interpretation of Statutes, section 112. "The language of the statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it." *Portland* v. *N. E. Tel. & Tel. Co.*, 103 Maine, 240. It is a well established rule that all statutes relating to the same subject matter though enacted at different times, are to be deemed in pari materia, and construed with reference to each other. "This rule" says Ch. J. Shaw in *Com.* v. *Goding*, 3 Met. 130, "is peculiarly applicable to the Revised Statutes in which for the convenience of analysis, and classification of subjects, provisions are sometimes widely separated from each other in the code which have so immediate a connection with each other, that it is quite necessary to consider the one in order to arrive at the true exposition of the other." See also *State* v. *Frederickson*, 101 Maine, 37.

The two sections of the Revised Statutes in question the one relating to highways (sec. 68, chap. 23) and the other to street railways (sec. 19, chap. 53) may accordingly be considered together as statutes in pari materia, and so construed that when the grade is established by the municipal officers at the request of the railroad company, by virtue of the latter section of the statute, it shall be deemed to have been done by a "person authorized" within the meaning of the former section. In such a case all formal objections and verbal criticisms are obviated by our statutory rules of construction (chap. 1, R. S.) under which the word "person" may include a corporation and words of the singular number include the plural.

In harmony with this view the presiding Justice instructed the jury that . . . "If the municipal officers of South Thomaston when the railroad went down there, did actually fix the grade of the road at that place, to which it was to be built up to that place, then

I say to you gentlemen, as a matter of law, that the raising of the road at that place was done by a person authorized; that is, the railroad had authority to do it by authority from the selectmen who by law were vested with power to give that authority."

"If the selectmen did it of their own accord, then the town would be liable, as the selectmen have authority to do those things of their own accord, irrespective of the railroad. If they didn't fix it, but the railroad without any authority, raised the grade, raised the street, then the defendant town wouldn't be liable for what the railroad did. Because the railroad in such a case wouldn't be a person authorized. The town in this form of action is liable only for the acts of a person authorized." . . . . . If the raising of the road anywhere, either upon the railroad side or upon the traveled side was done by authority of the selectmen of the town of South Thomaston, then it is a raising of the street within the meaning of this section."

Again it has been seen that section 68 of chapter 23, provides that the damages shall be assessed by the municipal officers "to be paid by the town," while section 19 of chapter 53 declares that "said alterations shall be made at the sole expense of said corporation with the assent and in accordance with the directions of said municipal officers." The word "expense" as used in this statute may include the damages to the landowners. *Brigham* v. *Worcester County*, 147 Mass. 446; *Damon* v. *Reading*, 2 Gray, 274. Thus construed together with respect to the question of payment, the two statutes are also easily reconciled by holding that the damages assessed by the municipal officers under the highway statute, if paid by the town, become a part of the "expense" of the alterations by virtue of the railroad statute, and legally recoverable by the town against the railroad corporation.

The charge of the presiding Justice was also in harmony with this construction, and no exceptionable error is disclosed.

The certificate must therefore be,

Exceptions overruled.

EDWARD O'BRIEN *vs.* J. G. WHITE AND COMPANY, Incorporated.

Cumberland. Opinion April 2, 1909.

Evidence. Master and Servant. Negligence. Excessive Damages.

If a fact is relevant and properly admissible for one purpose it cannot be excluded on the ground that when in evidence it may be used to effect another purpose for which it would not have been admissible.

Although evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, yet it cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding Justice may feel required to give to the jury concerning it.

If the act of a third party concurs with the negligence of a defendant in causing the injury complained of, such concurring act does not relieve the defendant from liability if such act ought to have been foreseen or anticipated, and especially when the concurring act could not have caused the injuries except for the defendant's negligence.

Where the defendant was constructing a line of poles and wires for the transmission of electric current from a generating station and the plaintiff, a servant in the employ of the defendant, was engaged in working on the wires, and a current of electricity unexpectedly passed over the wires and the plaintiff was injured, *held* that the standard of care required of the defendant was such as an ordinarily reasonable and prudent person would have exercised under like circumstances and that it was for the jury to fix the measure of that standard.

The plaintiff while in the employ of the defendant received serious and severe personal injuries caused by the alleged negligence of the defendant and recovered a verdict for $23,071.66. *Held:* That the finding of the jury on the question of the defendant's liability should not be disturbed but that the damages awarded were excessive and for that reason a new trial must be granted unless the plaintiff remits all the verdict in excess of $17,500.

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

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant corporation, and caused by the alleged negligence of the defendant corporation. Plea, the general issue. Tried at the October term, 1908,

Supreme Judicial Court, Cumberland County. Verdict for plaintiff for $23,071.66. The defendant excepted to certain rulings during the trial and also filed a general motion for a new trial.

The case is stated in the opinion.

William Lyons, for plaintiff.

Libby, Robinson & Ives, for defendant.

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

KING, J. Action to recover damages for personal injuries. The verdict was for the plaintiff, and the case is before this court on defendant's exceptions and motion.

On the twenty-eighth day of August, 1907, the plaintiff received personal injuries while in the employ of the defendant, a corporation engaged at the time in constructing a line of poles and wires, for the transmission of electric current from a generating station, which the defendant had constructed, at West Buxton, Maine, through certain other towns, and terminating in a switchboard in the power station of the Consolidated Electric Light Company in Portland, known as the Plum Street Station. Before reaching that station the line of wires passed through a transformer house, which the defendant also constructed, located about two and one-half miles westerly from Portland, the purpose of which was to "step down" the voltage of the incoming current at a ratio "of ten down to one." There were two sets of switches in the transformer house by the use of either of which the transmission wires could be disconnected so that no current could pass either way between the West Buxton and Plum Street stations.

There was another generating plant situated at North Gorham, called the Great Falls Station, from which electric current was being transmitted into the Plum Street Station and from there distributed. The switchboards of these two lines, in the Plum Street Station, were about forty feet apart. There was also an auxiliary steam plant in the Plum Street Station by which electricity was generated.

Early in August the West Buxton line had been completed in part, so that the wires on one side of the poles could be used, and

by an arrangement between the defendant and the Consolidated Company those wires were used, during the night time only, beginning with August ninth, for the transmission of electricity from the West Buxton Station into the Plum Street Station, where it was distributed.

The defendant placed a lineman at the West Buxton Station whose duty there was to disconnect the transmission line outside the power-house in the morning, when informed by telephone that the line crew were ready for work, and notify the foreman of the crew that the disconnection was made. He remained there during the day to guard the line and reconnect it at night.

On the morning of the day of the accident the men were notified by the foreman that the line was clear for them to work. Shortly before two o'clock of that day the plaintiff, as one of the defendant's line crew, was ordered up a pole by the foreman to unfasten the wires so that another pole could be uprighted, and while sitting on the crossarm, with a wire in each hand, and his feet resting on a third, waiting for the word to refasten the wires, a current of electricity passed over the wires causing his injuries. The place of the accident was between the West Buxton Station and the transformer house.

It is not absolutely certain from whence that current came. The evidence is undisputed, however, that the transmission line at the West Buxton Station was then disconnected and the machinery there not in operation. Undoubtedly the current came from the Plum Street Station, and in all probability through that station from the Great Falls line, for the fact is shown that some time prior to the accident a "tie" or connection had been made in the Plum Street Station between the switchboards of these two lines, over which the current from the Great Falls line would pass to the West Buxton board and thence out on that line, if the switch there should be closed for an instant. It appeared that some men of the Consolidated Company were directed to do some work about the West Buxton switchboard just prior to the accident. It was also in evidence that a short circuit was recorded at the Great Falls Station at about two o'clock of that day. A theory of the defense, there-

fore, was that those men in working about the West Buxton switch-board, in some way closed the switch there for an instant; but such does not appear as a fact in evidence.

The plaintiff's action was based on the alleged negligence of the defendant in not providing a reasonably safe place for him to work. He claimed that it failed to exercise reasonable care, in view of the dangerous situation, to protect him from the peril of an electric current passing on to the wires on which he was directed to work, and especially at the Plum Street Station.

EXCEPTIONS. Among other precautions which the plaintiff claimed the defendant should have taken was that of opening the switches in the transformer house, thereby entirely disconnecting the line, on which the plaintiff was working, from the Plum Street Station.

The exceptions are to the admission against objection of the testimony of Luke A. McCoy, defendant's line foreman, recalled by the plaintiff, that on the day after the accident he sent a man "To pull the switches in the transformer house," and kept him there "Until I got through on the line . . . . The 5th. day of September." This testimony was clearly inadmissible for the purpose of showing an act of precaution done after the accident. But it was only offered and admitted for another purpose. The defendant had introduced the deposition of Stewart C. Coey, who installed the electric apparatus in the transformer house for the defendant, in which the deponent said that he finished work there "About the 10th day of August," and that after he left, the Consolidated Company took charge of the transformer house. To contradict this testimony and show that the defendant had charge of the transformer house until after August 28th the testimony of McCoy was offered and admitted.

If a fact is relevant and properly admissible for one purpose it cannot be excluded on the ground that when in evidence it may be used to effect another purpose for which it would not have been admissible. Wigmore on Ev., Vol. I, Sec. 13. *State* v. *Farmer*, 84 Maine, 440.

In the latter case it is said: "That evidence properly admissible for one purpose may be so perverted in its use as to effect a

different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected.

"The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it."

At the time this testimony was admitted the presiding Justice stated: "I will say now to the jury that this testimony is admitted not for the purpose of showing the condition of this defendant after August 28th when the plaintiff was injured but simply to contradict the witness Coey whose deposition has been read to you, if in your judgment it does contradict it . . . and they should consider it for that purpose and for no other.

It is the opinion of the court that the testimony of McCoy was admissible for the purpose for which it was offered, and that no error was committed in so receiving it, especially in view of the caution given to the jury that they should consider it for that purpose and for no other. The exceptions, therefore, must be overruled.

MOTION. The issue as to the defendant's negligence was reduced to the question whether or not it exercised reasonable care and precautions to protect the line on which the plaintiff was ordered to work from a current of electricity coming from the Plum Street Station. That the defendant did not take any special care or precautions in this regard is unquestioned. Its general superintendent, Mr. Nichols, stated that no one was placed in the Plum Street Station, or at the transformer house, to look after the switches, and that there was no necessity of any one looking after that end of the line, because there was no "power on it." The defendant's contention was, as stated in the brief of its learned counsel, "that under all the circumstances existing before the accident there was no reasonable ground to apprehend that current would come from the Portland end of the line, and therefore the above precaution did not appear necessary in the exercise of reasonable care."

It claimed to have no knowledge that any connection had been made in the Plum Street Station between its switchboard and that of the Great Falls line, and that, from its arrangement with the Consolidated Company whereby the latter was to use the wires by night

only, because by day they were to be worked upon by the linemen, it was justified in assuming that the end of its line in the Plum Street Station would be a "dead end" and that no current could come from there.

On the other hand the plaintiff contended that the defendant must have known that its wires were necessarily connected at the Plum Street Station in some way with other wires, else the current transmitted from West Buxton at night could not have been distributed, and that, in view of all the circumstances and the perilous situation in which the plaintiff was placed, should a current of electricity pass over the wires, it was the defendant's reasonable duty to have disconnected the wires at the transformer house by throwing out the switches there, or to have guarded its switchboard in the Plum Street Station while its men were on the line.

These contentions of the parties were clearly and distinctly presented to the jury with appropriate instructions. The standard of care required of the defendant was such care as an ordinarily reasonable and prudent person would have exercised under like circumstances. It was for the jury to fix the measure of that standard. They were authorized, we think, to regard the circumstances dangerous, and to fix the measure of care required correspondingly high.

A current of electricity is silent, swift and dangerous, and the defendant should have regarded the risk of serious and perhaps fatal injuries to the plaintiff if such a current passed over those wires. It was its duty carefully to observe the situation and consider all conditions which would lead to the determination of what should be done to keep those wires "dead" while the plaintiff was at work upon them.

If the defendant had examined its switchboard in the Plum Street Station it would have learned that a connection had been made there whereby a live current of electricity was flowing directly onto that switchboard from the Great Falls wires, and that the only thing which prevented that deadly current from passing over the wires whereon the plaintiff was put at work was a switch which, according to the evidence, could easily be thrown out of place by a

slight force, either carelessly or accidentally applied to it by other workmen in that station. The jury may have determined, and we think properly, that reasonable care required the defendant to make such examination. Had the defendant actually known of this condition and failed to have guarded that switch, or disconnected its wires at the transformer house, it would not contend, we assume, that such failure would not constitute negligence. But if the exercise of reasonable care under the circumstances required the defendant to make such an examination, from which it would have learned of the existing conditions, and it did not do it, then its failure to guard the switch, or disconnect the wires, did in like manner constitute negligence, for the law charges it with such knowledge of the existing conditions as by the exercise of reasonable care it would have actually acquired.

Whether or not the defendant did exercise reasonable care to protect the plaintiff under the circumstances was a question of fact for the jury. They decided that it did not, and after a careful review and consideration of the evidence the court is of opinion that their decision should not be disturbed.

It is further contended that if the defendant was negligent as claimed by the plaintiff, nevertheless, it is not liable because its negligence was not the proximate cause of the accident, but that an independent act—the throwing in of the switch at the Plum Street Station by the men of the Consolidated Company while at work about the switchboard—intervened, and became the proximate cause. We think this contention should not prevail. Assuming it to be a fact that the switch was thus thrown in, by which act the current was let on to the defendant's wires, that would be only a concurring act with the defendant's negligence in causing the injuries complained of, for without the omission of the defendant to disconnect the wires and keep them "dead" the throwing in of the switch could not have caused the accident.

If the act of a third party concurs with the negligence of the defendant in causing the injury complained of, such concurring act does not relieve the defendant from liability if such act ought to have been foreseen or anticipated, and especially when the concur-

ring act could not have caused the injuries except for the defendant's negligence. *Lake* v. *Milliken*, 62 Maine, 240; *Lane* v. *Atlantic Works*, 111 Mass. 136, 139; I Shearman and Redfield on Negligence, (5th Ed.) sec. 39; *Harrison* v. *Kansas City Electric Light Co.*, (Mo.) 93 S. W. 951; Am. & Eng. Ency., 2d Ed. page 491, and cases cited.

The question whether the defendant should have foreseen the danger of the switch being thrown in accidentally or otherwise was clearly submitted to the jury by the presiding Justice, in the language of the defendant's special request, and the jury found that such danger should have been foreseen.

We think this finding of the jury should not be interfered with.

If the defendant knew, or by the exercise of reasonable care should have known, that the electric current from the Great Falls line was on its switchboard, and that only an easily moved switch kept that current from the plaintiff, then it was not manifestly unreasonable for the jury to decide that the danger of that switch being thrown out of place in some way should have been foreseen.

The defendant therefore is not relieved from liability by the fact that the throwing in of the switch by some third person concurred with its negligence in causing the plaintiff's injury, because that concurring act should have been foreseen by it.

The motion to have the verdict set aside and a new trial granted was also based upon the ground that the damages awarded ($23,071.66) were excessive. The plaintiff's injuries were severe, and his sufferings extreme. As the result he is, and must continue, physically disabled to a large extent. His right leg was amputated above the knee and the ends of the ring and middle fingers of his left hand were taken off at the first joints. He is further somewhat disabled from the results of his severe burns and nervous shock.

But he is not helpless, nor totally disabled for labor, for there are many occupations which can be pursued by persons having lost one leg and the partial use of the left hand.

Without attempting here to discover and point out what may have been the causes therefor, the court is constrained to reach the conclusion that the damages awarded by the jury are unmistakably

excessive. The amount awarded will purchase for the plaintiff an annuity of more than $1100, a sum in excess of his total yearly earnings at the time of the accident. We think the jury may have failed to appreciate that the amount to be awarded the plaintiff for the diminution in his future earnings should be a sum equal to the present worth of such diminution, and not its aggregate for his expectancy of life.

The evidence of the extreme suffering which the plaintiff endured, following the accident and before his leg and fingers were amputated, could not have failed to arouse the sympathy of the jury, and their judgment as to the amount of money to be awarded him for that suffering may have been unduly affected by that sympathy. In *Ramsdell* v. *Grady*, 97 Maine, page 322, this court said: "It is conceded that there is no precise way by which the pecuniary compensation for pain can be estimated, and that latitude in judgment must be allowed to the tribunal which determines it. Yet it is the duty of the court to see that what should be regarded as the ultimate bounds are not greatly overstepped."

It is the conclusion of the court that this verdict should not be allowed to stand for more than seventeen thousand five hundred dollars, ($17,500), and unless the plaintiff will remit all over that sum a new trial should be granted, because the damages are excessive. Accordingly the entry will be,

Exceptions overruled.

Motion overruled, if within thirty days after rescript is filed the plaintiff remits all of the verdict in excess of $17,500; otherwise, motion sustained, new trial granted.

MARY A. BRIGGS, Appellant, *vs.* EZEKIEL L. CHASE.

Piscataquis. Opinion April 6, 1909.

Landlord and Tenant. Lease. Construction. Demise in Presenti. Consideration. Optional Renewal. Election to Renew. Notice of Renewal.

A lease like any other contract is to be construed with reference to the intent of the parties, as gathered from all parts of the instrument, and the object and purpose of the transaction.

The form of the instrument is not decisive of its character as a lease, and the mere use of technical words and phrases which have a definite legal signification cannot be allowed to defeat a contrary intention of the parties, if that intention be manifest from the whole contract.

If the instrument contain words of a present demise, it will be deemed a lease in presenti, unless it appears from other portions of the instrument that such was not the intention of the parties, while, if possession be given under the agreement, this will be a circumstance tending to prove that it was intended as a lease in presenti.

A stipulation in a lease that the tenant shall have the privilege of renewing the lease, is a part of the consideration for which he takes the lease and agrees to pay the sum named therein as the rental of the premises leased.

Neither verbal nor written notice is necessary to establish an election to continue a tenancy under an optional lease, for a definite term.

Where the optional term was specified in a lease "as not exceeding ten years," *held* that written notice on the part of the tenant was not necessary to establish his election to continue his tenancy under the lease.

The plaintiff's testator on the twenty-second day of January, 1906, executed and delivered to the defendant a lease of a certain building, the habendum of which said lease among other things, contained the following clause: "to have and to hold for the term of one year from the date hereof with the privilege on the part of said Chase of renewing on the same rental for any term not exceeding 10 years from the expiration of said one year term." And in relation to the right of renewal, the lease also contained the following stipulation: "It is mutually understood that the said right of renewal as stipulated shall be wholly optional with the said Chase and such renewal — while in all other respects the same as in this lease, shall contain no further right of renewal except by mutual agreement." The defendant entered into the occupation of the premises under the lease, and continued his occupancy for the one year, and complied with all the terms of the lease during that time, and four days before the expiration of the year gave the

plaintiff verbal notice of his intention to renew the lease for the full period of ten years, and after the expiration of the year still continued in occupation of the premises, and paid rent upon precisely the terms and conditions specified in the lease, and the plaintiff acquiesced and received rent in accordance with the terms of the lease for three quarters, at least, upon the defendant's continued occupancy.

Held: 1. That it was the intent and purpose of the lease to make a demise in presenti to take effect in futuro, at the option of the defendant.

2. That no written notice was necessary on the part of the defendant to establish his election to continue his tenancy under the lease.

3. That the defendant duly exercised his option to renew the lease for the full term of ten years and that the same was renewed for ten years.

On report. Judgment for defendant.

Action of forcible entry and detainer brought in the Milo Municipal Court, Piscataquis County, to recover possession of certain premises in Brownville in said county. Writ dated January 25, 1908. Plea, the general issue with brief statement alleging in substance that the defendant was in lawful possession of the premises under and by virtue of a written lease dated January 22, 1906, given to him by the plaintiff's testator for the term of one year with the privilege of renewing the same for a term not exceeding ten years and that said lease had been renewed for the term of ten years.

The judgment in the Municipal Court was for the defendant and the plaintiff appealed to the Supreme Judicial Court in said county. The action was then tried at the September term, 1908, of the Supreme Judicial Court in said county. At the conclusion of the testimony, the case was reported to the Law Court to render such judgment as the law and the legally admissible evidence required.

The case is stated in the opinion.

The material parts of the lease given by the plaintiff's testator to the defendant, are as follows:

"Know all men by these presents.

"That this contract and Indenture made and entered into this twenty-second day of January A. D. 1906, by and between Judson Briggs of Brownville and Ezekiel L. Chase also of said Brownville—

witnesseth, That the said Briggs in consideration of the covenants and agreements hereinafter set forth and indicated on the part of said Chase hereby leases and demises unto said Chase the following described premises and appurtenances, situate in said Brownville (Description of premises omitted in this report).

"To have and to hold for the term of one year from the date hereof with the privilege on the part of said Chase of renewing on the same rental for any term not exceeding 10 years from the expiration of said one year term.

"Yielding and paying therefor the sum of 160.00 one hundred sixty dollars per year, same to be paid and such rental to be in full for rent heat and light as aforesaid.

(Paragraph whereby said Briggs agrees to cut a door and erect and maintain a walk, etc., omitted in this report).

"And the said Chase hereby accepts the said premises as described and for the term aforesaid and covenants to and with the said Briggs to pay the rent as stipulated and in the manner stipulated and to quit and surrender up the said premises at the expiration of this or of the renewal term—in good order and condition as the same now are or may be put into by said Briggs, reasonable use and wear thereof, fire and other unavoidable casualty excepted and not to use the said premises for any purpose usually denominated as extra hazardous, and not to sublet the same without the consent in writing of the said Briggs first obtained.

"It is mutually understood, that the said right of renewal as stipulated shall be wholly optional with the said Chase and that such renewal—while in all other respects the same as is this lease, shall contain no further right of renewal except by mutual agreement.

"In witness whereof the parties hereto have hereunto set their hands and seals this day and year first above written.

"JUDSON BRIGGS, (L. S.)
"E. L. CHASE." (L. S.)

Joseph B. Peaks, and W. H. Munroe, for plaintiff.
Hudson & Hudson, for defendant.

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

SPEAR, J. This is an action of forcible entry and detainer. The only question involved is the interpretation of a lease of Judson Briggs, the plaintiff's testator, executed and delivered January 22, 1906. The clauses of the instrument in question are found in the habendum which read: "To have and to hold for the term of one year from the date hereof with the privilege on the part of said Chase of renewing at the same rental for any term not exceeding ten years from the expiration of said one year term." And the following stipulation concerning the right of renewal, "It is mutually understood, that the said right of renewal as stipulated, shall be wholly optional with the said Chase and that such renewal, while in all other respects the same as is this lease, shall contain no further right of renewal except by mutual agreement."

The case shows the following undisputed facts: That the defendant excepted the lease; entered into occupation of the premises under it; continued his occupancy for one year; complied with all its terms during that time; after the expiration of the year continued in occupation and paid rent upon precisely the terms and conditions specified in the lease, and was in possession on the date of the plaintiff's writ.

The plaintiff contends that the terms of the lease should be construed to have demised the premises to the defendant for a period of one year with a covenant of renewal which required him on or before the expiration of the term, to present to, or at least request of, the lessor a renewal in writing for the term of ten years or such part thereof as he might specify. She urges that a fair construction of the phraseology of the lease required of the defendant, at least a written request for renewal as a verbal request should not be permitted to effect so important an interest in real property. The defendant, however, contends that the instrument purporting to be a lease was a demise in presenti of the premises therein described for a term not exceeding ten years at the option of the defendant, and that verbal notice of his election to continue his tenancy for a term of ten years, was sufficient, in law, to accomplish this result.

No question can arise in regard to the consideration. The stipulation that the lessee should have the privilege of renewing "was part of the consideration for which he took a lease," and agreed to pay the sum of $160 per year. *Sweetser* v. *McKenney*, 65 Maine, 225. The defendant, therefore, has paid for his option as well as for his use and occupation. The plaintiff had received consideration for it. No new consideration was required. 24 Cyc. 995. *Hunter* v. *Silvers*, 11 Ill. 124.

A lease like any other contract is to be construed with reference to the intent of the parties, as gathered from all parts of the instrument, and the object and purpose of the transaction. "The form of the instrument is not decisive of its character as a lease, and the mere use of technical words and phrases which have a definite legal signification cannot be allowed to defeat a contrary intention of the parties, if that intention be manifest from the whole contract. If the instrument contain words of a present demise, it will be deemed a lease in presenti, unless it appears from other portions of the instrument that such was not the intention of the parties, while, if possession be given under the agreement, this will be a circumstance tending to prove that it was intended as a lease in presenti." 24 Cyc. 898, and cases cited. *Sweetser* v. *McKenney*, 65 Maine, 225; *Holley* v. *Young*, 66 Maine, 520.

We are of opinion that the intent and purpose of the lease before us was to make a demise in presenti to take effect in futuro, at the option of the lessee. In *Sweetser* v. *McKenney*, 65 Maine, supra, the term of the lease was fixed "for five years and as much longer as he desires." The court held that the effect of this language was a present demise to take effect in the future. This was a case of forcible entry and detainer, and it appears that the plaintiff gave no notice for the renewal of his lease, but, on the contrary, was notified by the lessor in writing that his tenancy would cease at the expiration of the term of his lease. The new term "as much longer as he desires" it will be observed, is without limitation or certainty.

Holley v. *Young*, 66 Maine, 520, is a case in which the language in the lease is, in effect, analogous to the language in the lease before us. After stating the consideration, describing the property

and fixing the term, it says: "We further agree to lease to said Young said premises, situated in Farmington Village at the price and conditions named as long as he wishes to occupy the same." This lease did not place any limit upon his "wish." The legal limit was therefore his life. He could, however, determine it at any intervening point of time "if he wished." This was plainly more indefinite than "not exceeding ten years."

With reference to the term that may be agreed upon in a lease, C. J. Shaw in *Weld* v. *Traip*, 14 Gray, 330, says: "We are not, however, disposed to question the power of an owner in fee, who has the general jus disponendi, to create a term for five or five hundred years, to commence in futuro, even after his own decease so as in effect substantially to alienate the entire value of the estate, and thus, when the descent should be cast, subject the estate to the incumbrance of the term."

While the phraseology of the contract found in *Holley* v. *Young*, supra, "We further agree to lease," standing by itself might well be said to be a contract for a lease, yet the court construed it as follows: "The question whether a written instrument is a lease or only agreement for a lease, depends . . .. on the intention of the party to be collected from the whole instrument . . . . The form of expression 'we agree to rent or lease' is far from being decisive on this question, and does not necessarily import that a lease is to be given at a future date. On the contrary, these words may take effect as a present demise, and the words, 'agree to let' have been held to mean exactly the same thing as the word 'let,' unless there be something in the instrument to show that the present demise could not have been in the contemplation of the parties."

Here it will be observed, that the rule of construction is, not that the instrument must show that a present demise was intended but that it "could not have been." In other words the interpretation should be in favor of the present demise. We think the case before us stronger than the one cited for the application of the in presenti doctrine.

In the case at bar, there is not only nothing "to show that the present demise could not have been in the contemplation of the

parties" but everything to show that it was as will appear from the following analysis. In the original lease the plaintiff had no voice in the matter of renewal. Renewal "shall be wholly optional with" the defendant, "on the same terms, not exceeding ten years." The stipulations prescribed were absolutely at the dictation of the lessor. They are presumed to be favorable to his interests and to impose upon the lessee all that he wished him to do, in order to effectuate a renewal. But no notice of renewal is required. No new lease is called for. The conditions of continuance in occupation were precisely those of the original lease. The execution of a new lease was wholly unnecessary. It would have been precisely like the original except the term. This was left to the lessee. Whatever term he might choose, one, five or ten years, would be in exact accord with the contract of the lessor. The plaintiff could insist upon complete fulfillment. The defendant was equally bound. A new lease would be a useless form. The defendant's election, if he made it, to continue extended the stipulations of the original lease to his new occupancy. He continued his tenancy. That the parties contemplated a present demise seems to be the only fair inference from their acts, and the other facts and probabilities in the case.

Then after stating the in presenti rule as above in *Holley* v. *Young*, supra, the court conclude by saying: "The provision of the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease de futuro, requiring only the lapse of the preceding term and the election of the defendant to become a lease in presenti. All that is necessary to its validity is the fact of election."

In *Holley* v. *Young*, supra, it was declared that the intention of the parties, as inferred from the object, purpose and phraseology of the whole instrument, should control the interpretation of the words, "agree to lease" and that they were sufficient to constitute a lease in presenti. This, like the case at bar, was an action of forcible entry and detainer against the tenant who claimed the right of possession, not because he had given any written notice that he desired a new lease, nor because a new lease had been given, but from the single

fact that he had continued to occupy, as appears from the following remark of the court: "The tenant after the expiration of a year remained. His so remaining is an election to continue the tenancy."

The remaining question is did the defendant elect to continue his tenancy? The undisputed testimony shows that he called upon the plaintiff January 18, 1907, four days before the expiration of the year named in the lease. He says that, at this time, he informed the plaintiff of his intentions to renew the lease for the full period of ten years. The plaintiff denies this. The accompanying facts and subsequent acts of the parties seems strongly to corroborate the defendant. He was already in business upon the premises. He continued in occupation beyond the year. His act of continuing showed that he wished to remain. The plaintiff acquiesced and received rent in accordance with the terms of the lease for three quarters, at least, upon the defendant's continued tenancy. His continued occupancy upon the terms expressed in the lease and the acceptance of rent and acquiescence by the plaintiff, are regarded as the strongest evidence, not only as to the character of the lease, as already observed, but upon the question of election. The court is of the opinion, from the facts and circumstances herein established, that the inference is a fair one that the defendant exercised his option to renew the lease for the full term of ten years, unless notice in writing was required to effectuate such renewal.

Both the Maine cases above referred to were actions of forcible entry and detainer like the case at bar. The language of the lease in each case is held to constitute a demise in presenti. Each holds that no written notice is required to extend the optional terms in such a lease, and would seem to afford a complete precedent for applying a similar rule to the case before us. *Kramer* v. *Cook*, 7 Gray, 550 is also in point upon the question of notice. This was an action by the lessor to establish an election by the lessee, to continue his occupancy for a term of two years. The habendum clause in the lease was, "to hold for a term of three years from the date hereof, yielding and paying therefor the rent of $700 a year; and at the election of said Cook, for the further term of two years next after said term of three years yielding etc." The action was

upon a contract to recover rent. The defendant asked the court to instruct the jury that 'to show an election by the lessee to hold for an additional term of two years after the expiration of three years, it was necessary for the plaintiff to prove that the defendant so elected at the time of the expiration of the three years, and duly notified the lessor of the intention 'so to hold.' The presiding Justice refused to give the instruction and the court in passing upon the question said: "If it was necessary to prove that the election of the defendant was made at the time of the expiration of three years, the evidence was ample for that purpose. He continued to occupy after the expiration of three years. He paid the increased rents stipulated for from the time the three years expired. The court also said that continuing to occupy and payment of rent were the "best possible evidence of the election . . . . they were a declaration and an act, the expression of the wish and its execution." No written notice of renewal was required.

Kimball v. *Cross*, 136 Mass. 300, is equally pertinent upon the question of notice. The instrument herein involved recited that the plaintiffs had leased to the defendants the premises "for a term of one year for $75 with the privilege of continuing for five years at $100 per year." This was an action for rent. The defendant requested the court to rule that this clause should be regarded as a mere executory contract for a lease thereafter to be given, should the defendant desire it. In refusing the requested instruction the court say: "But the instrument upon its face purports to be the contract upon which the subsequent occupation at the election of the defendant, is to be enjoyed. By it the relation and rights of the parties is defined and the words are apt to create a then present demise when, at the end of the first year, the occupation is continued."

Upon the question of election, when the option is definite, the Maine and Massachusetts cases explicitly hold that continuance of the tenancy beyond the term is, in the language of the cases, "ample evidence" of an election to avail the lessee of the further term.

The authorities, therefore, are abundant that neither verbal nor written notice is necessary, to establish an election to continue a tenancy, under an optional lease, for a definite term. If the optional

term in the lease before us had been for a definite period, no notice would have been required of the defendant, as is clearly shown by the above cases. But the optional term being specified as "not exceeding ten years," quere, whether the act of continued occupancy, would not of itself effect an election for ten years? Certainly the plaintiff could not complain for it was the voluntary contract of the lessor. We are unable to discover any good reason why the defendant should complain, as it was optional with him, alone, to fix a shorter period if he so desired. However this may be the defendant did give notice, stated the term and continued in occupancy, and we think his election was thereby established.

Judgment for the defendant.

AUGUSTA C. MATHER AND HELEN E. BERRY, Appellants,

vs.

EDWARD R. CUNNINGHAM AND ALBERT W. CUNNINGHAM.

Waldo. Opinion April 15, 1909.

Domicil — of Origin — of Choice. How Domicil may be Established. Evidence of Domicil. Foreign Domicil. American Citizen may Acquire Domicil of Choice in Shanghai, China. Immiscibility.

Domicil is said to be the habitation fixed in any place without any present intention of removing therefrom.

"Domicil" in its usual sense does not present a complex or difficult problem, and ordinarily it is a pure question of fact.

While the term domicil seems to possess more or less elasticity, yet there can be but one domicil of testacy or intestacy.

The fundamental idea of domicil is a relation between an individual and a particular locality or country, and does not depend upon any distinction with respect to the source of the local law.

No exact definition can be given of domicil. It depends upon no one fact or continuation of circumstances, but from the whole taken together which must be determined in each particular case.

It is a maxim that every man must have a domicil somewhere, and also that he can have but one. It follows that his existing domicil continues until he acquires another and, vice versa, by acquiring a new domicil he relinquishes his former one. Very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it often appears that the evidence of facts tending to establish a domicil in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fixes it beyond question in another.

It is the place, not the local laws, that becomes of paramount importance in determining the question of domicil. Where, not under what laws, do the animus et factum concur?

From reason and necessity it has been declared that all estates must be referred to some locality. For the purpose of making the place definite and certain, it has been established as a rule of law that it shall be the soil where, at the time of decease, a person has a permanent abode, without any intention of removing therefrom.

Ordinarily, if a person has left his domicil of origin and selected another locality, whether in another State or a foreign country, in which his home is located and his business established, without any intention of leaving, that locality is his domicil.

Although a person may have abandoned his domicil of origin so far as his acts or intentions were concerned, yet if he was prevented by law from acquiring a domicil of choice then his domicil of testacy or intestacy would continue from necessity to be his domicil of origin.

In order to establish a domicil of choice evidence of three important facts must appear: 1. Abandonment of domicil of origin. 2. Selection of a new locus. 3. Animus manendi or the intention of remaining. Technically, proof of the selection of a new locus and of the intention of remaining necessarily establish the abandonment of the domicil of origin.

The domicil of a person, living in a country that has granted extraterritorial privileges, should be determined by the same rules of law that apply to the acquisition of domicil in other countries.

A Chinese domicil gives a decedent's estate a fixed place of abode and subjects it to the law governing the locality. Whether American Law or Chinese law it is, nevertheless, the law of the place, as to American citizens.

The effect of declaring domicil upon Chinese soil would be precisely the same, whether the law governing the locus was Chinese or American. In either case, it would be the law that covered that particular locality with respect to Americans, and, as to them, would become the local law.

In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove animus. In American jurisprudence, at least, it should be allowed to slumber with Quaker persecution, Salem witchcraft and other

kindred dogmas. Since the dictum of immiscibility was first declared, the world has experienced a revolution touching the national, commercial and trade relations between the nations of the East and those of the West.

A person whose domicil of origin is in the State of Maine can as a matter of law acquire a domicil of choice in the Province of Shanghai, China, a place where, by treaty, American law is substituted for the Chinese local laws.

The decedent, Henry H. Cunningham, was born in 1838, in Waldo County, Maine, of parents who were citizens of the State of Maine and resident and domiciled in said county of Waldo. His parents continued to reside in said county until 1865 when they removed to Virginia. From the time of his birth he continuously resided in said county with his parents until May 3, 1853, the last three years being at Belfast in said county. In May, 1853, he went to sea. In 1854 he went to Australia. About 1857, he was for a time a pilot on the river at Shanghai, China. The only time he was in Waldo County from the time he left it in 1853 to the time of his death was in 1866 when he returned to visit his parents only to find that they had changed their residence to Virginia. He then had neither property nor relatives left in Waldo County. From 1869 to the date of his death, he made his home, established his business and had his headquarters in Shanghai. He was never married and at the time of his death his only heirs and next of kin were two brothers and two sisters. He died at Shanghai, June 10, 1905, leaving an estate of personal property valued at over $50,000. He left a will, executed in the presence of two witnesses, in which he undertook to dispose of his estate. After his death, proceedings for the probate of the will were had before the United States Consul at Shanghai, the will was duly allowed, settlement and distribution of the estate made, and the various legatees named in the will received their distributive shares through the methods usually observed in the Consular Court at Shanghai in the settlement and distribution of similar estates. Afterwards the two brothers of the decedent filed a petition in the Probate Court, Waldo County, Maine, for administration of the estate of the decedent as intestate property, contending (1) that the Consular Court at Shanghai had no authority to settle and distribute the estate of the decedent, upon the ground that the decedent had never acquired a domicil in Shanghai but that his domicil continued during all the years of his absence to be in Waldo County, Maine; (2) That the will was not executed in accordance with the laws of Maine, having but two witnesses; (3) that his estate should be administered in Maine as intestate property.

Held: That the decedent, at the time of his decease, had abandoned his domicil of origin in Waldo County, Maine, and had acquired a domicil of choice in Shanghai, China, and that consequently the Probate Court in Maine had no jurisdiction of his estate.

On report. Appeal from decree of Probate Court. Sustained.

Appeal from the decree of the Probate Court, Waldo County, appointing Albert W. Cunningham administrator of the estate of

his brother, Henry H. Cunningham, deceased, who died in Shanghai, China, June 10, 1905, and who for many years next prior to his decease was a resident of Shanghai.

The appeal was heard at the April term, 1908, of the Supreme Judicial Court, in said county, sitting as the Supreme Court of Probate. At the conclusion of the evidence then presented some of which was in the form of admissions, the presiding Justice made the following order: "This case having come on to be heard by me at the April Term of the Supreme Judicial Court in Waldo County, I, the undersigned Justice, being of opinion that questions of law are involved of sufficient importance and doubt to justify the same and the parties agreeing thereto, the same is reported to the Law Court, and upon so much of the foregoing admissions and evidence as is legally admissible, together with the evidence to be taken by Lottie E. Lawry, commissioner appointed by the Court for that purpose, the Law Court is to determine the rights of the parties."

The case is stated in the opinion.

The allegations in the petition for administration filed in the Probate Court, Waldo County, are as follows:

"Respectfully represents Edward R. Cunningham of Washington, D. C., and Albert W. Cunningham, of Rockland, in Knox County, that Henry H. Cunningham who last dwelt in Belfast, in said County of Waldo, died on the 10th day of June, A. D. 1905, in Shanghai, China, intestate; that he left estate to be administered, to wit: personal estate to the amount of at least twenty dollars: that your petitioners are interested in said estate as heirs at law and next of kin; that said deceased left no widow, whose name is and as his only heirs-at-law and next of kin, the persons whose names, residences and relationship to the deceased are as follows:

"Name	Residence	Relationship
"Edward R. Cunningham,	of Washington, D. C.,	Brother
Albert W. Cunningham,	Rockland, Me.,	Brother
Helen E. Berry,	Rockland, Me.,	Sister
Mrs. A. C. Mather,	Rockland, Me.	Sister"

The "Reasons of Appeal" are as follows:

"1. Because the Probate Court in and for the County of Waldo had no jurisdiction in the premises.

"2. Because upon the allegations in the petition on which said decree was founded, that said Cunningham last dwelt in Belfast in said County, said Probate Court had no jurisdiction.

"3. Because said Probate Court had no jurisdiction to appoint an administrator upon the estate of said Henry H. Cunningham for the reason that said Cunningham was not at the time of his death either an inhabitant or a resident of the County of Waldo; did not leave personal estate to be administered in said County; did not leave debts to any amount, and did not own any real estate in said County, and none of his estate was afterwards found therein.

"4. Because the facts set out in said petition upon which the jurisdiction and action of said Court are predicated, viz: that the said Henry H. Cunningham last dwelt in said Belfast and that there was at the time of filing said petition any estate of said Cunningham to be administered, are false and contrary to fact, and were well known by the petitioners asking for such decree so to be.

"5. Because said Henry H. Cunningham was not at the time of his decease a resident or inhabitant of said Belfast, but was a resident and inhabitant of Shanghai, China.

"6. Because there was no personal estate of said Henry H. Cunningham at the time of filing said petition to be administered.

"7. Because the estate of said Henry H. Cunningham had, prior to the filing of said petition, been entirely settled and closed up and the estate distributed, by a competent court having jurisdiction thereof under the Constitution and laws of the United States, to wit, the Consular Court of said Shanghai, China, by the action of which Court all parties interested therein were bound and concluded.

"8. Because any jurisdiction assumed by said Probate Court or by the Supreme Court of Probate is in conflict with and in violation of the Constitution and Laws of the United States, and draws in question the validity of the action and authority of the Consular Court of said Shanghai, exercised under and by virtue of the authority of the Constitution and Laws of the United States, the

last will and testament of said Cunningham having been duly proved, allowed and settled, and his estate distributed thereunder by said Consular Court by virtue of said authority by which acts all parties interested are bound and concluded.

"9. Because said Henry H. Cunningham, a citizen of the United States but domiciled, residing and being an inhabitant of Shanghai, China, died abroad, to wit, at said Shanghai, and by lawful testamentary disposition appointed one E. H. Dunning to take charge of and manage all of his property, and gave special directions in relation thereto, and all the property of said Cunningham was by virtue of the laws of Congress applicable thereto, taken possession of, managed and disposed of by the said Dunning in accordance with said directions and there is, and was at the time of taking out of said administration, no property of the said Cunningham remaining, and over the property so disposed of by said Dunning under said directions, this Court has and can exercise no jurisdiction.

"10. Because said Henry H. Cunningham left a last will and testament and named an executor therein."

The will of the decedent is dated at "Shanghai, June 13, 1900," and was executed in the presence of two witnesses only, and begins as follows: "'This is the last will of me Henry H. Cunningham, of Belfast, Maine, U. S. A. and residing in Shanghai, China."

Littlefield & Littlefield (of the New York Bar,) and Arthur S. Littlefield, for plaintiffs.

W. Henry White (of the Washington, D. C. Bar,) and Dunton & Morse, for defendants.

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

SPEAR, J. This is an appeal from the decree of the Probate Court for Waldo County, dated September 11, 1906, appointing Albert W. Cunningham administrator of the estate of Henry H. Cunningham, deceased, and comes here on report. The agreed facts show that Henry H. Cunningham was born in 1838 in Swan-

ville, county of Waldo, Maine, of parents who were citizens of the State of Maine and resident and domiciled in said county and State. His parents continued to reside in Waldo County, Maine, until 1865, when they removed to Manassas, Virginia. He resided with his parents in Waldo County in this State continuously from his birth until May 3, 1853, the last three years at Belfast, Maine. In May, 1853, at the age of fifteen he went to sea. In 1854 he went to Australia. About 1857 he was for a time a pilot on the river at Shanghai, China. He was never married and at the time of his death his only heirs and next of kin were two brothers and two sisters. He died at Shanghai June 10th, 1905, leaving an estate of personal property valued at over $50,000. He left a will in which he undertook to dispose of his estate, executed in the presence of two witnesses. After his death proceedings were had before the United States Consul at Shanghai, China, for the settlement and distribution of his estate, and the various legatees have received their distributive shares through the method usually observed there in the settlement and distribution of similar estates. The appellees, however, deny the right of the consular court at Shanghai to thus settle and distribute the estate of the decedent, upon the ground that he had never acquired a domicil in Shanghai; that his domicil continued during all the years of his absence to be in Waldo County; that his will was not executed in accordance with the laws of Maine, having but two witnesses; and that his estate should be administered here as intestate property. Consequently they applied to the Probate Court for the county of Waldo for the appointment of an administrator to settle the estate. The appointment was made, from the decree of which the appeal before us was taken.

It therefore appears that but two issues, one of fact and one of law, are involved in the determination of this case. Each presents the same question: Did the decedent have a domicil in Shanghai at the date of his death, (1) as a matter of fact, (2) as a matter of law? The burden is upon the appellants to establish the affirmative of both issues. *In re Tootal's Trusts*, 23 Ch. Div. 532. We will first proceed to the issue of fact. Assuming, arguendo, that the

decedent could acquire a legal domicil in Shanghai, do the necessary facts appear to support this conclusion? Domicil may be established in different ways, but two of which are involved in this case, domicil of origin and domicil of choice. It is conceded that the decedent had a domicil of origin in Waldo County. That domicil continued, whatever the wanderings of the decedent, until he acquired a new one in some other locality. In order to establish a domicil of choice evidence of three important facts must appear, (1) abandonment of domicil of origin, (2) selection of a new locus; (3) the animus manendi. Technically proof of (2) and (3) necessarily establish (1). Putting these facts in the form of a definition, *Gilman* v. *Gilman*, 52 Maine, 165, says: "Domicil is said to be the habitation fixed in any place, without any present intention of removing therefrom." While the term domicil seems to possess more or less elasticity there can be but one domicil of testacy or intestacy. It is the latter sense in which it will be here treated.

We deem it unnecessary to consume much time in discussing the questions of fact. The evidence shows that the decedent was in Waldo County but once from the time he left it to the time of his death. In 1866 he returned to visit his father and mother, only to find that they had changed their residence to the State of Virginia. He had now neither property nor relatives left in this county. That he abandoned, and intended to abandon, his domicil of origin, is too apparent to require comment. It is also established that he made his home, established his business and had his headquarters, from 1869 to the date of his death, in Shanghai, China. In fact, the evidence in the case does not tend to show that during these years he permanently resided at any other place. We therefore find no trouble in determining that he selected Shanghai as his place of business and residence after 1869. While there is more or less conflict in the testimony respecting his intention to remain in Shanghai indefinitely, it cannot be reasonably declared upon the evidence, that he had any present intention of removing from Shanghai or of coming back to the State of Maine. In other words, the court is of the opinion that had Henry H. Cunningham resided in England, France, or any State in the Union, from the time he

left Belfast until the date of his death, under precisely the same circumstances that are found in connection with his residence at Shanghai, it would clearly appear that he had acquired a domicil of choice in either one of these localities where he had so resided. *Harvard College* v. *Gore*, 5 Pick. 369. The animus et factum concurred and the forum novum was substituted for the forum originis.

The facts being sufficient to establish the domicil of the decedent upon the soil of any foreign country, including that part of China not affected by treaty relations, we now come to a new and more difficult problem: Can an American under any circumstances, whatever the facts, acquire, as a matter of law, a domicil in the Province of Shanghai, China, a place where, by treaty, American law is substituted for the Chinese local laws? Although the decedent may have abandoned his domicil of origin, so far as his acts and intentions were concerned, yet it is conceded, if he was prevented by law from acquiring a domicil of choice, that his domicil of testacy or intestacy would continue from necessity to be that of origin. Therefore the case finally turns upon the question, whether the decedent could, as a matter of law, acquire a domicil in Shanghai. This proposition raises two important questions: First, whether any good reason can be adduced from all the circumstances of the case why the usual law of domicil should not be applied to the decedent's residence in Shanghai. Second, whether any decision or rule of law, admitting all the facts of domicil, intervenes to inhibit the acquisition of such domicil. The first question involves, in limine, the effect upon the government and territory of Shanghai of the treaty relations between this country and China. These relations have been so clearly expressed in the English case, *In re Tootal's Trusts*, that we adopt the following paragraph as a statement of their character. "The treaties do not contain any cession of territory so far as relates to Shanghai and the effect of them is to confer in favor of British subjects special exemptions from the original territory jurisdictions of the Emperor of China and to permit them to enjoy their own laws at a specified place. Similar treaties exist in favor of other European govern-

ments and the United States." Of course laws have been enacted by all the governments, including our own, to carry into effect upon the territory involved the treaty relations of the parties to the convention, but the broad fact that the treaty territory is exempt from local law, and under the rule of foreign law, raises all the questions that can effect the establishment of domicil upon treaty soil. We need not then inquire concerning the acts of Congress. To this situation is to be applied the law of domicil, its meaning, the reasons for it, its purpose.

To apply the law correctly we must first determine precisely what we mean by the term "domicil." While it is asserted in some courts that there may be two or more domicils, it is yet true that there can be but one governing the settlement of estates. We have already referred to the elements of domicil, the animus et factum, but have not determined whether they must concur with reference to a community, or with reference to a locality, in order to establish domicil; but we are clearly of the opinion that domicil in no case can be asserted, independent of locality. It expresses but little relation to society or community. As was said in *Harvard College* v. *Gore*, 5 Pick. 369, "The term inhabitant, as used in our laws and in this statute means something more than a person having a domicil. It imports citizenship and municipal relations, whereas a man may have a domicil in a country to which he is alien and where he has no political relations. As if an American citizen should go to London or Paris with an intention to remain there in business for the rest of his life, or if an English or French subject should come here with the same intention, they would respectively acquire a domicil in the country in which they should so live, but would have no political relations except that of local allegiance to such country." It was also said in *Tootal's Trust*: "The idea of domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with the numerous definitions of domicil, to be found in the books. In most, if not all of those from the Roman code to Storey's Conflict, domicil is defined as a locality,—as the place where a man is, his principal establishment, the true home. But it is useless to pursue the topic farther. Their

lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicil arising from society and not connected with a locality." This conclusion is in full harmony with the well settled doctrine in this country. That is, ordinarily speaking, if a person has left his domicil of origin and selected another locality, whether in another State or a foreign country in which his home is located and his business established, without any intention of leaving, that locality is his domicil. It therefore appears that "domicil" in its usual sense does not present a complex or difficult problem. Ordinarily it is a pure question of fact, as was said in *Thorndike* v. *City of Boston*, 1 Met. 242, "No exact definition can be given of domicil. It depends upon no one fact or continuation of circumstances, but from the whole taken together which must be determined in each particular case. It is a maxim that every man must have a domicil somewhere, and also that he can have but one. It follows that his existing domicil continues until he acquires another and, vice versa, by acquiring a new domicil he relinquishes his former one. Very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it often appears that the evidence of facts tending to establish a domicil in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fixes it beyond question in another." Therefore it is plain that it is the place, not the local laws, that becomes of paramount importance in determining the question of domicil. Where, not under what laws, do the animus et factum concur?

There are now forty-seven States in the Union, nearly all differing in some respects with reference to the laws of descent, the right of inheritance and the distribution of estates but, in whatever State the decedent may be found, to determine his domicil, no inquiry is made as to what laws shall govern the settlement of his estate, but where did he have a permanent abode. The same is true of the laws of Great Britain. England, Scotland, Ireland and Wales each has its own peculiar laws governing the descent and distribution of

property, yet these laws are never consulted upon the question of domicil. The place is the issue as will appear by a reference to the *Dr. Munroe case*, 5 Maddock.

Now then if the true legal meaning of domicil is to fix a locality, what is the reason for the law? Why may not an estate be settled wherever the owner happens to decease? The reason is manifest. It is to establish stability and certainty with respect to the place where estates are to be settled. Otherwise, great confusion and numerous difficulties might follow an attempt to settle estates in distant localities in which the decedent might happen to temporarily reside. It has, therefore, from reason and necessity, been declared that all estates must be referred to some locality. For the purpose of making the place definite and certain, it has been established as a rule of law that it shall be the soil where, at the time of decease, a person has a permanent abode, without any intention of removing therefrom. While the determination of domicil refers the settlement of an estate to a particular locality, it necessarily subjects it to the laws of that locality; but the underlying reason for the law of domicil is not to subject an estate to any particular law, but to fix its abode.

But it is forcibly urged that the term domicil necessarily implies subjection and obedience to the local laws, and that this cannot be said to be true of a residence in Shanghai. The first part of the proposition is admitted, but the conclusion is not conceded. No good reason appears in support of it. What is meant by local laws? Undoubtedly that code of laws which governs the affairs of a certain prescribed jurisdiction. The laws of Maine are limited in authority to the territory of Maine. They have no force beyond the State line. They are strictly local. The same is true of the jurisdictional limitations of every foreign state. That is, the local laws are considered to be limited to the territory over which their jurisdiction extends. The ownership of the soil, therefore, controls the establishment of all local laws. Without consent of the owner, no extra-territorial law can be enacted within an independent jurisdiction, or extended to it. China is independent. It never released its ownership to the soil of Shanghai. Its sovereignty over its territory was

retained. In *Tootal's Trusts* it is said: "The sovereignty over the soil of Shanghai remains vested in the Emperor of China with this exception, that he has by treaty bound himself to permit British subjects to reside at the place for the purposes of commerce only without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects but over no other persons." This description applies equally to the American treaty. Therefore whatever laws may have been extended by Congress to the Province of Shanghai are operative, not upon American soil, but upon the territory of the Chinese Empire. How do these laws reach there? By treaty, permission of the Emperor.

Now it will probably be admitted, that, had the Emperor extended by edict to this territory the identical enactments now governing Americans residing there, a Chinese domicil could be acquired under the laws thus promulgated. It is true that, instead of an edict declaring the law, the Emperor by consent permitted Congress to extend its statutes to the government of Americans in this treaty port. In other words, if the identical laws which now govern Americans upon this territory had been promulgated by edict, instead of permitted by treaty, the estate of the decedent would, without question, have been conceded a domicil in Shanghai. Now then as a practical question what logical reason can be given for declaring the existence of domicil in the one case and not in the other? The decedent would have lived under precisely the same laws and upon the same foreign soil. Although the Emperor had suspended some of the Chinese laws and permitted the extension of American law to the territory, yet the source of the law was the Emperor who had never released his sovereignty over the soil.

Upon this point we quote from an able article in The Law Quarterly Review, Vol. XXIV, page 444, by Prof. Huberich of Stanford University. In his analysis of Mr. Justice Chitty's opinion in *Tootal's Trusts*, he says: "It is quite immaterial that the Chinese law provides that persons of British nationality shall be governed by the rules of law prevailing in England, or by such laws as may be enacted and made applicable to them by the English authorities. The English law is operative in Shanghai as to certain

persons and certain transactions only because it is permitted and adopted by the territorial sovereign."

The effect, also, of declaring domicil upon Chinese soil would be precisely the same, whether the law governing the locus was Chinese or American. In either case, it would be the law that covered that particular locality with respect to Americans, and, as to them, would become the local law.

It would appear, then, that the only reason assigned for withholding from the decedent the right of Chinese domicil is that, while he lived upon Chinese soil, under Chinese sovereignty, he was subject to laws extended to the particular territory by treaty instead of by edict. We are able to discover neither logic nor reason for the distinction here suggested. The fundamental idea of domicil does not depend upon any distinction with respect to the source of the local law. A Chinese domicil gives the decedent's estate a fixed place of abode and subjects it to the law governing the locality. Whether American law or Chinese law, it is, nevertheless, the law of the place, as to American citizens.

Prof. Huberich states it this way: "Where the requisite factum and animus are shown to exist there is no valid reason why an Englishman or an American should not be held to acquire a domicil in China. In respect of all matters which private international law refers to the law of the domicil he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none the less the law of China because it provides that persons of British and American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China."

In the case before us the effect of denying a Chinese domicil absolutely defeats the will of the testator and diverts the transmission of his property into unintended and perhaps objectionable channels.

On the other hand no inequitable result can be reasonably predicated upon the declaration of such domicil. No injury can follow. The estate, if testate, is disposed of in accordance with the terms of the will, precisely as it would be here. That the will was attested

by but two witnesses instead of three, as required in Maine, is immaterial to the issue. *Lyon* v. *Ogden*, 85 Maine, 374. If intestate, the property of the estate is legally administered, as appears from the opinion of L. R. Wilfley, Judge of the United States Court for China, decided May 15th, 1907, in the matter of the Probate of the will of John Pratt Roberts. In this connection it may be proper to add that the record shows that one hundred and eight estates, testate and intestate, have been administered through the consular court at Shanghai since 1865.

In fine, in considering the reasons why the American law of domicil should not apply to American nationals in Shanghai, under the circumstances of this case, the court is unable to discover any substantial objection, nor has any been pointed out in any cited case. Jacobs on Domicil, section 361, in a brief summary of his analysis of Justice Chitty's opinion, *In re Tootal's Trusts*, pertinently suggests that no reasons are assigned even in this case which, by dictum, squarely denies the right of Chinese domicil. Section 361 reads: "Here, then, we have, according to the uncontradicted evidence, (1) complete abandonment of English domicil of origin, and (2) residence in China with intention to remain there permanently. If this case is to be accepted as an authority upon this point, therefore, something more is necessary for the establishment by an American or a European of his domicil in a country in which European civilization does not prevail, than abandonment of his domicil of origin, and mere residence with intention to remain permanently. What more is necessary has never been pointed out, although, doubtless, as Dr. Lushington intimates, a change of religion would be deemed sufficient."

The suggestion hinted at by the author, touching the effect of religion upon the domicil of American and European nationals in the East, is based upon a dictum in a passage found in the *Indian Chief*, 3 C. Rob. A. D. 29, in which Lord Stowell says: "In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted; and they become incorporated to almost the full extent; but in the East, from the oldest times, an immiscible character has been kept up; foreigners

are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were." Dicta of a similar import are found in *Maltass* v. *Maltass*, 1 Rob. Eccl. 67-80, and *In re Tootal's Trusts*.

In the cases cited the doctrine of immiscibility applies both to presumptions of law and fact. Mr. Justice Chitty in *Tootal's Trusts* defines the doctrine as follows: "The difference between the law, manners and customs of Chinese and Englishmen is so great as to raise every presumption against such a domicil." That is, an American may marry a Chinese woman, establish his business upon Chinese soil, accumulate a fortune there, raise a family and declare his intentions of ever remaining, yet the influence of religion and customs of the community in which he has chosen to live and die is presumed to be so repugnant to the idea of Western civilization as to rebut all evidence of intention however conclusive. The opinion of the learned Justice, however, concedes that if the strong presumption against intention could be overcome a domicil of choice in China might be acquired. We think it can be overcome.

In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove animus. In American jurisprudence, at least, it should be allowed to slumber with Quaker persecution, Salem witchcraft and other kindred dogmas. Since the dictum of immiscibility was first declared, the world has experienced a revolution touching the national, commercial and trade relations between the nations of the East and those of the West. Our conclusion, therefore, upon the first proposition is that no sound reason can be adduced against the practical application of the American law of domicil to Americans residing in China, when the animus et factum are found to concur.

This brings us to the second general proposition involved in the discussion: Is there any established principle of law which intervenes to prevent the practical application of the rules of American law of domicil to Americans residing in China? This precise point, so far as we are able to discover, has never been decided by any court of last resort. It has, however, been recently discussed and

decided in the negative by L. R. Wilfley, Judge of the United States Court at Shanghai, China.

The leading authority upon this issue is the English case, *In re Tootal's Trusts*, decided in 1883 in an opinion by Mr. Justice Chitty. It is, perhaps, fair to say that while the decision upon the point was pure dictum, it nevertheless, in legal effect, denies the possibility of a domicil of choice by a British subject. The issue presented to the court in this case involved the question of an Anglo-Chinese domicil. The real issue as stated by Mr. Justice Chitty is: "On principle, then, can an Anglo-Chinese domicil be established." Following the analogy of the early English cases, establishing an Anglo-Indian domicil for English subjects, residing in India, as members of the old East India Company, it was urged that an Anglo-Chinese domicil might be established for Tootal, an English subject who had lived in China with the animus et factum required to establish domicil; therefore the direct issue of Chinese domicil was not involved, and the case is not discussed by the learned Justice from that standpoint, as appears from the following quotation from his opinion: "In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in the *Indian Chief*, 3 Rob. Adm. 29, and by Dr. Lushington in *Maltass* v. *Maltass*, 1 Rob. Ecc. 67, 80, 81." From this paragraph it will be observed that the question of Chinese domicil was, by express admission of counsel, eliminated from the case. The discussion after this admission, was upon a question not in issue, and necessarily pure dictum, as it was not in any sense essential to the decision of the case. But the statement of Mr. Justice Chitty immediately following this admission, is the remark upon which he has established the legal impossibility of acquiring a Chinese domicil, and is therefore founded upon dictum, and dictum alone.

In the *Indian Chief case*, Lord Stowell was considering the question of the condemnation of a ship and cargo. The ship was charged with the offense of trading with the public enemy. The case involved the question of enemy character as determined by residence and protection. The determination of these questions did not in any sense involve the capacity of either party to acquire a residence in a foreign country. Yet upon these facts is based the opinion of Lord Stowell in which he speaks of the "immiscibility" of character in the paragraph already quoted as a reason why an Eastern domicil cannot be acquired by a British subject, and to which Mr. Justice Chitty alludes as a precedent for his conclusion. In *Maltass* v. *Maltass*, decided by Dr. Lushington, the question was as to the rule that should govern the descent of the personal property of John Maltass who died in Smyrna. One of the questions discussed was whether the testator had acquired a residence in Smyrna, he having had a domicil of origin in Great Britain. While this question was alluded to it is apparent from a most cursory examination that the question of domicil was in no sense involved in the case. With reference to the question of domicil the court summed up its conclusions as follows:

"I wish to observe that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case; my judgment therefore does not affect the question of domicil."

"I give no opinion therefore, whether a British subject can or cannot acquire a Turkish domicil; but this I must say—I think every presumption is against the intention of British Christian subject voluntarily becoming domiciled in the dominions of the Porte." Yet the last part of this paragraph is the passage cited as a precedent.

It is obvious then that the extracts cited from these cases as precedents are, themselves, pure dicta. It as manifestly follows that Mr. Justice Chitty's discussion upon the question of Chinese domicil, was not only dictum, itself, but founded upon dictum. The cases therefore upon which he relies for his conclusion by no means justify the statement that "the difference between the religion, laws, and

manners of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil," and *Tootal's Trusts* cannot be regarded as an authority for denying, as a presumption of law, the competency of acquiring a Chinese domicil.

We agree, however, with Mr. Justice Chitty upon the real issue before him for decision. An Anglo-Chinese domicil would certainly be of immiscible character. The Anglo-Indian domicil was so regarded by Mr. Justice Chitty, himself, who says of the cases establishing the doctrine "these authorities are generally admitted to be anomalous." While they may be regarded as anomalous in an attempt to establish a double domicil, a thing unknown to any rule of law and impossible in practice, they may be made, by a fair analysis, precedents in fact if not in name, for a straight Indian domicil in the anomalous cases considered, and for a straight Chinese domicil in the case at bar.

In its practical application, what does Anglo-Indian mean? It is simply the invention of a name. No new feature, except the name appeared in any of these cases that did not comport with all the general rules of acquiring a domicil in India. In alluding to this compound domicil Baggallay, L. J., *In ex parte Cunningham, In re Mitchell*, 13 Q. B. Div. 418, remarks: "There are some anomalous cases in which a subject of the queen had entered into the service of the Old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicil." The phrase, "What was called an Anglo-Indian domicil" is significant and disclosed that, in the mind of the learned Justice, no such domicil could be legally said to exist. It appears, as already stated, that the Anglo-Indian domicil was declared upon the ground that the East India Company was a permanent institution in India, and that those persons who entered its employ were, ipso facto, presumed to have abandoned their domicil of origin and to have become permanently located in India.

Cotton, L. J., in the same case, takes emphatic exception to the elements of fact which the old cases declare are capable of constituting an Anglo-Indian domicil. He says: "It is said that a Scotchman by entering the service of the East India Company acquired

an Anglo-Indian domicil. I take exception to the expression 'by entering the service' of the East India Company. The ground of the decision in those cases was that the officer was residing in India under circumstances which showed that he intended to abandon his domicil of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicil. This is really what was said by Wood, V. C., in *Forbes* v. *Forbes*, 'When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be animo et facto in India." In other words the learned Justice eliminates the East India Company, which made whatever domicil was acquired, dependent, not upon the East India Company at all, but upon a permanent residence in India. But eliminating the East India Company eliminates the component, "Anglo," from Anglo-Indian and leaves the Indian domicil only. The logic of these cases is that Anglo-Indian was a misnomer, as duty cannot be considered superior to volition in power to fix intention.

On the other hand, the whole trend of modern authority is in opposition to the dictum advanced in *Tootal's Trusts*. Judge Wilfley of the United States Court for China sitting at Shanghai in 1907 in re Probate of the will of Young J. Allen announced a strong opinion in which he rejects the dictum in *Tootal's Trusts* and comes to a directly opposite conclusion. The facts in the case are very similar to those in the case at bar. After an elaborate and exhaustive review of the authorities and text writers, he comes to the conclusion, First: That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicil to American citizens residing in countries with which the United States has treaties of extraterritoriality."

Second, "That Dr. Young J. Allen having lived in China for a period of forty-seven years and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicil in China; consequently this court in the administration of his estate will be guided by the law which Congress has extended to Americans in China which is the common law." We wish to say, however, that we do not agree with Judge Wilfley in employing the name "extraterritorial domicil." It appears to be inconsistent with the fundamental idea of domicil, which, as we have endeavored to show, is a relation between an individual and a particular locality or country. The fact that the law governing the particular locality is extraterritorial, does not make the domicil extraterritorial, since it is immaterial upon the question of domicil from what source the law is proclaimed, as before shown.

This same view is taken by Prof. Huberich in the article already alluded to in which he says: "The choice of the words 'extraterritorial domicil' is unfortunate in that it is likely to convey the idea of exemption from the laws of the territorial sovereign."

Sir Francis Piggott, Chief Justice of Honkong, in a recent work, expresses the opinion "that when the question is again raised it will be found that the principles established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty." As a result of his discussion he further concluded:

"A man may set up his home in a Treaty Port, he may have banished forever the idea of returning to his native country, the animus manendi may be clear, without shadow of doubt; on the hypothesis, too, there is a body of law regulating the community. Why is it impossible then for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicil of their choice; of those who are born members of the community as the law of the domicil of their origin? . . . Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicil referred to above on

the following lines:—The law which regulates a man's personal status must be that of the governing Power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing Power as to be in fact the law of the land." Lord Watson's interpretation was that domicil must be referred to locality and not to community.

Hall, a distinguished authority on International Law, in his work on "The Foreign Jurisdiction of the British Crown," also takes issue with the views expressed in *Tootal's Trusts* upon the ground of expediency, and says: "It is perhaps to be regretted that a change in the law is not made which a short order in Council could easily effect. Anglo-Oriental domicil has its reasonable, it may almost be said, its natural place." This suggestion clearly shows that, in the opinion of the learned author, the doctrine of immiscibility, which has been made the fundamental objection to the possibility of an Eastern domicil, should no longer be regarded as a potential reason for denying such domicil. He further says upon the question of expediency: "So long as persons have not identified themselves with the life of a new community, they must keep each his own law; but as soon as they have shown their wish and intention to cut themselves adrift from the association of birth, they prove their indifference to the personal law attendant on their domicil of origin; there is, therefore, no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicil of origin. English families, even in the present day, often remain through more than one generation in Oriental countries as their permanent place of abode; formerly the history of persons whose domicil might become a matter of importance was generally known sufficiently well; many are now of obscure antecedents and of an origin uncertain among the numerous places from which British subjects can derive. As no domicil can be acquired in an Anglo-Oriental community, it becomes every year more probable that cases will occur in which the determination of the domicil

of a father, perhaps of a grandfather, may become necessary, and in which it may be equally impracticable to impute an English domicil or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicil should be enabled to find that a domicil had been acquired in the Eastern country which carried with it the application of English law."

Prof. Huberich upon this point says: "The English view it is submitted, is based on erroneous conceptions of domicil and extra-territoriality. It is supported by the authority of a single case, (*Tootal's Trusts*), has been vigorously attacked, and may be repudiated by courts not bound by the precedent."

In reviewing Judge Wilfley's opinion, he says "The result of the case is correct."

Westlake, in his Private International Law, takes the same view, and points out the inconsistency of the opinion in which Mr. Justice Chitty declared: "There is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign power," having said in the same connection "It may well be that a Hindoo or Mussleman sitting in British India and attaching himself to his own religious sect there would acquire an Anglo-Indian domicil." Westlake says: "The Hindoos or Mussle-mans are as little the supreme or territorial power in India as the English are such in China." This discrepancy serves to point out the complexities that arise in an attempt to deny or modify the application of the rational and established rules of law.

The theory of this opinion is in accordance with the application of the ordinary rules of law touching the question of domicil. We have found no difficulty and discover no error in referring the existence of domicil to locality. We allude to this matter for the purpose of avoiding any confusion which might arise in reading the text writers cited in connection with the opinion. While they all advocate the legal propriety of holding that an American national

or an English national may acquire a domicil in a treaty port, they suggest, if we interpret them correctly, that such a domicil may be referred to community rather than locality. The reference of Sir Francis Pigot to "a modification of Lord Watson's interpretation of the law of domicil" relates to this precise point. We concur in the result of their conclusions, but not in the method of reaching it.

Upon both reason and authority we are of the opinion that the domicil of the decedent living in a country that granted extraterritorial privileges, should be determined by the same rules of law that apply to the acquisition of domicil in other countries. In support of this position we refer to the reasons cogently and comprehensively expressed in Judge Wilfley's opinion. In the language of Prof. Huberich, the result here reached, it is submitted, "preserves intact the theory that domicil is a legal relation between an individual and a particular country, and involves a certain submission to the laws of such country as the laws of the territorial sovereign. It upholds the doctrine that each State is supreme over all persons and things within the territorial boundaries. It does away with an anomaly in the law of domicil, and enables the courts to recognize the legal existence of a domicil where the facts and intent ordinarily requisite are present."

The court is of the opinion that Henry H. Cunningham, the decedent, at the time of his decease, had abandoned his domicil of origin in Waldo county, Maine, and had acquired a domicil of choice in Shanghai, China; therefore in accordance with the stipulations in the report, the entry must be,

Appeal sustained.
Decree of the court below reversed.

CORNELIUS C. VERMEULE *vs.* YORK CLIFFS IMPROVEMENT COMPANY.

York. Opinion April 16, 1909.

Principal and Surety. Action by Surety against Principal. Same Maintainable, When.

It is well settled in Maine that in an action by a surety against his principal it is necessary for the plaintiff to prove that he has paid the debt or discharged the principal for the amount which he seeks to recover, in order to maintain his action.

When a surety on a contract in which the principal is liable, either pays the debt for which he has become liable or extinguishes it so that it is no longer a debt against the principal, the law implies a promise on the part of the principal to reimburse the surety for the amount paid by him.

The plaintiff, a resident of New Jersey, brought an action against the defendant, a domestic corporation in the State of Maine, to recover money paid out by him for the use and benefit of the defendant. The defendant had needed for its use the sum of $10,000 for which sum on November 24, 1897, it executed and delivered a demand note payable to the order of John D. Vermeule, a resident of New York City. Upon the note was this endorsement: "This note is given to be held by John D. Vermeule as collateral security for moneys to be advanced by him to York Cliffs Improvement Company to pay its outstanding bills payable, accounts payable and current expenses." Also upon the note was this further endorsement: "I hereby assume liability for all money to become due or to be secured by this note to the extent of 11-27 of the entire amount. C. C. Vermeule." John D. Vermeule, having advanced payments upon the note whereby C. C. Vermeule became liable upon his contract, on the 24th day of September, 1901, brought suit in the Supreme Court of New Jersey against him for his proportion of the amount due and on the 12th day of June, 1906, recovered judgment against him upon which execution was issued and delivered to the sheriff for levy. Upon the rendition of said judgment, C. C. Vermeule filed in an equity suit then pending in the Chancery Court, New Jersey, for a co-partnership accounting, in which he was plaintiff, and John D. Vermeule was the defendant, a prayer for an injunction to restrain the collection of the judgment and the levying of the execution, whereupon he was required by decree of the court to deposit with it the sum of money due upon the execution, to be held to await the determination of the bill and further order of the court. The deposit was made by C. C. Vermeule

as required, and, at the date of his writ in the case at bar, the bill had not been determined and no further order had been made, the money deposited still remaining in the custody of the court.

Held: 1. That the defendant company is discharged of its liability upon its note to the amount paid into court by the plaintiff and that he has paid the note pro tanto.

2. That the said payment in court is regarded as a deposit for the payment of a judgment which is as conclusive upon the plaintiff as if he had paid the money on the execution.

3. That the action in the case at bar was not prematurely brought.

On report. Judgment for plaintiff.

Assumpsit on account annexed to recover $5,694.01 paid by the plaintiff for the use and benefit of the defendant, as surety on a certain note given by the defendant. The writ also contained the common counts for money expended. Plea, the general issue, with a brief statement alleging as follows:

"That no money or other value has ever been received by defendant, or paid by the plaintiff for the use of the defendant; but that a judgment was obtained in favor of one John D. Vermeule against the plaintiff in the Supreme Court of the State of New Jersey for the sum $5,601.82 with costs, June 12th, 1906, and execution issued thereon:—that thereafter the plaintiff filed in the Court of Chancery of New Jersey a bill in equity containing a prayer for injunction to restrain the collection of said judgment and the levying of said execution,—whereupon said plaintiff was required by said court to deposit with it said sum of money to be held to await the determination of said bill and further order of said court; that plaintiff did so deposit said sum, and that said bill has not been determined, and no further order made by said court, nor has this defendant ever received, nor does it now have, any possession, use or control of said sum or any part thereof, but said sum still remains on deposit in said Court as aforesaid."

When the action came on for trial, an agreed statement of facts was filed and the case was reported to the Law Court for decision.

The case is stated in the opinion.

Geo. F. & Leroy Haley, for plaintiff.

George C. Yeaton, for defendant.

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

SPEAR, J. This is an action brought by Cornelius C. Vermeule against the York Cliffs Improvement Company to recover the sum of $5,694.01 for so much money paid by the plaintiff for the use and benefit of the defendant corporation. The plaintiff is a resident of the State of New Jersey and John D. Vermeule is a resident of New York City. The defendant is a domestic corporation of the State of Maine. The writ contains the common counts for money paid and expended with an account annexed of the following tenor.

"York Cliffs Improvement Company,
to Cornelius C. Vermeule, Dr.

To money paid August 1, 1906, as surety on your note dated the 24th day of November 1897. $5,694.01."

The facts upon which this plaintiff seeks to recover are these: The York Cliffs Improvement Company required for its use the sum of $10,000 for which sum on November 24, 1897, it executed and delivered a demand note payable to the order of John D. Vermeule. Upon the note was this endorsement: "This note is given to be held by John D. Vermeule as collateral security for moneys to be advanced by him to York Cliffs Improvement Company to pay its outstanding bills payable, accounts payable and current expenses." Then appears the further endorsement: "I hereby assume liability for all money to become due or to be secured by this note to the extent of 11-27 of the entire amount. C. C. Vermeule." There is another endorsement upon the note of similar import but immaterial in the discussion of this case.

Now it appears that John D. Vermeule, having advanced payments upon the note whereby C. C. Vermeule became liable upon his contract, on the 24th day of September, 1901, brought suit in the Supreme Court of New Jersey against him for his proportion of the amount due. On the 12th day of June, 1906, John D. Vermeule recovered judgment against C. C. Vermeule upon which execution was issued and delivered to the sheriff for levy.

Prior to the date of this judgment, C. C. Vermeule had filed a bill in equity in the Court of Chancery for the city of New Jersey wherein he claimed among other things, that John D. Vermeule had been, and was, a co-partner with himself; that their final accounts had never been settled; and praying for an accounting and settlement of the alleged co-partnership affairs. This bill was pending when the above judgment and execution were issued.

Upon the rendition of the judgment at law C. C. Vermeule, the defendant in that suit, filed in the equity suit, in which he was plaintiff, a prayer for an injunction to restrain the collection of the judgment and the levying of the execution, whereupon he was required by decree of the court to deposit with it the sum of money due upon the execution, to be held to await the determination of the bill and further order of the court. The deposit was made by C. C. Vermeule as required and, at the date of his writ in the present suit against the defendant corporation, the bill had not been determined and no further order had been made, the money deposited still remaining in the custody of the court. Upon making the deposit C. C. Vermeule took the following receipt.

"Whereupon the said C. C. Vermeule did pay and deposit in court the sum of $5,694.01, as appears by the record of the clerk of said court, as follows:

IN CHANCERY OF NEW JERSEY.

"Between

CORNELIUS C. VERMEULE, Complainant,

and

JOHN D. VERMEULE, et al., Defendants.

On Bill etc.

Received, this first day of August, one thousand nine hundred and six, of Cornelius C. Vermeule, through McCarter & English, his solicitors, the sum of five thousand six hundred and ninety-four dollars and one cent ($5,694.01), being the amount due at this time from the said Cornelius C. Vermeule, complainant above named, to John D. Vermeule, the defendant, upon a judgment

obtained in the New Jersey Supreme Court on the twelfth day of June, nineteen hundred and six, in a case therein pending, wherein the said John D. Vermeule was plaintiff, and the said Cornelius C. Vermeule was defendant."

Upon this state of facts the plaintiff in the present action contends that the case shows a complete discharge of the defendant company for that proportion of the defendant's note for which he became surety. On the other hand the defendant claims that inasmuch as the bill in equity has not been finally determined and no further order of the court made in regard to the disposal of the deposit, the defendant's liability upon the note is not discharged since it says it has never received and does not have any possession, use or control of, the amount deposited or any part thereof.

It is well settled in this State that in an action by a surety against his principal it is necessary for the plaintiff to prove that he has paid the debt or discharged the principal for the amount which he seeks to recover, in order to maintain his action. *Ingalls* v. *Dennett*, 6 Maine, 79; *Emery* v. *Hobson*, 62 Maine, 578, also *Davis* v. *Smith*, 79 Maine, 351. When upon such a contract in which the principal is liable, the surety either pays the debt for which he has become liable or extinguishes it so that it no longer is a debt against the principal, the law implies a promise on the part of the principal to reimburse the surety for the amount paid. Therefore the sole question in the case at bar is, had the plaintiff paid the debt for which he became surety, or by his act extinguished it as a liability of the principal?

We are of the opinion that upon the facts reported, the defendant company is discharged of its liability upon its note to the amount paid into court by the plaintiff and that he has paid the note pro tanto. The facts clearly show that in the equity court no question whatever is raised respecting the validity of the judgment against C. C. Vermeule as surety upon the note of the defendant corporation. Nor is any question made that the amount so paid was to be accounted for in payment of the judgment. C. C. Vermeule's receipt for the deposit unquestionably concedes the validity of the judgment and the amount due upon it. He

specifically says, "being the amount due at this time . . . . to John D. Vermeule . . . upon a judgment obtained in a New Jersey supreme court," etc.

"The defendant, however, upon the effect of the deposit presents the issue precisely as we understand it, namely: "This necessarily implies that the money thus alleged to have been so paid must have passed completely beyond control of, and the possibility of any return to, the plaintiff, and at the same time must have passed into the actual possession of, or for the use and benefit of, the defendant.

"Now what has occurred? Has either the plaintiff thus parted with his money or defendant thus received it, for its use or benefit? Neither. Non constat yet what would become of the money."

We are unable to agree with the defendant's analysis. We see no way in which the judgment against C. C. Vermeule can be attacked. We regard the payment in court, as a deposit for the payment of a judgment which is as conclusive upon C. C. Vermeule as if he had paid the money upon the execution. The only difference between the deposit and such payment being, that the money due upon the judgment of John D. Vermeule may be distributed according to the decree of the equity court but as the property of the latter. The fact that this money may under the order of the court be paid to the creditors of John D. Vermeule, or to C. C. Vermeule in the settlement of the co-partnership affairs, in no way changes the effect of the judgment against C. C. Vermeule, as a payment by him as surety upon the defendant's note. We think it does appear, as a matter of law, that the plaintiff has paid the amount of money, for which he seeks to recover, for the use and benefit of the defendant company, and that it is fully discharged from liability upon the note to the amount of such payment. The entry therefore should be,

Judgment for the plaintiff for $5,694.01 and interest from August 1, 1906.

MARY D. JELLISON *vs.* MABEL C. SWAN, Administratrix.

Penobscot. Opinion May 1, 1909.

Executors and Administrators. Special Statute of Limitations. Same Apply to Claims against Estates Before and After Representation of Insolvency. Same a Bar, When. Statutes (Mass.) 1791, chapter 28. Statute, 1821, chapter 52, section 26; 1872, chapter 85; 1883, chapter 243; 1889, chapter 120; 1903, chapter 198, section 3. Gen. Statutes (Mass.) 1860, chapter 97, section 5. Revised Statutes, 1841, chapter 120, section 23; 1857, chapter 87, section 12; 1871, chapter 87, section 12; 1883, chapter 66, section 4; chapter 87, section 121; 1903, chapter 68, section 14.

The special statute of limitations of actions against executors and administrators applies to claims against estates after representation of insolvency as well as before. It is an absolute bar, unless the suit is brought before the representation, or the claim is presented to the commissioners afterwards within the period limited for bringing a suit. The insolvency statute changes the mode, but does not extend the time, of commencing process for enforcing claims against estates.

On exceptions by defendant. Sustained.

Action for money had and received brought in the Bangor Municipal Court, against the defendant in her representative capacity as "administratrix with the will annexed of the goods and estate which were of Ora S. Pease at the time of his decease." The defendant administratrix had duly represented the estate of the deceased insolvent and thereupon commissioners were duly appointed and meetings of the commissioners were duly held. The plaintiff having a claim against the estate of the deceased, presented it to the commissioners at their last meeting and the same was duly allowed by them. Upon the acceptance of their report the defendant administratrix duly appealed from the allowance of the plaintiff's claim. The plaintiff then, in accordance with Revised Statutes, chapter 68, section 14, which provides that "When an appeal is so taken, ... the claim shall be determined in an action for

money had and received, commenced within three months after the report was made," etc., brought the aforesaid action to determine her claim.

When the action came on for hearing in the Bangor Municipal Court an agreed statement of facts was filed and it appearing from the agreed statement that the plaintiff's claim was presented to the aforesaid commissioners within "six months of the time of the appointment of said commissioners, but more than eighteen months after the affidavit had been filed in the Probate Court that notice had been given of said administratrix's appointment, no suit ever having been brought on said claim," the Judge of said court ruled, pro forma, "that Revised Statutes, chapter 89, section 14, did not apply to claims presented to commissioners in insolvency," and rendered judgment for the plaintiff for $121.73. To this ruling the defendant excepted and the case was certified to the Chief Justice of the Supreme Judicial Court in accordance with section 6, chapter 211, Private and Special Laws of 1895.

The case is stated in the opinion.

Joseph F. Gould, for plaintiff.

Martin & Cook, for defendant.

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

SAVAGE, J. Chapter 120 of the Laws of 1899, which was an amendment of R. S., 1883, ch. 87, sect. 121, contained the following language:—"No action shall be maintained against executors or administrators on claims against the estate, except as provided in sections thirteen and fifteen, unless commenced after six months and within eighteen months after notice given by him of his appointment."

Revised Statutes, 1883, chap. 66, sect. 4, provided that the commissioners, appointed by the probate court to receive and decide upon the unpreferred claims against an estate represented insolvent, "shall appoint convenient times and places for their meetings, and give notice thereof, as the judge directs. Six months after their

appointment shall be allowed in the first instance for the presentation of claims. An additional time, not exceeding in the whole eighteen months, may be allowed therefor."

In this case, an administratrix with the will annexed gave notice of her appointment in May, 1902. In July, 1903, she represented the estate insolvent, and commissioners were appointed. Regularly appointed meetings of the commissioners were held September 1, and December 29, 1903. At the latter meeting, the plaintiff presented her claim against the estate, and it was allowed by the commissioners. Upon the acceptance of their report, the administratrix appealed; and the plaintiff brings this action, under R. S., ch. 68, sect. 14, to determine the appeal.

Inasmuch as the claim was not presented to the commissioners within eighteen months after the administratrix gave notice of her appointment, the defendant contends that it was barred by the special statute of limitations, above cited, before it was presented to the commissioners, although that presentation was within six months after their appointment. On the other hand, the plaintiff claims that the limitation was extended by the representation of insolvency and the appointment of commissioners for the period of six months thereafter. The question thus raised is purely one of statutory interpretation, and the answer depends upon the proper construction of the two statutes quoted at the beginning of this opinion, both of which were in force in 1903. See Laws of 1903, ch. 198, sect. 3.

The question may be stated in a simple form in this manner:— Does the phrase "no action shall be maintained" in the statute of 1899, include proceedings for the allowance of claims against insolvent estates?

It is evident that in some cases the time limited may be shortened by insolvency proceedings, unless "an additional time" is allowed by the judge of probate for presenting claims. May it be lengthened? We think not.

When the expressions in two statutes relating to the same subject matter are seemingly inconsistent, or their interpretation doubtful, we frequently obtain light by studying the history of the statutes. We may do so now.

In the earlier statutes, 1821, ch. 52, sect. 26, and R. S., 1841, ch. 120, sect. 23, it was said "that no executor or administrator shall be held to answer to any suit" unless commenced within four years from the time of his accepting the trust. In R. S., 1857, ch. 87, sect. 12, and R. S., 1871, ch. 87, sect. 12, the language was, "no executor or administrator shall be compelled to defend a suit commenced against him . . . after four years." In St. 1872, ch. 85, the phraseology was "no suit . . . shall be maintained, unless commenced" etc. In St. 1883, ch. 243, and since, the phrase has been "No action shall be maintained" etc., St. 1899, ch. 120. We think these changes in phraseology have in nowise changed the sense of the statute. But the statute of 1821 contained also these words: "and filing a claim with the commissioners upon an estate represented insolvent shall be esteemed equivalent to originating a suit against executors or administrators, within the meaning of this Act." This was a legislative interpretation of the word "suit" as used in this connection.

In *Parkman* v. *Osgood*, 3 Maine, 17, a judge of probate, after the four years limitation had expired, opened the commission in an insolvent estate, and granted additional time for the proof of a claim. On an appeal from the allowance of the claim, the court in discussing the Massachusetts statute of 1791, ch. 28, of which our 1821 statute was a copy, said: "When an estate is not represented insolvent, any creditor, ... must commence it [suit] within four years, or he will be barred. If the estate should at any time within the four years be represented insolvent, then the statute bar will be avoided by filing his claim with the commissioners *at any time within that period*. If an estate is represented insolvent by the executor or administrator immediately on his acceptance of that trust, and only a portion of the eighteen months which a judge of probate may by law allow to creditors to bring in and prove their claims before commissioners has in fact been allowed, suppose six months, as in the case before us,—the creditor must prove his claim within the six months, or obtain the allowance of further time, by applying to the judge of probate for that purpose, *and filing his claim within the four years*. . . . The plaintiff, by more

vigilance, might have procured the opening of the commission and the allowance of his claim *within the four years;* but he omitted to take any measures for his own benefit until it was too late." See *Todd* v. *Darling*, 11 Maine, 34.

It is to be observed, however, that in the general revision of 1841, the limitation statute of 1821 was condensed, and the legislative definition of what should be deemed a "suit," above referred to, was omitted. But we are not persuaded that this worked a change in the law. It is true that in *Greene* v. *Dyer*, 32 Maine, 460, decided in 1851, the court used this language:—"The four years limitation, relied on in the first reason for the appeal, applies only to suits brought, and not to proceedings in the probate court." But in that case, the proceeding was not the presenting and proof of a claim before commissioners, a proceeding in some respects analogous to a suit, but it was a petition that an administratrix settle a further account, so that credit might be given to the petitioner for a judgment which he had already recovered against her, within the limitation period, on appeal from a disallowance of a claim by commissioners in insolvency. That clearly is not this case. To such a proceeding in probate court, it is clear, as was held, that the special statute of limitations does not apply. The language of the court must be applied to the case then in hand. And so in *Thurston* v. *Lowder*, 47 Maine, 72, a case arising under another section of the statute, which extended the period of limitation, when new assets were discovered, the court in the discussion quoted from *Greene* v. *Dyer* the language which we have quoted above, and then threw a shadow of doubt over that case by saying, "The opinion in that case was delivered orally, and evidently did not receive much consideration. We have no occasion, however, at this time, to question its authority."

Of course, the period of limitation may be shortened if the representation of insolvency is made more than six months before its expiration, unless an additional time be granted. Otherwise a creditor has the full period in which to proceed. He may bring a suit at law up to the time the estate is represented insolvent. After that he may at any time within the eighteen (now "twenty," St.

1907, c. 186) months present to the commissioners his claim supported by affidavit. He cannot be cut off by the administrator in making the representation, nor by the commissioners in appointing the hearings for dates after the limitation has expired. In the case at bar, one meeting was held during the period of limitation. But that is immaterial. It might have been otherwise. The meetings are held at appointed times for hearing and allowing claims. But claims may be presented at such meetings or any other time, and when presented, the operation of the limitation statute is interrupted. The hearing may be had afterward. In this respect the analogy between such proceedings and suits at law is complete.

While the statute allows full six months for the presentation of claims, only such claims can be allowed as are not barred, when presented, by the special statute of limitations, or by the general statute of limitations, or by some other principle of law. The question always is,—Was the claim alive and enforceable when presented?

Accordingly we hold, contrary to the ruling below, that the presenting of a claim to commissioners "is to be esteemed equivalent to originating a suit," in the language of the act of 1821, and that the special statute of limitations of actions against executors and administrators applies to claims against estates after representation of insolvency as well as before. It is an absolute bar unless suit is brought before the representation, or the claim is presented to the commissioners afterwards, within the period limited. The insolvency statute changes the mode, but does not extend the time, of commencing process for enforcing claims against estates.

This same question has been decided in the same way by the court in Massachusetts. In *Aiken* v. *Morse*, 104 Mass. 277, that court had under consideration the effect of the Massachusetts special statute of limitation, Gen. Stat. (1860) ch. 97, sect. 5, upon claims against insolvent estates. That statute is in all essential respects like our own. The court used this language: —

"This (the plaintiff's contention) would be in effect to hold the representation of insolvency and the appointment of commissioners as the commencement of proceedings in behalf of all creditors, with-

out regard to the time when the individual creditor should commence his suit by presenting his claim for proof. But it is clear from the statutes that such is not the intent of the provisions relating to insolvent estates of persons deceased. Those provisions change the mode in which the creditor may prosecute his claim, but do not in any way relieve him from the limitation which restricts his right to proceed and to hold the administrator to answer, to two years from the giving of the bond. *The presentation of his claim to the commissioners by the creditor is the commencement* of his proceedings or suit for its enforcement against the estate; and the statute applies to a proceeding in that mode as well as to a suit at law." Then after stating that a statutory provision for the allowance of further time for creditors to present and prove their claims, and also a provision for the appointment of a new commissioner, and a still further allowance of time, do not necessarily imply an extension of time beyond the two years to which the liability of the administrator is limited, the court added:—"It may sometimes be necessary that the time for investigating claims presented, completing the proofs and making the return thereof should extend beyond the two years; but there is nothing in these provisions which indicates that the creditor is to be relieved from his obligation to commence his proceeding, either at law or before the commissioners, within the two years prescribed." This view is restated and affirmed in *Tarbell* v. *Parker*, 106 Mass. 347, and *Blanchard* v. *Allen*, 116 Mass. 447. And we think it is the correct view.

Exceptions sustained.

BLANCHE G. HUNTINGTON, by next friend,

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion May 14, 1909.

Railroad Crossings. Flagman. Gates. Negligence. Accidents without Liability.

A railroad company is bound to take reasonable and proper precautions for the safety of travelers upon the highway having reference to all the circumstances and probabilities to be anticipated and when a railroad crossing is especially dangerous the railroad company must employ such means as are reasonably necessary considering its character, to warn travelers of the approach of a train.

It is difficult if not impossible to lay down an abstract rule of law as to the exact time when or the exact distance at which travelers should be warned of an approaching train. It must be governed largely by the circumstances and surroundings of each particular case. In a general way it may be said that it is a flagman's duty to give such seasonable warning as will enable a traveler to stop his team at a point where an ordinarily well broken and gentle horse would not become dangerously frightened. Circumstances and conditions might modify this and impose a greater obligation upon him but this would seem to be a workable principle.

A flagman whose duty it is to guard a railroad crossing over a public street and who remains at his post of duty until an approaching train has reached the crossing and is passing the same, is not negligent in then leaving his post as the train itself then becomes a warning.

When gates at a railroad crossing would not cause a traveler approaching such crossing to stop any sooner than a flagman, it is not negligence on the part of the railroad company to maintain a flagman at such crossing instead of gates attended by a watchman.

The purpose of gates at a railroad crossing over a public street, is merely to give warning that trains are passing or about to pass, and it cannot be successfully contended that under ordinary circumstances gates should be maintained as a barrier to runaway teams.

The plaintiff, a girl of nineteen and who was an expert horsewoman, was driving along a public street towards the point where the defendant's railroad crossed the street. She was entirely familiar with the crossing and its approaches. The horse driven by her was seventeen or eighteen years old and was regarded as perfectly kind and safe and not afraid of moving trains. When the plaintiff was approaching the crossing she saw the

defendant's flagman standing near the crossing and towards the westerly side of the street but he was not waving his flag. Upon seeing the flagman, however, the plaintiff immediately stopped at a point ninety-one feet from the crossing. She had not then heard any bell or whistle or seen any approaching train. She remained stationary, the horse entirely docile and unfrightened, for what she said seemed to her a long time, when the engine and the forward cars of a long freight train came into view at the crossing, moving at the rate of about four miles an hour, on an up-grade, with all the noise usually attendant under such conditions. While the train was passing the crossing, the horse suddenly started and dashed against the train with such force as to throw the plaintiff from the wagon and beneath the train and resulting in the loss of her left hand at the wrist.

Held: That the defendant was neither responsible nor liable for the plaintiff's injuries, but that the case belongs to a class of lamentable accidents for which no one is legally liable.

On motion by defendant. Verdict set aside.

Action on the case to recover damages sustained by the plaintiff in a crossing accident, and alleged to have been caused by the negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $6125. The defendant then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

Louis C. Stearns, F. H. Appleton, and Hugh R. Chaplin, for defendant.

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

CORNISH, J. This is an action on the case to recover damages for personal injuries received in a crossing accident, November 4, 1907, and comes to this court on defendant's motion to set aside a verdict for the plaintiff.

The crossing in question is over South Main Street in the thickly settled portion of the village of Guilford. Ninety-one feet south of the crossing an iron bridge, one hundred and seventy-four feet long and nineteen feet wide in the clear, spans the Piscataquis River. South of this bridge South Main Street ascends a steep hill known as Bridge hill, at whose top is a public square. To a traveler

going north, as was the plaintiff, the view of the railroad crossing from the square, a distance of between four hundred and five hundred feet, is clear and unobstructed and remains so until the crossing is reached. The railroad track or a railroad train east of the crossing is discernible to such traveler only at intervals owing to intervening buildings on the north side of the river.

For twenty-five years the railroad company has employed as a flagman one Cimpher, a harness-maker with a shop on the westerly side of the street, near to and south of the crossing. About three o'clock in the afternoon of the day of the accident, the plaintiff, a girl of nineteen, started with a team from her home about one and a half miles south of Guilford Village, to go over the route above described to the school house situated north of the crossing in question to bring her brothers from school as was her custom. She was entirely familiar with the crossing and its approaches. The horse was seventeen or eighteen years old, had been her favorite family horse for a year and was regarded as perfectly kind and safe. She herself was an experienced horsewoman having driven since she was eight or nine years old. On arriving at the Village Square she walked her horse down Bridge hill, and while descending the hill says that she looked across the river but did not see the flagman at the crossing. As she was entering on the bridge she looked down and across the river but saw no train, although at various points one must have been plainly visible. She continued slowly across the bridge either at a slow trot or a walk, and when she reached the north end she saw the flagman for the first time as he was standing near the crossing and toward the westerly side of the street. He was not waving his flag but the plaintiff readily interpreted the meaning of his presence and immediately stopped, "because," as she testified, "I saw him with his flag." She had not then heard any bell or whistle or seen any approaching train. She stopped and remained stationary, the horse entirely docile and unfrightened, for what she says seemed to her a long time, when the engine and the forward cars of an exceptionally long freight train came into view at the crossing, moving from the east at the admitted rate of about four miles an hour, on an up-grade, with the noise

usually attendant upon those conditions. The horse acted "all right" when the engine came into view and while the engine and the first two or three cars were passing the crossing. Then the horse "started all of a sudden, kind of jumped like" as the plaintiff expresses it, or as an eye witness says, "all at once the horse shook his head, and made a rise right up on his hind feet and run toward the train." He dashed against it with such force as to throw the plaintiff from the wagon and beneath the train, from which she was rescued with the loss of her left hand at the wrist.

With this picture of the accident in mind, a picture drawn by the plaintiff herself, can the verdict be sustained? However much we may sympathize with the plaintiff because of her lamentable injury we are unable to find the grounds upon which liability for its occurrence can be fastened upon the defendant. We will assume that there was sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. The important question remains whether there was evidence that the accident was caused by the negligence of the defendant.

So far as the management of the train itself is concerned no negligence is charged. It is not controverted that in approaching the crossing the proper warnings were given by the engineer and fireman, the whistle was sounded and the bell was rung, while the speed was only four miles an hour.

But the learned counsel for the plaintiff contends that the defendant did not exercise due care in three respects, any one of which would support the verdict. First, because the flagman did not warn the plaintiff seasonably to enable her to stop at a safe distance and avoid the risk of alarm to her horse and of collision. It is difficult if not impossible to lay down an abstract rule of law as to the exact time when or the exact distance at which travelers should be warned of an approaching train. It must be governed largely by the circumstances and surroundings of each particular case. In a general way it may be said that it is a flagman's duty to give such seasonable warning as will enable a traveler to stop his team at a point where an ordinarily well broken and gentle horse would not become dangerously frightened. Circumstances and con-

ditions might modify this and impose a greater or less obligation upon him but this would seem to be a workable principle. Measured by this rule no want of due care can be attributed to the flagman in this case. The evidence shows that this freight train had been engaged in work at the station and on the sidings a considerable distance east of the crossing and that it whistled out of the station as it finally started. This signal brought the flagman from his shop, the door of which was open, to his post of duty in the street where he stood for nearly two minutes before the engine reached the crossing. While standing there he says he saw the plaintiff as she drove onto the southerly end of the bridge a distance of two hundred and sixty-five feet. He was in plain sight of the plaintiff as she walked her horse across the bridge, although her mind did not perceive him until she reached the northerly end. He could not be expected to move towards the bridge, because his duty was to warn teams coming from the north as well as the south and his post was at or near the crossing.

The conclusive fact, however, is that his warning was effectual. It stopped the team at a point and at a time when the horse was in no way disturbed by the train even when the engine and the first two or three of the cars had passed the crossing. It is not a case where neglect of duty incumbent on the defendant or its servants caused the plaintiff to approach so near the passing train that her horse took fright and caused the injury. It was not because of any want of due care on the flagman's part that she omitted to take precautions in regard to her horse which would have avoided the injury, nor because of any neglect of his, did she place herself in such a position in reference to the passing train as she would not otherwise have done and thereby lost control of the horse. It is clear from the plaintiff's own testimony that she stopped the horse at what she deemed a safe place. Had she seen the flagman earlier, she doubtless would not have stopped before she did. Why should she have done so? She had full confidence in herself as a driver. She had full confidence in the gentleness of the horse and felt no fear whatever. She had frequently driven him near moving trains under worse conditions and he had shown no fright. She even

declined the offer of the witness Perkins, who stood nearby, to hold her horse after she had stopped at the end of the bridge, and in reply to his question whether the horse was scared, she said "no, the horse was kind and was not scared of the train," and Perkins added "I told her if her horse was scared I would hold it."

Plainly no omission of the flagman in failing to give seasonable warning was the proximate cause of the accident.

In the second place the plaintiff finds negligence in the defendant in maintaining a flagman instead of gates attended by a watchman. It is true that a railroad company is bound to take reasonable and proper precautions for the safety of travelers upon the highway having reference to all the circumstances and probabilities to be anticipated and when a railroad crossing is especially dangerous the company must employ such means as are reasonably necessary considering its character, to warn travelers of the approach of a train. But we fail to see how gates at this crossing could have been more effective than the flagman, how they could have prevented this accident, or how their non-existence can be construed as the proximate cause of the accident. The purpose of gates is merely to give warning that trains are passing or are about to pass. And gates would not have caused the plaintiff to stop any sooner than did the flagman. Whatever the form of warning, her confidence in the horse governed the stopping place. Nor can it be successfully contended that under ordinary circumstances gates should be maintained as a barrier to runaway teams. Such is not their ordinary purpose. *Marks* v. *Fitchburg R. R. Co.*, 155 Mass. 493; *Brooks* v. *Boston and Maine R. R.*, 188 Mass. 416.

In the latter case the plaintiff claimed that a gateman in addition to the gates should have been maintained. The court disposed of this contention in these words: "We are of opinion that this contention is not well founded. The gates were operated effectually and proper warning was given in this way. If there had been a gateman on the ground, it is difficult to see what he could have done to avert this accident. Gatemen are not employed to place themselves in front of runaway horses for the purpose of stopping

them. An attempt of this sort is more likely to be harmful than otherwise." The same doctrine mutatis mutandis applies here.

The third contention made by the plaintiff needs but brief consideration, that is that the flagman left his post of duty before the train passed over the crossing. The weight of the evidence is against the proposition as a fact. The flagman may have walked toward the side of the street but he remained in some part of the street until the train reached the crossing and at that moment the train itself became a warning. "When a traveler sees the train itself in front of him he has all the warning that gates can give." *Theobald* v. *Railway Co.*, 75 Ill. App. 208. Moreover when the engine had passed the crossing the horse was standing quietly, so that the position of the flagman is entirely immaterial. He had already fulfilled his duty.

In conclusion it is the opinion of the court that this case belongs to a class of lamentable accidents for which no one is legally liable. *Berry* v. *B. & M. R. R. Co.*, 102 Maine, 213. The sudden and unaccountable frenzy that seized this old and gentle horse and caused him to plunge into a moving train was an act for which neither the plaintiff nor the defendant was responsible. Without the slightest warning he did what he had never done before and what the plaintiff had no reason to think he was disposed to do. It seemed unlike the ordinary case of fright because he dashed directly towards and into what might otherwise be considered the cause of his fright.

The sympathy of the jury must have blinded them to the legal principles involved, for the verdict is clearly wrong.

Motion sustained.
Verdict set aside.

WILLIAM F. LIBBY *vs.* CITY OF PORTLAND.

Cumberland. Opinion May 17, 1909.

Municipal Corporations. Same may Own Real Estate Disconnected from Public Use. Same Liable for Negligence in Management of Such Real Estate. Private and Special Laws, 1832, chapter 248, section 4; 1863, chapter 275, section 7. Revised Statutes, chapter 1, section 1; chapter 4, sections 1, 80, 81, 82-85.

In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belong the discharge of duties imposed upon them by the legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes.

A municipality as proprietor is not to be confounded with the municipality as a legislator or custodian of the public welfare. If a building is maintained solely for a public purpose no liability on the part of the municipality arises for accidents in connection therewith.

In an action on the case against a municipal corporation to recover damages for personal injuries sustained by reason of the alleged defective conditions of a basement step of a building owned by the defendant municipal corporation, the writ contained two counts, the first count alleging in substance that the defendant municipal corporation was the lawful owner and in lawful possession, control and management of a certain farm with the buildings thereon which it was operating in the usual method of husbandry and that "all said buildings, land and other property were then and there used by the said defendant for its own emolument profit and advantage," but it nowhere alleged or even intimated that the farm was a poor farm and that the building where the injury was received, was a city almshouse. The second count alleged that the defendant municipal corporation was the owner of an almshouse, in the maintenance of which negligence was charged. The defendant filed a general demurrer to each count. The ground of the demurrer to the first count was that the negligence alleged therein appeared to have resulted from the performance of ultra vires acts and that a municipal corporation cannot be held liable for the performance of such acts.

Held: That while a municipal corporation cannot raise money by taxation for the purchase of a farm for other than municipal purposes, yet it may lawfully own, control and manage such farm and the buildings thereon, disconnected from any public use, and for its own emolument, profit and advantage, and in the absence of prohibiting statutes it may receive and hold in its corporate capacity, gifts of either real or personal estate.

2. That a municipal corporation holding property for its profit or gain is liable for negligence in the management thereof to the same extent that business corporations or individuals would be.

3. That as the demurrer to the first count admitted as true the facts therein alleged, and as the facts therein alleged were sufficient, if true, to constitute a cause of action, the first count in the writ was good.

On exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries alleged to have been sustained by reason of the alleged defective condition of the basement step of a building belonging to the defendant city. The writ contained two counts, and on the first day of the return term the defendant filed a general demurrer to each count. The demurrers were overruled and the defendant excepted.

The case is stated in the opinion.

William Lyons, for plaintiff.

John T. Fagan, and Clarence W. Peabody, for defendant.

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

CORNISH, J. Action on the case for personal injuries alleged to have been sustained by the plaintiff by reason of the defective condition of the basement step of a building belonging to the defendant. The writ contains two counts. A general demurrer was filed to each count. The presiding Justice overruled both demurrers and the defendant alleged exceptions. If either count sets forth a cause of action, the exceptions must be overruled.

The first count alleges in substance that the defendant was the lawful owner and in the lawful possession, control and management of a certain farm with the buildings thereon which it was operating in the usual method of husbandry and that "all of said buildings, land and other property were then and there used by the said defendant for its own emolument profit and advantage." It nowhere

alleges or even intimates that this was a poor farm and that the building, where the injury was received, was a city almshouse. The second count is based squarely on the allegation of an almshouse, in the maintenance of which negligence is charged. It is necessary to consider the allegations of the first count alone, the objection to which on the part of the defendant is that the alleged negligence appears to have resulted from the performance of ultra vires acts by the city and that the city cannot be held liable in the performance of such acts. This leads us to a brief consideration of the rights, powers, duties and liabilities of municipal corporations in this State.

In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes. This distinction is sharply defined in a long line of decisions of which it is necessary to cite only the following: *Eastman* v. *Meredith*, 36 N. H. 284; *Oliver* v. *Worcester*, 102 Mass. 489; *Small* v. *Danville*, 51 Maine, 359; *Bryant* v. *Westbrook*, 86 Maine, 450. The Revised Statutes, recognize this two fold character, ch. 4. sec. 1, making the inhabitants of each town a body corporate, and ch. 1, sec. 1, making towns a subdivision of the State.

The precise question is whether the city of Portland acting in its corporate capacity could lawfully own, control and manage a farm house within its limits, disconnected from any public use, and for its own emolument, profit and advantage.

1. It may be conceded that a city or town would not have the right to raise money by taxation for the purchase of such a farm any more than for the establishment of manufacturies, *Opinion of Justices*, 58 Maine, 590, or for the erection of buildings for the purpose of renting them as stores, or banks or halls. *French* v. *Quincy*, 3 Allen, 9.

But it does not follow that a city or town might not be the lawful and legal owner of a farm or of a block of rentable buildings and might not as such owner maintain the same for its pecuniary advantage.

Suppose, by way of illustration, that the municipal officers of a town bid in, in behalf of the town, real estate sold for non-payment of taxes, as they are authorized to do by R. S., c. 10, sec. 85. It is clearly the purpose of the statute that the title shall vest in the town, if the statutory proceedings have been complied with and the property is not redeemed by the owner. Such vesting of title confers upon the town all the ordinary incidents of lawful ownership among which is the right to use and utilize. Must the town, although the lawful owner, yet because it is a town, let the property, if land, lie fallow, or if buildings, remain vacant and unrented? Such a hollow result cannot be the purpose of the statute.

Suppose again that some benefactor should convey by deed, or devise by will, such real estate to the town as a gift, would not the title vest and would not the town be authorized to manage and maintain the property for profit until some other disposition of it might be deemed advisable? Gifts of real estate should stand on no different basis than gifts of money, and certainly the treasury would be lawfully enriched by such benefactions, in either form.

The authorities so hold. Dillon on Municipal Corp., Vol. 2, sec. 566, states the principle thus: "Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law, clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which, property and revenues are absolutely necessary, and, there-

fore, legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law."

There is no such disabling statute in this State, but on the contrary cities and towns are expressly authorized to receive and carry out the terms of conditional gifts, R. S., c. 4, sec. 80 and 81, and of trust funds, R. S., c. 4, sec. 82-85. The necessity of express action on the part of the municipality in fulfilling the conditions of such gifts and trusts rendered necessary the passage of an enabling statute. But in the absence of any prohibiting statute, such municipality in its corporate capacity may receive and hold gifts of either real or personal estate. 2 Abbott Mun. Corp., sec. 720, while questioning the doctrine as an academic proposition admits it to be the law of the decisions.

Worcester v. *Eaton*, 13 Mass. 371, was a real action based upon a deed of real estate to the town in consideration that the grantor should be supported during her natural life, and the point was raised in defense that the town could not take the premises as grantee. In overruling this defense the court say: "With respect to the capacity of the demandants to take by purchase and to hold real estate, we cannot deny to towns such right, since by the immemorial usage of the country, it appears to have been an incident to their corporate powers. As early as the year 1679, provision was made by a colonial act respecting lands, woods, &c. owned by towns in their corporate capacity; and authority was given to the inhabitants, by vote of the major part, to dispose of the same by grant of lots for settlement, and it is well known that many towns, at this day, are owners of real estate, which they hold in their corporate capacity, other than such as may be necessary to erect school-houses and other public buildings upon. Whether the inhabitants of a town can be assessed, to raise money for the purchase of lands, to be used for any other purpose than the execution

of some lawful requisition, is a different question. But there seems to be no reason why there may not be a gift or a devise to the inhabitants."

This case has been cited with approval in *Oliver* v. *Worcester*, 102 Mass. 489, and *Commonwealth* v. *Wilder*, 127 Mass. 1, the court affirming in the last case that "there is no provision in the statute forbidding towns to hold real estate for any particular purposes."

New Shoreham v. *Ball*, 14 R. I. 566, was an action of ejectment, the plaintiff town in proof of title adducing evidence of possession for more than twenty years. The defendant contended that the town could not acquire title by possession for any other than municipal purposes, but the court speaking through Chief Justice Durfee held otherwise in these words: "The cases cited in support of the exceptions do not go to the point that a town cannot acquire land by possession for other than municipal purposes, but only to the point that it is ultra vires for a town to purchase land for other than such purposes. We think this is quite a different proposition; for a town cannot purchase land without expending its moneys, and it has no right to expend its moneys, raised by taxation or otherwise for municipal purposes, for other purposes. The acquirement of land by possession does not involve an expenditure any more than does the acquirement of land by deed of gift or by devise; and it has been decided that a gift or devise of land to a town is good, even though the land be given or devised in general terms, and be accepted without any intent to use it directly for municipal purposes. . . . Land so given, even when not wanted for municipal purposes, may be applied by sale or lease to the alleviation of municipal burdens."

This same principle has been recognized frequently in the decisions of this court. *Marston* v. *Scarborough*, 71 Maine, 267; *Camden* v. *Village Corporation*, 77 Maine, 530-535; *Bulger* v. *Eden*, 82 Maine, 352; *Keeley* v. *Portland*, 100 Maine, 260-265.

Moreover the charter of the City of Portland expressly provides that the city council "shall have the care and superintendence of city buildings and the custody and management of all city property

with power to let or sell what may be legally let or sold; and to purchase and take, in the name of the city, such real or personal property . . . as they may think useful to the public interest. Sec. 4, chap. 248 of Spec. L. 1832, sec. 7, ch. 275, Sp. Laws, 1863. The "custody and management of all city property" must include all to which the city has title, and not simply what is taken or purchased for municipal purposes.

2. From this proposition of lawful ownership follows another that is equally well settled viz. That a city or town holding property for its own profit or gain is liable for negligence in its management to the same extent that business corporations or individuals would be.

"When this legal condition exists, the public corporation may by the exercise of an express or an assumed power, acquire property in this capacity and where this is done it will be treated as a private corporation and subject to all the rules of law, regulating rights and liabilities as devolving upon a private individual . . . . Its rights and its liabilities are measured strictly by the laws which determine all private rights and liabilities." 2 Abb. Mun. Corp., sec. 720.

Woodward v. *Boston*, 115 Mass. 81, was an action of tort brought to recover damages for the alleged conversion of a building that had been sold at auction by the city to the plaintiff. The court say: "In the sale of this building the city acted, in its capacity as a proprietor in the management of property held for its profit and advantage as a corporation, and as to it, has substantially the same rights and liabilities as a private individual." See also *Oliver* v. *Worcester*, 102 Mass. 489-500; *Hill* v. *Boston*, 122 Mass. 344-359; *Haley* v. *Boston*, 191 Mass. 291-292; *Savannah* v. *Cullins*, 38 Ga. 334.

The decision in *Moulton* v. *Scarborough*, 71 Maine, 267, must rest squarely on this principle. That case came to this court on demurrer to the declaration in which the plaintiff alleged that the defendant town was guilty of negligence in the management of a certain ram owned and controlled by it. Like the case at bar the declaration was barren of any allegation or intimation that the

property was used in connection with the farm maintained by the town for the support of the poor. Counsel for defendant in that case sharply contended that "a town cannot own property, except when necessary to aid in the performance of duties imposed on it by law. For a town to be 'owner and possessor of a ram' otherwise than in the line of its statutory duties, is ultra vires." The language of the court in answer to this contention is this: "It is not claimed in support of the demurrer that the declaration is defective; but it is contended in behalf of the defendants, that the town had no legal authority to own and keep a ram; that the act was ultra vires, and that, therefore, the town is not liable. "It is admitted, however, by the defendants' counsel, that if the town could legally own and keep the ram for any corporate purpose, for profit and gain, then it rests under the same liability as a person or private corporation for its proper care and control. This is the well settled rule of law."

The opinion then discusses the right of a town to maintain a farm for the support of the poor and to stock it for ordinary farm purposes, and holds the declaration good. Later cases have cited this decision with approval. *Bulger* v. *Eden*, 82 Maine, 352; *Sibley* v. *Lumbering Assoc.*, 93 Maine, 399-402; *Keeley* v. *Portland*, 100 Maine, 260-265. In this last case after considering the non-liability of a municipal corporation to a private action for neglect to perform, or negligent performance of, corporate duties imposed upon it by the legislature, unless such liability to action has been given by statute, the court adds: "It is true there are limitations to this rule, or conditions to which it is not applicable, the most important perhaps of which is this: A municipal corporation lawfully owning and controlling property not in the performance of a public duty enforced upon it by law, but wholly or partially for its own profit or gain, is liable for negligence in the management of such property to the same extent as business corporations or individuals must be."

The municipality as proprietor is not to be confounded with the municipality as legislator or custodian for the public welfare. If a building is maintained solely for a public purpose no liability on

the part of the city arises for accidents in connection therewith; excavation in school house yard, *Bigelow* v. *Randolph*, 14 Gray, 541; unsafe stairway in school building, *Hall* v. *Boston*, 122 Mass. 344; defective heating apparatus in school building, *Wixon* v. *Newport*, 13 R. I. 454; unsafe floor in town house, *Eastman* v. *Meredith*, 36 N. H. 284. But when property is used or business is conducted by a city principally for public purposes under the authority of law, but incidentally and in part for profit, the city is liable for negligence in management. Thus, for injury sustained in falling through a trap door in a hall let for hire, in a city building, *Worden* v. *New Bedford*, 131 Mass. 23; or because of insufficient lighting of the approaches to such hall, *Little* v. *Holyoke*, 177 Mass. 114; where the town engaged in crushing stone and repairing road for a street railway company, *Collins* v. *Greenfield*, 172 Mass. 78; where the town used a stone quarry in part for the public streets and in part for the sale of stone, *Duggan* v. *Peabody*, 187 Mass. 349. The liability in the cases last cited is created when public use gives way to use for private gain. *Larrabee* v. *Peabody*, 128 Mass. 561. If then a city is liable for accidents in a part of a public building used for private gain it must certainly be liable when the entire building is so used. And the same rule would apply to any other property lawfully held and maintained for private gain whether it be a hall, a business block or a farm house.

The cases cited by the defendant do not reach the point under consideration. They involved acts clearly ultra vires, as the construction of an embankment across two channels of a stream in *Anthony* v. *Adams*, 1 Met. 284; the digging of a ditch across the land of a private individual in *Seele* v. *Deering*, 79 Maine, 343; and the maintenance of a public ferry in *Hoggard* v. *Monroe*, 51 La Ann. 683, 44 L. R. A. 477.

Our conclusion therefore is that since the City of Portland may be "the lawful owner and in the lawful possession, control and management" of the property in question and may be liable for negligence in connection with the maintenance thereof for its "own emolument, profit or advantage" and since these facts duly alleged

in the declaration are admitted to be true by the demurrer, the first count sets forth a cause of action and the demurrer thereto was properly overruled.

Exceptions overruled.

GEORGE M. COLBATH AND THOMAS M. HOYT

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion May 28, 1909.

Common Carriers. Terminal Carrier Liable for all Damages to Goods Injured While in Transit. Carrier Liable for Failure to Observe Directions. Damages. Same Cannot be Apportioned. Presumptions.

Where goods are delivered in good condition to the initial carrier to be carried by a succession of connecting common carriers and are delivered by the last or terminal carrier in a damaged condition, the presumption is well established that the injury to the goods occurred on the line of the last or terminal carrier upon whom is imposed the burden of exonerating itself. This presumption arises even though the goods are delivered to the terminal carrier in a sealed car.

A common carrier is liable for damage to goods resulting from disobedience of directions given by the owner and assented to by the carrier, respecting the mode of conveyance.

If a common carrier accepts for transportation a package having legible directions as to carriage, he is liable for loss arising from a failure to observe such directions.

In an action for damages for injuries to goods carried, brought against the last only of a succession of connecting common carriers, even if upon the evidence it is manifest that part of the damages occurred upon the line of a preceding carrier, no apportionment of the damages is to be made but the defendant in such action must be held liable for all the damages.

On report. Judgment for plaintiffs.

Action on the case to recover damages for injuries to twenty crates of asbestos roofing transported by the defendant in its capacity as a common carrier, from Old Town, Maine, to Easton, Maine. Plea, the general issue.

Tried at the November term, 1907, Supreme Judicial Court, Aroostook County. At the conclusion of the evidence, and by agreement of the parties, the case was reported to the Law Court with the stipulation that that court should "have full power to determine all questions of fact involved in the case, and to determine the amount of the plaintiffs' damages, should the plaintiffs be entitled thereto."

The facts, as found by the court and stated by Mr. Justice BIRD who drew the opinion, are as follows:

"The plaintiffs bring this action to recover damages from defendant for injuries to twenty crates of asbestos roofing, in all 120 squares or sheets, carried by defendant, as a common carrier, from Old Town to Easton, their place of destination. The roofing consisted of sheets of asbestos, with a layer of asphalt between, subjected when hot to the action of rolls. The sheets thus produced were about eight feet long by about thirty inches wide and about one eighth of an inch thick. The crates in which the roofing was packed had solid ends and sides but the tops and bottoms were formed of slats of about five inches in width. All the crates were plainly marked "Lay Flat" on either side and also on each end. The value of the goods at invoice price was $339.60.

"Thus crated and in good order the roofing was delivered July 6, 1904, at New York by the manufacturers to the Maine Steamship Company to be forwarded, via defendant's railroad, to plaintiffs at Easton, Maine. The Steamship Company, upon delivery to it, gave to the consignor a bill of lading or shipping receipt of substantially the ordinary form, the weight being given as 7000 pounds. Subsequently a car containing fifteen of the crates was delivered upon the premises of the consignees at Easton. The car was promptly opened and the crates found to be standing on their sides or edges, not laid flat as directed, and the sheets of roofing to

have sagged from two to five inches from the upper sides of the crates and to be badly bulged and wrinkled. The remaining five crates arrived at the same time or shortly after and were found to be similarly loaded and damaged. The plaintiffs refused acceptance and defendant later sold the roofing under the statute and October 21, 1904, paid to the plaintiffs $76.35, being the proceeds of the sale, less freight and advances.

"On the part of defendant the undisputed evidence was to the effect that on the ninth day of July 1904, the Maine Steamship Company delivered the twenty crates of roofing to the Maine Central Railroad at Portland to be forwarded and delivered to defendant carrier. Upon the evening of July 11, 1904, between eight and nine o'clock defendant received at Old Town from the Maine Central Railroad Company, M. C. R. R. car No. 1158 and B. & A. car No. 7430, each fully sealed with Maine Central Railroad Company seals of its Portland Station. These seals were intact and indicated that the cars had come through from Portland to Old Town unopened. These cars left Old Town the same evening between nine and ten o'clock and were hauled by defendant to Houlton where they arrived on the morning of the following day, July 12, the seals remaining unbroken. At Houlton both cars were opened by the servants of defendant and each crate was found to be standing on edge. The B. & A. car, No. 7430 was re-sealed with defendant's seals without change in the position of the fifteen crates and the five crates were transferred from car No. 1158, in which they arrived at Houlton, to B. & A. car No. 7075, the crates being again loaded on edge. The same day these cars were carried onward by defendant and reached Easton between five and six o'clock on the evening of that day. Car No. 7430 containing the fifteen crates was opened at Fort Fairfield Junction, a short distance from Easton, and two pieces of granite placed in the car.

"After the roofing was refused by plaintiffs, the fifteen crates remained on edge for several days when they were laid flat and there is evidence tending to show that the five crates, after some delay were also laid flat."

Anthoine & Talbot, and Madigan & Madigan, for plaintiffs.

F. H. Appleton, Hugh R. Chaplin, Louis C. Stearns, and Powers & Archibald, for defendant.

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

BIRD, J. In consequence of the rule prevailing in most of the courts of the United States, that, in the absence of partnership or other contract between connecting lines or special contract with shipper or consignee, each of a succession of connecting common carriers is relieved of further obligation by safe carriage over its own line and prompt delivery to the succeeding carrier: *Perkins* v. *P. S. & P. R. R. Co.*, 47 Maine, 573, 589; See also *Grindle* v. *Eastern Express Co.*, 67 Maine, 317, 320; the presumption has been established that, when goods are delivered to the initial carrier in good condition and are delivered by the last or terminal carrier in a damaged condition, they were injured on the line of the latter upon whom is imposed the burden of exonerating himself: *Moore* v. *Railroad Co.*, 173 Mass. 335, 337; *Cote* v. *Railroad Co.*, 182 Mass. 290; *Bullock* v. *H. & B. Dispatch Co.*, 187 Mass. 91. This presumption has been declared to be one of convenience and necessity and to be based upon the presumption that goods shown to have been delivered in good condition remain so until shown to be in bad condition: *Moore* v. *N. Y., &c. R. R. Co.*, ubi supra.

In the case of *Philadelphia, etc. Co.* v. *Diffendal*, recently decided by the Court of Appeals of Maryland, in considering this presumption, it is said: "The reason of the rule, or rather the reason for the exception to the general rule, is that, when a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he of course loses all sight of or control over them. From that time forward they are committed to the custody and management of the initial and connecting carriers, and these latter may each in turn, by the exercise of reasonable caution, ascertain the condition of the goods at the time of accepting them from the

last preceding carrier, and thus in case of loss be able to prove where the loss occurred; whereas, the shipper has no means whatever of obtaining the necessary information, or witnesses to prove his case, except by summoning the employés of the carriers whose own negligence has caused the loss. One great difficulty that he would encounter in persuing this course would be to discover which of the defendant's employés had knowledge of the facts. Should he be able to discover these, it would still be dangerous for the shipper to rest his case upon their testimony, since the natural impulse of mankind would be likely to sway them, in narrating the circumstances, to state the occurrence in the light most favorable to themselves, in order to palliate their fault." 73 At. Rep. 193, 197.

The presumption arises even though the goods are contained in a package locked, sealed or otherwise closed; *Moore* v. *Railroad Co.*, and *Bullock* v. *H. & B. Dispatch Co.*, ubi supra; *Leo* v. *St. Paul, M. & M. Ry. Co.*, 30 Minn. 438, 440: and also although they are delivered to the terminal carrier in a sealed car; *Leo* v. *St. Paul, etc. Ry. Co.*, ubi supra: *Cote* v. *Railroad Co.*, ubi supra.

A carrier is liable for damage to goods resulting from disobedience of directions given by the owner and assented to by the carrier, respecting the mode of conveyance; *Sager* v. *P., etc., R. R. Co.*, 31 Maine, 228; *Hastings* v. *Pepper*, 11 Pick. 40; and if a carrier accepts a package having legible directions as to carriage, he is liable for loss arising from failure to observe them: *Hastings* v. *Pepper*, ubi supra.

Applying these principles of law, which are amply supported by authority and are consonant to reason, we are unable to find that defendant has exonerated itself. It is true that the plaintiffs, confessedly not very familiar with the character of the goods, testify that if the crates containing the roofing were shipped on edge, the weight of the sheets would cause them to sag so that they would wrinkle and bulge and especially so in warm weather and that an employé of the manufacturers states that the reason for marking the crates "Lay Flat" was, that if they were stowed on end for any length of time they would buckle up to the injury of the goods. Whether an appreciable length of time or a considerable length of

time is meant is uncertain. But there is an entire lack of evidence as to the condition of the goods at Old Town or at Houlton or Fort Fairfield Junction. It is impossible, therefore, for us to find that no part of the injury occurred subsequent to their delivery to defendant at Old Town.

For an apportionment of the damages between defendant and the carrier immediately preceding it, earnestly urged by defendant, we find no authority; *Lake* v. *Milliken*, 62 Maine, 240; *St. L., I. M. & S. Ry. Co.* v. *Coolidge*, 67 L. R. A. 555, 557.

In accordance with the agreement of the parties, there must be,

Judgment for the plaintiffs for $324.68 with costs.

STANLEY W. HUBBARD

vs.

MARINE HARDWARE AND EQUIPMENT COMPANY.

Cumberland. Opinion May 28, 1909.

Verdict. Motion for New Trial. Death of Plaintiff Pending the Motion. No Reduction of Verdict in Such Case.

A motion for a new trial on the ground that the verdict is against the evidence will not be granted where the evidence is conflicting and it does not appear that the verdict is clearly wrong.

Where, in an action for tort for personal injuries, the verdict manifestly includes damages for impairment of the future earning capacity of the plaintiff and pending the motion of the defendant for a new trial on the ground that the verdict is against the evidence, the plaintiff dies, the Law Court has no power to reduce the verdict.

Nor, in such case, such motion being denied, can the Law Court order a new trial because of the death of the plaintiff pending the motion.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries received by the plaintiff while employed by the defendant in the

operation of a drop hammer and which injuries resulted in the loss of the plaintiff's right hand. Plea, the general issue.

The plaintiff recovered a verdict for $3383.00 and thereupon the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Foster & Foster, for plaintiff.

Forest Goodwin, for defendant.

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

BIRD, J. This action was brought by the plaintiff to recover damages for the loss of his right hand while employed by defendant in the operation of a drop hammer. The action is based upon the alleged negligence of defendant in carelessly allowing the hammer to become defective and out of repair. The defense was contributory negligence and assumption of the risk by plaintiff. The case is before this court on motion for new trial upon the usual grounds. The charge of the Justice presiding at the trial is not made part of the record. Upon all the issues the evidence was conflicting and careful and repeated reading of the record fails to impress the court that the jury, in reaching its verdict, acted under misapprehension or with prejudice or passion and that its verdict is indisputably wrong. The motion for new trial must be denied.

The defendant alleges in his brief that since, and but shortly after, the rendition of verdict the plaintiff died. His death evidently occurred subsequently to the filing of the motion for new trial. The defendant, admitting that at the time verdict was rendered the damages were not excessive, contends that the element of loss arising from diminished earning capacity of the plaintiff was removed by his death and, that a motion being now before the Law Court to set aside the verdict, the court should take cognizance of the death of plaintiff and reduce the damages accordingly. The brief of opposing counsel admits the death of plaintiff since the verdict but the record is entirely silent upon the subject.

Waiving this, we are unable to find any power lodged in this court to arbitrarily reduce the verdict. The verdict is an entire

sum and it is impossible to know what amount was allowed by the jury as damages for reduced future earning capacity. It is sufficient to say that the objection is insuperable that the court in so reducing the verdict would clearly usurp the functions of the jury: *Kinnon* v. *Gilmer*, 131 U. S. 22, 29.

Can a new trial be granted, assuming defendant to ask this? Damages resulting from one and the same cause of action must be assessed and recovered once for all; Pollock on Torts (6th Ed.) 189; *Rockland Wat. Co.* v. *Tillson*, 69 Maine, 255, 268, 269; S. C., 75 Maine, 170, 182; Mayne on Dam. (7th Eng. Ed.) pp 110 et seq. *Wightman* v. *Providence*, 1 Cliff. 524, 525, Fed. Cases 17630, page 1179; *Fetter* v. *Beale*, 1 Saelk. 11. We know of no instance of new trial granted for matters occurring subsequently to the verdict save in the case of newly discovered evidence. But in such case no new fact has transpired. The discovery is new but the fact discovered existed before verdict. "A man who has had a verdict for personal injuries cannot bring a fresh action even if he finds that his hurt was graver than he supposed." Pollock on Torts (6th Ed.) 189: See *Fay* v. *Guynon*, 131 Mass. 31, 35. Both plaintiff and defendant go to the jury upon the facts existing at the time of trial and are bound by the result thereon. The evidence of subsequent events cannot effect the question of damages unless the verdict rendered is set aside and a new trial granted for reasons apparent upon the record or the new discovery of evidence or some infirmity in the proceedings below preceding or attending the rendition of verdict.

The argument from inconvenience is not without grave weight. If a new trial can be granted upon the ground urged by defendant, neither the imposition of double nor treble costs will prevent the taking of frivolous exceptions or motions for new trials intended for delay, in the hope that pending the same the plaintiff may die.

The defendant admits it finds no authorities for its position. We can find no reason consistent with law upon which to establish a precedent.

Motion overruled.
Judgment on the verdict.

ULYSSES G. MUDGETT, Executor, Appellant from decree of Judge of Probate, Estate of JONATHAN O. FIFIELD.

Penobscot. Opinion May 28, 1909.

Probate Court. Decree of Distribution. Account of Distribution. When Same Must be Presented. Jurisdiction. Statute, 1891, chapter 49. Revised Statutes, chapter 65, section 7; chapter 66, sections 21, 56; chapter 67, section 20; chapter 69, section 25.

1. A judge of probate has no jurisdiction to allow an account of distribution to heirs or legatees, unless it is presented within one year after the decree of distribution is made. The allowance of such an account, presented more than one year after the decree of distribution, is void and of no effect.
2. Revised Statutes, chapter 67, section 20, among other things, provides as follows: "When an executor, administrator, guardian or trustee has paid or delivered over to the persons entitled thereto the money or other property in his hands, as required by a decree of a probate court, he may perpetuate the evidence thereof by presenting to said court, without further notice, within one year after the decree is made, an account of such payments or of the delivery over of such property; which account being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered to be recorded." This statute is merely permissive. It creates a privilege, but it imposes no obligation. The accountant may avail himself of the privilege, but is not required to do so. But if the accountant would avail himself of the privilege, he must do so within one year after the decree of distribution is made.

On exceptions by appellant. Sustained. Appeal dismissed.

Appeal by Ulysses G. Mudgett, executor of the estate of Hattie B. Fifield, from the decree of Judge of Probate allowing the account of distribution presented by Benjamin F. Lennan, administrator of the estate of Jonathan O. Fifield.

When the matter came on for hearing in the Supreme Judicial Court sitting as the Supreme Court of Probate, the appellant moved to dismiss the entire proceedings on the ground that the Probate Court had no jurisdiction to settle and allow the account. The motion was overruled and the appellant excepted. A hearing was then had during which other exceptions were taken by the appellant.

The case is stated in the opinion.

Ulysses G. Mudgett, and E. M. Simpson, for appellant.

A. H. Harding, Louis C. Stearns, and Louis C. Stearns, Jr., for Benjamin F. Lennan, administrator.

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

SAVAGE, J. Appeal from allowance of administrator's account of distribution. One Lennan was administrator of the estate of J. O. Fifield. Having completed the administration, on his petition, a decree of distribution was made by the Probate Court, March 31, 1903. On December 26, 1906, Lennan filed in Probate Court an account of the distribution, showing payments to the distributees, as ordered. Notice thereon was ordered and given. One of the distributees having died since the order of distribution was made, Ulysses G. Mudgett, her executor, appeared, and objected to the allowance of the items alleged to have been paid to the distributees. The account was allowed, however, and Mudgett appealed. In the Supreme Court of Probate, the appellant moved to dismiss the entire proceedings, on the ground that the Probate Court had no jurisdiction to settle and allow the account. The motion was overruled and exceptions were taken. The case proceeded to a hearing, during which other exceptions were reserved.

The question of the jurisdiction of the Probate Court must first be considered, for if that court had no jurisdiction, the Supreme Court of Probate has none, and the appeal must be dismissed.

By Revised Statutes, chap. 65, sect. 7, it is provided in general that Judges of Probate have jurisdiction of all matters relating to the settlement of estates. But there is no provision of statute in this State which expressly requires an administrator or executor to settle in the Probate Court an account of his distribution to distributees, on a decree obtained therefor. Nor, prior to chapter 49 of the Laws of 1891, was there any provision which authorized the Probate Court to allow such an account, unless it is to be implied from the provisions which made it the duty of administrators and

executors to settle accounts of their administration, in general. We think this conclusion is not to be so implied.

R. S., chap. 66, sect. 56 provides that "every executor or administrator shall render his accounts agreeably to his bond." The bond of an administrator is conditioned, so far as is material to this discussion:—

"II. To administer according to law all the goods, chattels, rights and credits of the deceased.

III. To render, upon oath, a true account of his administration within one year, and at any other times when required by the judge of probate.

IV. To pay and deliver any balance, . . . remaining in his hands upon the settlement of his accounts, to such persons as the judge of probate directs." R. S., chap. 66, sect. 21.

The administering of the goods, chattels, rights and credits, and the rendering of a true account of that administration necessarily come before the decree of distribution. After such administration, and accounting, it only remains "to pay and deliver any balance." And it is noticeable that the bond makes no provision in paragraph IV for the rendering of an account after the balance is paid and delivered.

In one case only is provision made for the settling of an account on a decree of distribution, and that is in the case of an insolvent estate. R. S., chap. 69, sect. 25. And in such case the distribution is not made to distributees in the sense in which the word is used in the case of solvent estates when a balance after administration remains to be paid, but the distribution is made to creditors, and hence is a part of the administration of the estate.

There is no other statutory provision, except the statute of 1891, to be considered later, which touches the matter. And the provisions we have cited certainly do not confer jurisdiction on the probate court to settle an account on a decree of distribution; and the Probate Court has no jurisdiction except that which some statute confers. We think therefore that, except in cases brought within the statute of 1891, an administrator has fully administered, so far as the estate is concerned, and so far as the Probate Court is con-

cerned, when he has reduced the assets to cash, paid the debts and specific legacies, settled his account thereof, and obtained an order of distribution of the balance in his hands to the persons entitled thereto. From that time, his duties are not to the estate, nor to the Probate Court, but to the individual distributees.

While, indeed, a distributee is protected by the administrator's bond, R. S., chap. 66, sect. 21, he also has a remedy at law against the administrator personally, if the latter fails to pay as ordered. The distributee has no claim against the estate. It is against the administrator. He must look to him, or his bond, alone. The Probate Court has no authority to interfere. If it does interfere in such a case, its action is entirely nugatory. No one's rights are affected. The reasoning in *Hanscom* v. *Marston*, 82 Maine, 288 at pages 294, 295, and *Eacott, Applt.*, 95 Maine, 522, supports this view.

Such seems also to have been the legislative view when chapter 49 of the Laws of 1891, now incorporated in R. S., chap. 67, sect. 20, was enacted. It was then provided that "when an executor, administrator, guardian or trustee has paid or delivered over to the persons entitled thereto the money or other property in his hands, as required by a decree of the Probate Court, he may perpetuate the evidence thereto by presenting to said [Probate] Court, without further notice, within one year after the decree is made, an account of such payments or of the delivery over of such property; which account being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered to be recorded." If prior to this statute, the Probate Court, as is now claimed, had jurisdiction to allow such an account, it is evident that the statute was entirely unnecessary, because a party, without that statute, could perpetuate his evidence by settling an account, and the judgment of the Probate Court allowing the account, unappealed from, would be conclusive, and so would work a discharge of the accountant. It is to be observed also that the statute of 1891 is merely permissive. It creates a privilege, but it imposes no obligation. The accountant may avail himself of the privilege, but is not required to do so.

Prior to 1891, then, we conclude that the Probate Court had no jurisdiction to allow an account of distribution, and that such an allowance, if made, was of no effect. And such is the result now in all cases not brought within the terms of the 1891 statute. That statute applies only when the account is filed within one year after the decree of distribution is made. In this case, the account was not filed until more than three years after the decree was made. It follows that the Probate Court had no jurisdiction to allow the account of distribution in this case, and this court has no jurisdiction on appeal.

The court below therefore erred in overruling the motion to dismiss. The exceptions must be sustained. And the appeal must be dismissed for want of jurisdiction. The allowance of the account by the Judge of Probate was entirely void and of no effect. The entry will be,

Exceptions sustained. Appeal dismissed, with costs against the administrator. Order to be certified to the Probate Court with the direction to dismiss the proceedings on the account.

In Equity.

GEORGE W. MASON et als. *vs.* JOHN P. CARROTHERS et als.

Cumberland. Opinion May 28, 1909.

Corporations. Promoters. Fraud by Promoters. Secret Profits Received by Promoters. Action by Stockholders. Equity. Revised Statutes, chapter 47, section 50.

The promoters of a corporation stand in a fiduciary relation to the corporation itself and to future bona fide purchasers at par of stock from the treasury of the corporation, and when such promoters undertake to sell property to the corporation they are bound to disclose all the facts connected with the transaction.

A promoter of a corporation, whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts, but containing something, which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to.

When the promoters of a corporation have received secret profits for which they should account, and it is apparent that an application to the officers of the corporation to take the necessary steps to secure an accounting would be ineffectual, the stockholders may proceed in their own name.

Where the promoters of a corporation made a contract with the corporation and at the time the contract was made the corporation was composed solely of dummy stockholders and directors who were employees of the promoters and who simply carried out the wishes of the promoters, *held* that the promoters were in fact dealing with themselves and not with another.

Where the promoters of a corporation succeeded in transferring to the corporation for $100,000 of its preferred stock and $799,400 of its common stock, certain patent rights which the owners of such rights were ready to transfer to the corporation for $100,000 of its preferred stock and $50,000 of its common stock, and such owners did transfer such rights to the corporation for the less consideration, but the promoters took care that the transfer should be made not directly to the corporation but through themselves as a conduit and that $749,400 of the common stock should adhere to them in transit, *held* that subsequent purchasers of the preferred stock from the treasury paying full cash value therefor and without knowledge of the transaction on the part of the promoters, had a remedy in equity.

Where the persons who promoted a corporation and controlled it through their nominee stockholders and directors, obtained a profit for themselves without revealing the fact to any persons except their associates, and that profit consisted of $549,400 the common stock of the corporation and subsequent bona fide purchasers of stock from the treasury without notice of the profit received by the promoters, brought a bill in equity for a surrender of the stock certificates and the cancellation of the same, *held* that the bill was maintainable and that equity would not allow the stock so received by the promoters to be retained by them nor by any person holding under them with no superior rights.

Revised Statutes, chapter 47, section 50, provides that any corporation may purchase property necessary for its business and "issue stock to the amount of the value thereof in payment therefor . . . and the stock so issued shall be full paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased . . . shall be conclusive." This statute contemplates two independent contracting parties, the one buying and the other selling each looking out for his own interests. It does not contemplate one party dealing with himself and acting in two capacities. It means also the honest and bona fide judgment of the directors.

Where the promoters of a corporation had received secret profits for which they should account, *held* that a master should be appointed to hear and determine the claims of the promoters for services and expenses in promoting the corporation and also to determine the value of certain shares of stock at the time it was issued to them.

The maxim of clean hands applies solely to some wilful misconduct with reference to the matter in litigation and not to some other illegal transaction, although it may be directly connected with the subject matter of the suit.

In equity. On appeal by plaintiffs. Sustained.

Bill in equity by the plaintiffs, eleven in number and all of New York City, holders of preferred Stock in the Marine Safety Appliance Company, a corporation organized under the laws of Maine and located at Portland, Maine, against "John P. Carrothers, of Port Clinton, Ohio, James S. Barcus, of New York City, Willard F. Hallam, of Harpers Ferry, West Virginia," and sixteen others, stockholders in said corporation, and against said Marine Safety Appliance Company, alleging in substance that certain stock issued to certain prior takers had been illegally and fraudulently issued in exchange for certain letters patent, and praying for the surrender and cancellation of the stock so alleged to

have been illegally and fraudulently issued. Answers were filed by ten of the defendants and the usual replications were filed by the plaintiffs.

A hearing was had on bill, answers, replications and evidence, after which the Justice who heard the cause made a finding of facts, ruled in several matters of law and then filed a decree dismissing the bill, and thereupon the plaintiffs appealed as provided by Revised Statutes, chapter 79, section 22.

The material facts are stated in the opinion.

Charles E. Gurney, and Moses, Morris & Westervelt (of the New York Bar), for plaintiffs.

Verrill, Hale & Booth, and John P. Carrothers, for defendants, Carrothers, Barcus, Hallam, et als.

Ernest E. Noble, for defendant Marine Safety Appliance Company.

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

CORNISH, J. Bill in equity brought by bona fide purchasers at par of treasury preferred stock in the Marine Safety Appliance Company, against certain prior takers of common stock alleged to have been illegally and fraudulently issued in exchange for letters patent, and against the corporation, praying for the surrender and cancellation of said certificates. The cause was fully heard by a single Justice, who, after making exhaustive findings of fact and various rulings in matters of law, made a decree dismissing the bill. The cause is before the Law Court on plaintiffs' appeal from this decree. The record is voluminous but so far as material to the decision, the facts are these:

In May, 1905, Frank W. Irvine and James T. Lihou were the owners of certain letters patent of the United States covering inventions for handling life boats, and of application for letters patent in the Dominion of Canada. They met James S. Barcus and Willard F. Hallam, two of the defendants and after various negotiations, a written contract was entered into at Washington, D. C., on July 10, 1905, between Barcus and Hallam on the one part

and Irvine and Lihou on the other, whereby Barcus and Hallam agreed to cause a corporation to be organized within four months (subsequently extended six months) for the purpose of manufacturing and selling said life boat handler in the United States and Canada, with a capital stock of one million dollars, two hundred thousand of which was to be six per cent cumulative preferred stock and eight hundred thousand common stock. Barcus and Hallam further agreed to cause the corporation to do the following acts: to issue to Irvine and Lihou one hundred thousand dollars paid up and non-assessable preferred stock at par and fifty thousand dollars paid up and non-assessable common stock at par; to enter into a contract to pay Irvine and Lihou a royalty of ten per cent on the gross receipts from the sales of the life boat handler; and to make an advance payment of ten thousand dollars on royalty account. Barcus and Hallam also agreed to personally pay twenty-five hundred dollars thereof immediately, the balance, seventy-five hundred dollars, to be paid by the corporation, Irvine and Lihou assigning to Barcus and Hallam their interest in the royalty contract.

Irvine and Lihou agreed to transfer to the corporation, in consideration of the foregoing, all their rights in the patents, on receipt of the stock and the ten thousand dollar advance payment on royalties. In case of failure to have the stock issued and the ten thousand dollars paid, Barcus and Hallam were to forfeit all rights in the premises, including all money advanced by them before the completion of the contract, and all compensation for services already rendered and to be rendered in connection with the enterprise.

It was further stipulated that a copy of this contract together with an assignment of the patents should be placed in escrow with a Trust Company in Washington, to be delivered to Barcus and Hallam upon the payment of the remaining seventy-five hundred dollars on or before November 1, 1905.

On November 13, 1905, Barcus and Hallam caused the Marine Safety Appliance Company to be organized under the laws of Maine for the purposes and with the capital stock previously agreed upon.

There were six incorporators, each subscribing for one share of common stock, one being the attorney of Barcus and Hallam residing in Boston, three being employees in their New York office, and two residents of Maine used as a convenience. The attorney and the two residents of Maine were elected Directors at the first meeting but one of the latter resigned as soon as the organization was perfected and one of the employees was elected in his stead. On November 17, 1905, the attorney director and the employee director held a meeting at the office of Barcus and Hallam in New York, at which the attorney director and the remaining Maine director also resigned and two other employees were substituted. This left the entire board of directors, employees of Barcus and Hallam.

After this organization was completed, and at this same meeting of November 17, 1905, Barcus and Hallam, representing themselves to be the exclusive owners of these patent rights, offered to sell the same to the corporation in consideration of $100,000 of the full paid and non-assessable preferred stock and $799,400 of the full paid and non-assessable common stock of the corporation at par, being all the common stock except the six shares subscribed for by the dummy incorporators and directors, and of a ten per cent royalty agreement and a ten thousand dollar advance royalty payment in cash, the terms of the royalty agreement being similar to those in the July 10 contract between Barcus and Hallam, and Irvine and Lihou. The directors with what the single Justice aptly terms "a grave and eloquent mummery of whereases," accepted the proposal and voted to make the purchase.

Thereupon Barcus and Hallam executed an assignment of all right, title and interest in the letters patent to the corporation, the royalty contract was executed and the requisite certificates of preferred and common stock were made out in the names of Barcus and Hallam but were retained by the treasurer. On the following day another directors meeting was held and Barcus and Hallam in consideration of the corporation note of $5000, retransferred and gave back to the corporation $200,000 of the common stock, to be used as a bonus in its sale of the remaining $100,000 of preferred stock. They also split up their certificates and carved out $50,000 common

stock for which certificates were written in the name of Irvine and Lihou, but none of the certificates were delivered before December 12, 1905. On that date Barcus and Hallam on the one part and Irvine and Lihou, on the other, or their representatives, met in New York, and reached a settlement of their affairs. Barcus and Hallam delivered to Irvine and Lihou $100,000 of the preferred stock and $50,000 of the common stock, certificates for which had been written November 18, and assigned to them the royalty contract made between the corporation and Barcus and Hallam on November 17, and instead of the $10,000 advance royalty payment, Irvine and Lihou accepted part cash and part notes of the corporation. The corporation at the same time delivered to Barcus and Hallam the remaining $549,400 of common stock.

Irvine and Lihou then acknowledged and delivered to Barcus and Hallam, instead of to the corporation, an assignment of their interest in the patents, which on November 17, Barcus and Hallam had conveyed to the corporation, the assignment from Irvine and Lihou bearing date July 10, 1905, though not acknowledged until December 12, 1905. This left $100,000 of the preferred stock in Irvine and Lihou, and $100,000 in the treasury; $50,000 of the common stock in Irvine and Lihou, $549,400 in Barcus and Hallam, $600 in the dummy incorporators and $200,000 in the treasury to be used as a bonus in the sale of the preferred stock. The number of directors was increased on January 8, 1906 from three to nine, and Barcus and Hallam were two of the number, so that with the three employees they still had a majority of the Board.

The plaintiffs became stockholders between November 18, 1905, and February 13, 1906, by the purchase of preferred stock at its par value from the corporation itself, the stock being a part of the $100,000 not issued to Barcus and Hallam, and they received as a bonus two shares of common stock for each share of preferred. The active plaintiffs hold $5800 of such preferred stock and ask to represent other holders not appearing as parties plaintiff, making a total of $11500, being all the preferred stock issued for cash. In June, 1906, Barcus and Hallam assigned to the defendant Carrothers

all interest in the stock held by them in consideration that he would push the business of the company and carry out an agreement previously made with a Cleveland syndicate so called, which is immaterial here, and Carrothers now holds the same, although it has never been transferred to him on the books of the corporation. However, he was familiar with the whole history of the stock issue and was held by the sitting Justice not to be a bona fide purchaser for value but chargeable with notice of any imperfection in the title to the stock and of any illegality in its issue, to the same extent that Barcus and Hallam would be and that finding we approve. Carrothers has no rights superior to Barcus and Hallam. This bill was filed March 1, 1907.

It is unnecessary to go into the facts with greater detail. Enough has been outlined to make clear the single decisive issue which is, the right of the plaintiffs to secure a return to the treasury and a cancellation of all the shares of common stock issued to Barcus and Hallam on November 17, 1905 in excess of the $50,000 turned over by them to Irvine and Lihou in accordance with the original agreement of July 10, and of the $200,000 turned back to the treasury for corporate uses. Have the plaintiffs under the facts of this case a right to require these defendants to return to the corporation this $549,400 of common stock as an unjust enrichment which equity will not allow them to retain?

The single Justice dismissed the bill on the ground that the plaintiffs did not seek an accounting for secret profits of officers or promoters but asked relief on two other grounds, both of which he held to be untenable, first, that Barcus and Hallam had no title whatever to the patents which they attempted to assign on November 17, 1905, so that there was no consideration for the issue of stock to them; and second, that inasmuch as Barcus and Hallam held for the benefit of the corporation the contract with Irvine and Lihou by which the corporation was entitled to an assignment of the patents in consideration of $100,000 preferred and $50,000 common stock, the issue of the additional $749,400 of common stock to Barcus and Hallam was a fraud upon the corporation and the stockholders existing and subsequent. The conclusion as to owner-

ship should be adopted. There was a conflict of evidence as to whether the assignment from Irvine and Lihou to Barcus and Hallam was actually made and delivered on July 10, 1905, its date, or on December 12, 1905, the date of its acknowledgment, and had been dated back to July 10, for a purpose. The single Justice, however, found as a fact that Barcus and Hallam had an equitable if not a legal title to the patents on November 17, 1905, when they made a conveyance to the corporation and his finding should stand unless clearly wrong. *Paul* v. *Frye*, 80 Maine, 26; *Hartley* v. *Richardson*, 91 Maine, 424; *Proctor* v. *Rand*, 94 Maine, 313. The evidence and the circumstances warrant the finding. But in reaching the conclusion on the second point, the fiduciary relation between promoters and subsequent purchasers of treasury stock was lost sight of. The sitting Justice held that Barcus and Hallam on the one side and Irvine and Lihou on the other were the only persons interested in the corporation, the interest of the dummy stockholders of course not deserving consideration; that whatever issue of stock was then agreed to or subsequently ratified, would be legal as to them, whether the consideration was worth the par value or not, or was so judged by the directors or not, and that subsequent stockholders could not maintain a bill for the cancellation of the stock. This is undoubtedly correct so far as Irvine and Lihou are concerned. It would be correct as to subsequent stockholders who might purchase from the promoters or from Irvine and Lihou stock already issued, but it is not correct as to those who might without notice purchase directly from the treasury, because it ignores the fiduciary relation between promoters and such future purchasers. Were Barcus and Hallam simply strangers, dealing with an independent corporate body and making the best sale they could, it might be doubtful whether a future purchaser of stock could disturb the transaction in absence of actual fraud. That question, however, we are not called upon to decide. Here the parties selling are the promoters, and the parties buying are not the existing dummy stockholders but the future real stockholders whose cash alone will go into the treasury of the corporation and enable it to begin and carry on business. The purpose of the bill was therefore misinterpreted. The plaintiffs

do seek an accounting for secret profits of promoters, not in cash, because no cash was paid by the corporation nor has since been received by the promoters in the sale of their stock, but in restitution of the stock itself which the promoters secured from the treasury in violation of their trust, and which has not yet reached the hands of bona fide purchasers for value. It is on that ground that the bill should be sustained. The allegations in the bill and the facts proved are ample to warrant it.

It needs no argument to show that Barcus and Hallam were promoters of the corporation in the legal sense of the term. Am. and Eng. Ency. of Law, Vol. 23, page 232-3. The six incorporators who subscribed for only one share each of common stock had no real interest in the corporation but were nominees of Barcus and Hallam, four being in their employ. They were in the corporation simply to represent and act for the promoters and to do their bidding, and their stock if paid for at all was doubtless paid for by the promoters. The three shares issued to the attorney and the two residents of Maine were transferred to Barcus on December 15, one month after their issue. The corporation was not only created but manned by the promoters: it was in fact the promoters in a corporate guise, and it is the privilege as well as the power of the court in equity to remove the mask. With this ingeniously devised and smoothly working machinery the promoters experienced no difficulty in transferring to the corporation for $100,000 preferred and $799,400 common stock, the same rights which Irvine and Lihou stood ready to transfer for $100,000 preferred and $50,000 common, and which in fact Irvine and Lihou did transfer to the corporation for the less consideration, the promoters taking care that the transfer should be made not directly to the corporation but through themselves as a conduit, and that $749,400 of the common stock should adhere to them in transit. Have subsequent purchasers of preferred stock from the treasury paying full cash value therefor and without knowledge of this transaction no remedy under such circumstances? This question is of importance not merely to the parties in interest but to the general public in these days of frequent corporate promotion.

That a promoter of a corporation stands in a fiduciary relation to the corporation itself and to future stockholders therein is well settled. The leading English case is *Erlanger* v. *New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1298, where the subject is exhaustively discussed and the wholesome equitable doctrine firmly established. See also *In re Olympia*, L. R. 2 Ch. Div. (1898), page 153. The courts of this country have taken the same position whenever the question has been raised. The burden imposed upon promoters growing out of this fiduciary relation is clearly expressed in *Pietsch* v. *Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 1017, as follows:

"If one or more persons acquire property, intending to promote the organization of a corporation to purchase it from them at a profit to themselves and effect such purpose, limiting the membership to interested parties till the transaction is completed between them and the corporation, intending thereafter to cause the balance of the capital stock to be sold to outsiders, they being kept in ignorance of the true nature of such transaction, and effecting such intent, they are guilty of actionable fraud upon the corporation and responsible to it for the gains made. In such circumstances, in the making of the contract between the corporation and its agents, it is mere fiction as to its prospective members by original subscription. Since it has no one to stand for it as an adverse party in the transaction, no meeting of adverse minds, essential to a binding contract, occurs. The corporation is deceived, in that advantage is taken of its incapacity to protect itself, as to the interests of prospective memberships by the original taking of its stock." To the same effect are *Pittsburg Mining Co.* v. *Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, and note 161-8; *Plaquemines Tropical Fruit Co.* v. *Buck*, 52 N. J. Eq. 230; *Densmore Oil Co.* v. *Densmore*, 64 Penn. St. 43; *Burbank* v. *Dennis*, 101 Cal. 90; *South Joplin Land Co.* v. *Case*, 104 Mo. 572; *Hayward* v. *Leeson*, 176 Mass. 310; *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315, and see *Lomita Land & Water Company* v. *Robinson*, 97 Pac. Rep. 10, and full note in same; 18 L. R. A. N. S. 1106.

This court has laid down the same doctrine in this unequivocal language in a very recent case.

"It may be conceded, for it is well settled and true, that promoters of a corporation stand in a fiduciary relation to the corporation, to its subscribers for stock and to those who it is expected will afterwards buy stock in the corporation. The promoters owe to them the utmost good faith. If they undertake to sell their own property to the corporation they are bound to disclose the whole truth respecting it. If they fail to do this, or if they receive secret profits out of the transaction, either in cash or by way of allotments of stock, when there are other stockholders, or it is expected that there will be other stockholders, undoubtedly the corporation may elect to avoid the purchase; or it may hold the promoters accountable for the secret profits, if in cash, or may require a return of the stock if unsold, or if sold, an accounting for the profits of its sale." *Camden Land Co.* v. *Lewis*, 101 Maine, 78-95.

The case at bar falls within the ample scope of this rule. This bill is brought not to rescind the sale but to "require a return of the stock" "received as secret profits" by the promoters when they sold "their own property to the corporation" without "disclosing the whole truth respecting it" as they were "bound" to do. The necessary elements concur for its maintainance, the relations of the parties, the failure to disclose the whole truth concerning the property to the real parties in interest, the secret profits and the injury.

Had Barcus and Hallam been dealing with a stranger they could have asked any price they pleased and they would have been under no legal obligation to state the cost. "On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them to be material to the property and the purchase, or to see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to the beneficiary, no matter whether it is a case of trustee and cestui que trust, guardian and ward, solicitor and client or promoter of a corpora-

tion and the corporation itself." *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315, 322.

Such disclosure was not made here. That the promoters were turning over to the corporation through themselves, rights for which they were paying but one-tenth of the consideration was carefully concealed from the purchasing public, for the purchasing public as well as the corporation are deemed beneficiaries, and here they were the sole beneficiaries as the corporation itself was a mere farce. The defendants, however, say that there was no attempt at concealment, as the whole transaction was spread upon the records of the corporation where the intending purchaser could ascertain the facts. Were that true there would be merit in the defendant's claim, for perhaps in no better way could the information be given to an unknown body of purchasers than by recording it where it would be open to the inspection of all interested parties. But the records here are absolutely silent as to any contract with Irvine and Lihou, by which they agreed to assign the patent rights to the corporation for the smaller consideration. They show with suspicious detail the transaction between the corporation and Barcus and Hallam, but Irvine and Lihou appear only as transferee stockholders from Barcus and Hallam. The full transaction was not disclosed and the promoters' profits were certainly kept secret so far as the purchasing public was concerned. "A promoter of a corporation, whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts, but containing something, which, if followed up by further investigation, will enable the enquirer to ascertain that profits have been made and what they amounted to." *In re Olympia*, L. R. 2 Ch. Div. (1898) 153-166. Considering all the facts therefore, this would seem to be a case calling for equitable intervention, where good morals reinforce sound law, and the two work together to undo an attempted fraud.

Various defenses are interposed and these will be considered seriatim.

First. It is contended that under the Maine Statute the transaction was valid unless there was actual fraud. R. S., ch. 47, sec. 50, provides that any corporation may purchase property necessary for

its business and "issue stock to the amount of the value thereof in payment therefor . . . and the stock so issued shall be full paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased . . . shall be conclusive." This contemplates two independent contracting parties, the one buying and the other selling, each looking out for his own interests. It does not contemplate one party dealing with himself and acting in two capacities. It means also the honest and bona fide judgment of the directors and the facts here negative the idea that even these dummy directors were of the honest and bona fide opinion that the patent rights were worth the price paid, when there was in existence a contract to convey the same property to them for $50,000 instead of $799,400 of common stock. The sitting Justice so found. But this case does not proceed on that theory. It is not brought by a creditor to compel payment by a stockholder for stock up to par, nor by an existing stockholder to compel cancellation of stock illegally issued. The transaction is challenged because of the breach of the fiduciary relationship existing between the seller and the buyer and the consequent fraud upon future stockholders. A similar point was raised in *Hayward* v. *Leeson*, 176 Mass. 310, and the court answer it as follows: "But even if they did so believe and their belief was honest, and there was a foundation for that honest belief, they were none the less guilty of fraud. It is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized that one third of the whole capital stock of that corporation is a fair remuneration for their services as promoters, to issue one third of the capital stock to themselves as such remuneration and then to invite the public to subscribe to the stock of the corporation without disclosing the fact to the subscribers and without getting their consent to the payment of the remuneration." It is equally a fraud for promoters to issue to themselves three-quarters of the capital stock in excess of the contract price of property conveyed.

Second. The defendants rely upon a line of cases cited as holding that if such a transaction is agreed to by all the stockholders existing

at the time, even though they be dummy stockholders, no fraud is committed upon the corporation and the corporation itself cannot rescind. *Blum* v. *Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Tompkins* v. *Sperry, Jones & Co.*, 96 Md. 560, 54 At. Rep. 254; *Foster* v. *Seymour*, 23 Fed. Rep. 65; *McCracken* v. *Robison*, 57 Fed. Rep. 375; *Old Dominion Copper Mining Co.* v. *Lewisohn*, 136 Fed. Rep. 915, 148 Fed. Rep. 1020, 210 U. S. 206. These cases, however, with the exception of *Old Dominion Copper Mining Co.* v. *Lewisohn*, do not support the contention.

In *Blum* v. *Whitney*, supra, there was a consolidation of various constituent corporations and alleged stock jobbing operations resulted in profits to the manipulators. But the court in denying relief expressly stated that the facts of that case did not bring it within the law governing promoters, and that the rights of the public were not involved. In *Tompkins* v. *Sperry, Jones & Co.*, supra, all the stock and bonds were issued to the defendants, and any subsequent purchasers of stock purchased from the defendants and not the corporation. "The public were not invited to subscribe to any stock." The distinction between that case and those in line with *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218 is noted and the court expressly state that there is no conflict between them. The underlying principle is recognized in these words.

"The true test of the responsibility of parties occupying positions such as Sperry and Jones did, in putting the brewing properties into the company in this case, is whether other persons than themselves hold stock in the company, and are not made aware of the true state of facts, or are induced to come into it by concealment or misrepresentation of the facts, or have furnished all or part of the capital embarked in the enterprise, and are misled or kept in the dark as to the actual transaction. In other words, the ground of their liability is the concealment or misrepresentation by those whose duty it is, by virtue of their relation to the other persons interested in the transaction, to make a full disclosure. It is a misuse of terms in the present case to say that Sperry and Jones stood in a fiduciary relation to the company at the time they made the contracts with the brewers, or when they turned the property into the company in

payment for its stock and bonds. They, at that time, held all of its stock, and were the sole owners of the company. They were, in equity, the company itself. *Swift* v. *Smith, Dixon & Co.*, 64 Md. 428, 5 Atl. 534. There was no invitation to others to subscribe for the stock."

In *Foster* v. *Seymour*, 23 Fed. Rep. 65, and *McCracken* v. *Robison*, 57 Fed. Rep. 375, all the stock had likewise been issued to the promoters and directors in payment of the property sold, and therefore the transaction was acquiesced in by all those then interested and who might be interested in the corporation, except third parties who might purchase from the promoters and directors. Such third parties would be bound by the acquiescence of their vendors, and the corporation would be bound by the acquiescence of all its stockholders. Upon the authority of these last two cases, which lack the distinguishing element of future bona fide purchases of stock directly from the treasury, the Federal Court in *Old Dominion Copper Mining Co.* v. *Lewisohn*, 136 Fed. Rep. 915, where the corporation itself sought to rescind the sale or recover damages, extended the doctrine to a case where only a part of the stock was issued to the promoters and the balance to the public and held that the corporation had no remedy, and this decision has been affirmed by the Circuit Court of Appeals in 148 Fed. Rep. 1020, and by the Supreme Court of the United States, in 210 U. S. 206. This case stands upon its own authority and is in direct conflict with the decision of the Supreme Court of Massachusetts on precisely the same facts in *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315, before cited. The reasoning of Mr. Justice Holmes speaking for the former court is as follows:

"The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. . . . .

"At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. *Salamon* v. *A. Salamon & Co.*,

(1897) A. C. 22; *Blum* v. *Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Tompkins* v. *Sperry*, 96 Md. 560, 54 Atl. 254. If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation nunc pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now." . . . .

"It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede."

In *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315, the Supreme Court of Massachusetts carefully analyzed and distinguished all the cases cited by Justice Holmes as authorities and reaffirmed the decision in *Hayward* v. *Leeson*, 176 Mass. 310, where a corporation was allowed to recover secret profits from its promoters, who invited the public to purchase stock without apprising them of the fact that one-third of the entire capital had been issued to themselves as a remuneration for their services. Were the pending bill brought in the name of the corporation it would be necessary for this court to choose between these two decisions, and adopt the one best fortified by reason and authority. But that is unnecessary

here, as this bill is brought by the persons actually defrauded, the subsequent bona fide purchasers of the stock.

Without discussing therefore the reasoning in these antagonistic decisions, it is sufficient here to say that the Supreme Court of Massachusetts in case only a part of the stock has been issued, grants a remedy to the corporation itself and impliedly to the subsequent purchasers of treasury stock; while the Supreme Court of the United States denies it to the corporation, but intimates that subsequent purchasers might have the right, because they are the parties who are wronged. Both courts recognize the transaction as a fraud on subsequent purchasers of treasury stock and the case at bar, though perhaps the first one to apply the remedy directly in behalf of such purchasers, is clearly within the equitable principles that have been heretofore recognized. It would be strange indeed if the parties defrauded cannot be the parties plaintiff.

Third. That the plaintiffs have themselves received two hundred per cent of common stock as a bonus for their preferred and must therefore be held to have acquiesced in all that went before. But the plaintiffs cannot be held to have acquiesced in what they had no knowledge of, and those who were called as witnesses testified that they had no knowledge whatever of the past transactions. The burden of proving such knowledge was on the defendants. It appears that the stock was sold through agents employed by the dummy directors on most extravagant terms, one agent receiving a salary of twenty dollars per week, twenty-five per cent commission, and $30,000 of common stock in case he sold $5000 of preferred. Such agents would not be likely to reveal more than they deemed advisable, certainly not anything throwing suspicion upon previous methods of stock issue.

Fourth. That the plaintiffs do not come into court with clean hands; that another corporation, known as the Irvine Life Boat Handler Co. has been formed by Irvine and his associates, a majority of its board of directors being included among the plaintiffs; that this corporation has acquired a lease of the patents from the Marine Safety Appliance Co. and the plaintiffs have received from Irvine share for share in the new Company as a gift. Irvine

says that this was done to protect the preferred stockholders, but whatever its purpose, a careful study of the transaction fails to reveal anything soiling the hands of these plaintiffs and preventing their pursuing their equitable rights in the pending cause. The single Justice so found. The maxim of clean hands applies solely to some wilful misconduct with reference to the matter in litigation and not to some other illegal transaction, although it may be indirectly connected with the subject matter of the suit. *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101.

Fifth. That any wrong done, was to the corporation itself, and that remedy should have been sought in the name of the corporation and not of the stockholders. It is undoubtedly true that a bill in equity by a stockholder against a corporation charging that the directors have acted ultra vires and contrary to law will not ordinarily be sustained unless the corporation is shown to be unwilling or incapable of seeking the remedy for itself. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495; *Ulmer* v. *Real Estate Co.*, 93 Maine, 324; *Wells* v. *Dane*, 101 Maine, 67. But a rule ceases when the reason therefor ceases, and the law does not require a useless ceremony to be performed before relief can be granted. If it is apparent from the evidence that application to the officers of the corporation to take the necessary steps would be ineffectual the shareholders may proceed in their own name. In the case at bar it is true that the plaintiffs constituted a majority of the board of directors at the time this bill was filed, but had they taken this step in the name of the corporation it is evident that the defendants, controlling a large majority of the stock would speedily have held a stockholders meeting and have suppressed the proceeding. Their attitude of resistance to the bill when brought is conclusive proof of what it would have been had they been asked to take the initiative. The object of the rule is to prevent a single stockholder from harassing a corporation or its officers by citing it or them into court for every real or fancied grievance. If aggrieved he must seek his remedy through corporate channels. But that reason does not prevail here. The plaintiffs are attempting to secure relief which the evidence shows could not be obtained through

corporate channels and they therefore have a standing in this court. This exception is as well recognized as the rule itself. *Ulmer* v. *Real Estate Association*, *Wells* v. *Dane*, supra. Moreover the corporation is made a party defendant and this suit is brought in behalf of all holders of preferred stock, so that all parties are before the court.

Finally, that it would be inequitable to leave the promoters Barcus and Hallam without any compensation for services rendered and expenses incurred in connection with the promotion and development of the corporation and its business. There is merit in this contention and exact justice can be done these parties by the appointment of a master to hear and determine the claims of Barcus and Hallam for services and expenses and also to determine the value of the preferred and common stock at the time it was issued to them and upon the report of said master, the court to take such further action and make such further decree as the rights of all parties may require.

The entry must therefore be,

Appeal sustained.

Bill sustained, with one bill of costs against James S. Barcus, Willard F. Hallam and John P. Carrothers, and the Marine Safety Appliance Company.

Bill dismissed as to the other defendants with one bill of costs for such defendants.

Master to be appointed by the single Justice.

Decree in accordance with this opinion.

ALFREDA ROY *vs.* ALPHONCE POULIN.

Kennebec. Opinion May 28, 1909.

Bastardy Complaint. Non-resident Mother. Jurisdiction. Revised Statutes, chapter 99.

1. A non-resident mother of a bastard child may maintain filiation proceedings against a resident of this State, though the child was begotten and born in another State.
2. Filiation proceedings by a non-resident mother are properly entered in the county where the defendant resides.

On exceptions by defendant. Overruled.

Bastardy complaint entered in the Superior Court, Kennebec County at the January term, 1908. The defendant is a resident of Winslow in said county. At said term of said court, the defendant filed the following motion:

"And now comes the defendant on the second day of said term and moves that said action be dismissed, because he says that this Honorable Court has no jurisdiction, because the complainant is not a resident of this State, has no legal residence in the same and that the act of sexual intercourse and begetting of the child took place outside the limits of this State, and that she is not a resident of said County of Kennebec." This motion was overruled and the defendant excepted.

The case appears in the opinion.

Louis B. Lausier, for plaintiff.

F. W. Clair, for defendant.

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

EMERY, C. J. The question is this: — Assuming the defendant, a resident of this State, to be the father of a bastard child begotten

and born out of the State of a woman not then nor now a resident of this State, can the mother avail herself of our statutes and courts to compel him to contribute to the support of the child?

There are two views of this question, each well supported by authority. One is that the purpose of the statute is to secure the maintenance of illegitimate children liable to become paupers in the State, and hence the statute does not apply to the illegitimate children of non-resident mothers. The other view is that the statute converts an existing moral obligation of the father into a legal obligation, enforceable like any other legal obligation upon the obligor if within the jurisdiction. We think this latter view the correct one. The father of an illegitimate child is certainly under a moral obligation to assist the mother in its maintenance. Our statute makes the obligation legal and enforceable. The moral duty is made a legal one, and we see no good reason why our courts may not enforce it, if the father is subject to our jurisdiction and the mother submits herself to it.

The statute is general and comprehensive. It is the mother who is authorized to invoke the statute. Overseers of the poor cannot invoke it, except in her behalf. In case of her death pending the suit her executor or administrator is to prosecute it to final judgment. It is her suit, her remedy. The statute does not limit the remedy to residents. It opens the door of the court to any unfortunate mother of a bastard child without exception. If the court has jurisdiction over the father, it should not turn away a mother willing to submit herself to it. It should enforce upon persons subject to its jurisdiction at the suit of any aggrieved persons resident, or non-resident whatever the statutes of the State declare to be a legal duty.

In *Hodge* v. *Sawyer*, 85 Maine, 285, the complainant was a non-resident and the child was born in another State, yet the suit was sustained. True the child was begotten in this State while the mother was commorant here, but that circumstance was immaterial. It cannot matter where the child was begotten or born; the duty to contribute to its maintenance is the same. In this case the defendant is a resident of this State, and is subject to our laws one

of which is that the father of a bastard child shall contribute to its maintenance at the suit of the mother.

As to the venue, the suit was rightly entered in the county of the defendant's residence, the plaintiff not being a resident in any county in the State.

Exceptions overruled.

In Equity.

ANNA C. PEIRCE *vs.* CITY OF BANGOR.

Penobscot. Opinion May 28, 1909.

Eminent Domain. Just Compensation. Interested and Disinterested Tribunals. Appeal. Death of Appellant Pending Hearing. Statutory Construction. Constitution of Maine, Article I, section 21. Revised Statutes, chapter 4, sections 89, 90, 91; chapter 23, sections 8, 20; chapter 84, section 50.

1. Payment of just compensation is a condition precedent to an appropriation of land for public uses.
2. The legislature has in the first instance the right to prescribe the method of fixing the compensation for land taken for public uses, but the State Constitution requires that the compensation be just, i. e., fixed by a disinterested tribunal.
3. Compensation fixed by an interested tribunal is not just, unless agreed to.
4. The municipal officers of a city are not, where their city is interested, a disinterested tribunal.
5. Compensation fixed by municipal officers if not appealed from by the land owner, is just compensation.
6. Compensation fixed by municipal officers if appealed from by the land owner, is not just compensation.
7. In case of an appeal just compensation cannot be ascertained until the appeal is heard and determined.

8. If because of the death of the appellant, the land owner's appeal cannot be heard, then condition precedent has not been complied with and the land cannot be appropriated.

9. The Constitution of Maine, Article I, section 21, provides that "private property shall not be taken for public uses without just compensation." This provision for "just compensation" assumes the existence of a tribunal to determine the "just compensation."

10. When a statute may be interpreted in two ways, one of which works manifest inequitable results, and the other just and reasonable results, the latter must prevail.

11. The city of Bangor instituted proceedings for the taking of certain land for a public library lot. The municipal officers awarded the owner of the land $45,000 as damages for the taking and the owner appealed. While the appeal proceedings were pending the land owner died. *Held:* That the whole proceeding for taking the land abated and became void ab initio.

In equity. On appeal by plaintiff. Sustained.

Bill in equity brought by the plaintiff to enjoin the defendant city from occupying for a public library lot the land described in the bill. The defendant city, without answering, filed a general demurrer to the bill. The Justice hearing the matter sustained the demurrer and dismissed the bill. The plaintiff then appealed as provided by Revised Statutes, chapter 79, section 22.

NOTE. In connection with the case at bar, see *Hayford* v. *Bangor*, 102 Maine, 340, and 103 Maine, 434.

The case is fully stated in the opinion.

E. C. Ryder, and Hugo Clark, for plaintiff.

Donald F. Snow, City Solicitor, *Charles A. Bailey, and Louis C. Stearns*, for defendant.

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

SPEAR, J. William B. Hayford late of Bangor died testate seized and possessed of certain real estate situated at the corner of Franklin and Hammond streets in Bangor. This property was given by him to his wife in trust during her life. At her decease the trust was to terminate and the trust property to vest in Anna C. Peirce, if living, otherwise in her issue. Mrs. Hayford qualified as trustee and became seized and possessed of the premises in question.

While so seized and possessed the city council of the city of Bangor, acting under the provisions of sections 89, 90 and 91 of chapter 4 of the Revised Statutes upon a petition in writing signed by 36 tax payers, properly describing the land and the owners as far as known, directed the municipal officers to take the premises for a lot for a public library building if they found the land suitable for that purpose. The municipal officers acting under the instructions given proceeded to take the premises for a lot for a public library building, awarding to Mrs. Hayford in her capacity as trustee for damages for such taking, the sum of $45,000. From the award of the municipal officers Mrs. Hayford in her capacity as trustee appealed to the Supreme Judicial Court, praying that a just estimate of the damages be had and determined as provided by law. This appeal was entered at the October term of court in 1906. While the appeal proceedings were pending Mrs. Hayford died testate and Anna C. Peirce was appointed administratrix with the will annexed. At the October term 1907, Mrs. Peirce offered to go into court and prosecute the appeal, both as administratrix and as beneficiary under the will of William B. Hayford, whereupon the city filed a motion asking that her name be stricken from the docket upon the ground that she had no right to appear for the reason that the appeal proceedings abated upon the death of Mrs. Hayford. The Law Court held that the death of Laura Hayford abated her complaint and that neither her legal representative nor her successor in title should prosecute it. *Hayford* v. *Bangor*, 103 Maine, 434.

The regularity of the proceedings and their validity in the first instance are not questioned. In fact they have been adjudged good. *Hayford* v. *Bangor*, 102 Maine, 340. Upon the death of Mrs. Hayford, Anna C. Peirce, the plaintiff, succeeded to the legal title in the premises in question if the condemnation proceedings proved ineffective. She refused the tender of the $45,000 awarded by the municipal officers. Nothing further was done until the city attempted to tear down the buildings on the premises. Thereupon a bill in equity was filed by the plaintiff as owner of the land asking for a preliminary and permanent injunction restraining the city from interfering with the property alleging that by the death of

Mrs. Hayford not only her complaint for damages to be determined by the court abated but the whole proceedings for the taking of the land abated and became void ab initio. The preliminary injunction was granted upon the filing of the statutory bond. The city before making an answer to the bill filed a general demurrer. Upon hearing a decree was filed sustaining the demurrer and dismissing the bill. From that decree the plaintiff appealed and upon this issue the case comes before us.

We shall spend no time in determining that Mrs. Hayford's complaint should be regarded as an appeal from the assessment of damages by the municipal officers, R. S., ch. 4, sec. 91, and ch. 23, sections 8 and 20, construed in pari materia clearly establish this proposition. Section 8 provides that any person aggrieved by the estimate of damages . . . . "may appeal therefrom."

Therefore the issue in this case is not what was the effect of Mrs. Hayford's appeal, for it is conceded that the appeal alone merely suspended the judgment below;—but what was the effect of her death upon her appeal? Did it abate the whole proceeding or did it revive the judgment below? It is admitted that our statute is silent upon this point nor has our court passed upon it. The sitting Justice who dismissed the bill said: "The status of an award of damages by municipal officers for town ways, pending such a complaint, has never been precisely determined by the court, so far as I can discover. Whether the original assessment is absolutely vacated by the complaint, as judgments in common law actions are vacated by an appeal from an inferior to a superior court, or as decrees of the probate court are vacated by an appeal to the Supreme Court of Probate, or as decrees in equity are vacated by an appeal to the Law Court, or whether the operation and effect of the assessment is merely suspended, pending a review or revision of the same on complaint, has never been adjudicated."

Therefore it would seem that this court is now perfectly free to determine whether the appeal in the case at bar abated the proceedings or left them merely in abeyance so that they revived and became effective as a judgment by the death of the appellant. This is purely a matter of statutory construction and should be

decided in accordance with the well settled rules. "The object of construing a statute is to ascertain the intent of the legislature. This should be done by an examination of the phraseology of the statute itself, and by ascertaining the circumstances and conditions surrounding, and the subject matter, object and purpose of the enactment of the statute." *Church* v. *Knowles*, 101 Maine, 264.

It has also been held that the effect of a statute upon the subject matter of the enactment is of vital importance in ascertaining the intent of the legislature. After speaking of the burden of double taxation imposed by an explicit statute, *East Livermore* v. *Banking Co.*, 103 Maine, 418, the court say: "This section, however, should not be read by itself. It is only a part of the statute upon taxation. It should be read in connection with the other statutes prior and contemporaneous, and also in the light of contemporaneous and subsequent practical construction by the taxing officers and business public." In other words, that the effect of the statute upon business interests as understood by the "business public" must be taken into consideration in determining the rights of parties to be affected by the construction given.

This is not cited because it is a new rule of construction, but because it is specific in its application. Now, the rule established in this case is, that, when a statute may be interpreted in two ways, one of which works manifest inequitable results, and the other just and reasonable results, the latter must prevail. In other words, that unless the statute demands it, it cannot be presumed that the legislature intended to enact a law calculated to work manifest wrong and injustice. We find no such statute.

On the contrary nothing can be made plainer, that the legislature intended to give the land owner an appeal and trial by jury, than the fact that it expressly provided for them. Therefore the intent to be sought in this case is, not whether the legislature intended to give a trial by jury but whether their intent, in this regard, is to be defeated by an accident, a failure to provide for a contingency undoubtedly not thought of. For to declare that the legislature provided for an appeal, and then deliberately omitted a provision for survival in case of death, would be a base aspersion of its

integrity. Because, then, they forgot to so provide should their intention be, not upheld, but defeated? Not unless judicial construction requires it. In the light of these rules let us construe Mrs. Hayford's rights in filing an appeal.

The constitution provides that "Private property shall not be taken for public uses without just compensation." Section 89, ch. 4, R. S., authorizes the municipality to take land for a library and sections 90 and 91 prescribes the method of making "just compensation." As a part of this method, sections 8 and 20, R. S., ch. 23, the owner has a right to appeal to the Supreme Judicial Court and have "just compensation" determined by a jury. It is admitted that Mrs. Hayford completed and entered her appeal and that it was pending when she died. This court held that her appeal did not survive, no statute providing therefor. The defendants admit by their demurrer to the plaintiff's bill that the property, which these municipal officers valued at $45,000 is worth $125,000. Her appeal was defeated by vis major: Neither the original land owner nor the present appellant was in any respect at fault. The damages for the land taken have never been determined in accordance with the mode prescribed by the statute. If the defendants' contention prevails a gross injustice may result. Under these circumstances what was the object, purpose and intention of the legislature in giving the right of appeal? That the appellant should be finally heard if she so desired, by a disinterested tribunal,—or that she should be obliged, without fault on her part, to submit to the judgment of an interested board of municipal officers? When the constitution of Maine was adopted not one of the men, comprising this municipal board, could have been permitted to sit on this case as a juror, nor would he now. R. S., ch. 84, sec. 50, forbids a Justice of the S. J. C. to sit in the trial or disposal of an action in which his county or town is a party or interested, except upon waiver of the adverse party. In *Conant's Appeal*, 102 Maine, 477, it is said: "It is a maxim of the law that a person ought not to be judge in his own cause, because he cannot act both as judge and party, and it applies in all cases where judicial functions are to be exercised whether in proceedings of inferior tribunals or in

courts of last resort. *Dimes* v. *Proprietors of Grand Junction Canal, 3 House of Lords Cases,* 759, 793; *Queen* v. *Justices of Hertfordshire,* 6 Q. B. 753; *State* v. *Castleberry,* 23 Ala. 85; *Meyer* v. *City of San Diego,* 121 Cal. 102; *Tootle* v. *Berkley,* 60 Kan. 446; *Pearce* v. *Atwood,* 13 Mass. 324; *Cooley's Constitutional Limitations,* 592, 595. This rule has been established since the earliest periods of the common law. *Bonham's Case,* 8 Coke, 118. The reason for it expressed by Bronson, J., in *The People* v. *The Suffolk Common Pleas,* 18 Wend. 550, shows its universal application. "Next to the importance of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

An act of the legislature cannot change the influences that may act upon a man's mind. His self interest is the same whether he is acting under authority of a statute or upon his own volition the other elements being equal. Therefore, it follows that the municipal officers were not, in fact, disinterested. But it may be asked why the legislature authorized a board to be constituted of interested parties? It never would have done so without coupling with the procedure the right of appeal. The appointment of the municipal officers under our New England form of government, where the town is the unit, to act in the first instance with respect to certain matters affecting the municipality, was a most convenient method, and their action would naturally lead to a final determination of most matters submitted. But, to the party who felt aggrieved at the decision of this interested tribunal, the right of appeal, it seems to us, was emphatically intended, not only for the purpose of "securing a righteous judgment" but of doing so in such a manner as "will beget no suspicion of the fairness and integrity of the judge." — In this case the municipal officers were financially interested in the result of the litigation and absolutely ineligible at common law. But it is clear that if the defendant's contention is sustained, the right of appeal, the safety valve of this mode of procedure, would utterly fail of its purpose.

On the other hand, what harm can result to the defendant in this or any other similar case by sustaining the plaintiff's contention

that the whole proceeding abate? The land, barring the possibility of destruction by a convulsion of nature, will remain. The city will retain all its municipal powers. It can at any moment begin new proceedings of condemnation. It can suffer no hardship except the inconvenience of some delay, and a trifling matter of expense, infinitesimal in its distribution among the tax payers.

At this juncture, we admit the court has the power, if constitutional, to interpret the statute in question in favor of the contention, either of the plaintiff or defendant. But under the rules of construction found in the recent cases cited, it has the duty of construing it in harmony with just and equitable results. We find ourselves in a position that not only enables, but commands, us to give the latter interpretation. We find no statute or decision of our court that forbids it. A contrary construction would put the legislature in the position of permitting, if not contemplating, the perpetration of a wrong.

By this construction both parties to the proceeding receive their constitutional and statutory rights. The city, by a new taking, may acquire the land; it is entitled to this and nothing more. The owner, by a new trial, can get "just compensation;" she is entitled to this and nothing less. Submission to this rule hurts nobody.

It is suggested, however, that it is startling to think that, by parity of reasoning, town ways or even highways would all be abated and made void by the death of any land owner pending his appeal, but, to the mind of the court, it would appear more startling to contemplate the taking of a person's land, in invitum, without a fair trial. If the legislature has failed to provide for the survival of the appeal why should not they be abated? These highway proceedings have abated in this State as the books will show scores of times upon the most trivial technicality. Why not for a substantial reason? Besides, the infrequency of the present contingency, it never having happened before so far as we know, makes it too remote to be invoked for the purpose of defeating the plain requirements of justice.

What would this court say in regard to the constitutionality of a statute that made a board of railroad directors a tribunal of final award upon the question of land damages taken by their company? It is as much a right of way as a highway or town way, and the same legal and constitutional question is involved. The transaction, if permitted by statute, would not only startle but dismay. Yet this is the logic of the defendant's position.

But now, as bearing upon the intent of the legislature in giving an appeal, and omitting to provide for the contingency of death, let us consider the effect of the defendant's contention upon the rights of the parties. This position is so closely stated in the decree dismissing the bill, that we adopt it. "The plaintiff alleges in her bill that the property for which the municipal officers awarded $45,000 is worth $125,000, and therefore that she is being deprived of her property without just compensation. And she contends that since the allegation must be held to be admitted by the demurrer, she is entitled in any event to maintain her bill upon this allegation. It does not seem so to me. If the land was legally taken, and if the damages were legally assessed by a legally competent tribunal, before which the owner had a right and opportunity after notice, to appear and be heard, and if that assessment now stands as the final award, the plaintiff is concluded by it, and the fact, assuming it to be so, that the municipal officers erred in their judgment as to the value is not material in this bill for an injunction. The complainant cannot be heard again on that question by any tribunal."

We are not quite able to agree with this conclusion. The appellant who had been brought into court, in invitum, and who had conformed to every provision of law should not by the act of God be subjected in her estate to even probable injury. Had she once been heard or had an opportunity to be heard, she should be concluded. But this is not the case. She has never been heard. By inevitable accident she is construed out of court, where her appeal was legally pending. We are aware that the value of the land is admitted only as a matter of pleading, and is entirely open upon a new procedure; yet the logic of the case must assume it to be as

stated. It is admitted by the defendant and we have before us no other evidence. We hardly think this contention should be permitted to prevail and supersede a construction that does justice to all and injustice to none.

This construction of the statute giving a right of appeal is supported by analogous cases in other jurisdictions. *Johnson* v. *Baltimore and N. Y. Ry. Co.*, N. J. Eq. 17 Atl. 574, is a case involving the effect of an appeal under a statute precisely like ours with respect to the right of a trial by jury in the appellate court. The issue was whether the taker had a right to the possession of the land, pending the owner's appeal. The question turned upon the effect of the appeal. It may be said that this case does not apply, as in the case at bar, no appeal is pending. But this is not a fair criticism. In the New Jersey case the appeal had not been prosecuted at all. It had simply transferred the case to the appellate court, nothing more. The reasoning of the opinion applies only to the effect of taking and completing the appeal. In this respect it is exactly like the case at bar. Mrs. Hayford had taken and completed her appeal and it was pending in full force and effect, when she died.

The Chancellor in construing the New Jersey statute and the effect of the appeal under it said: "This, as it seems to me, is the obvious meaning of this clause, and this construction conforms to what, in my judgment, must be regarded as sound principle. Where the legislature provides, as part of the method of ascertaining what is just compensation, that the land owner may appeal from the award of the commissioners, and have a trial by jury, it would seem to be entirely clear that it cannot be said, after an appeal has been taken, that what is just compensation in that particular case has been ascertained in the manner appointed by law; for in such a case a right to a trial by jury constitutes a very material part of the method appointed by law for the ascertainment of what is just compensation, and until what is just compensation has been ascertained in the manner authorized by law, and the condemnation money paid, either actually or constructively, it is not within the power of the legislature to dispossess the land owner and put another person in possession of his land. To the same effect is *Maskall* v.

Maskall, 3 Sneed, Tenn. 208, see also *Loring* v. *Hitchcock*, 2 Ohio, 274.

It could not have been the intention of the legislature that the appeal should abate by death and leave the rest of the procedure valid.

There is another construction which we believe supports the plaintiff's contention. It will be observed that the clause of the constitution involved does not authorize the taking of private property. It was not intended to. It says it "shall not be taken . . . without just compensation; that is, if a municipality does take private property it must pay for it. To secure "just compensation" is the sole object and purpose of the constitutional provision. So solicitous were the founders of the State, upon this matter, that they declined to leave the question of "just compensation" to the action of the legislature, but made it a requirement of the fundamental law. *Comins* v. *Bradbury*, 10 Maine, 447. In view of the great care manifested upon this subject, what tribunal did the framers of this clause have in mind, as competent and qualified to determine this question of "just compensation?" For, the provision for just compensation assumes the existence of a tribunal to determine it. The constitution does not expressly define the tribunal. It has left the determination of this question to implication and judicial construction. The only question, therefore, is what sort of tribunal did the people, adopting the constitution, intend? To determine this we may refer to the competency of contemporary tribunals and methods of procedure.

The implication is that they expected just compensation to be finally determined by a tribunal whose qualifications for competency should substantially correspond with the requirements of their time. Upon this point Cooley in his Constitutional Limitations says: "But when there has been a practical construction which has been acquiesced in for a considerable period, considerations of adhering to this construction, sometimes present themselves with a plausibility and force which it is not easy to resist." In the light of this rule can it be held that the municipal officers of the city of Bangor, tax payers and financially interested, even by express statute, could be made a court of last resort upon this important question?

The statute authorizing the proceedings before us allows "any city or town containing more than one thousand inhabitants upon petition in writing," etc., to take private property. These officers are constituted a court, in the first instance, to determine what is just compensation for such taking. The authority of the legislature to prescribe this method is not questioned. But, barring the palpable incapacity of the selectmen of small towns, was this a tribunal, at the time our constitution was adopted, that had final jurisdiction over questions of this nature? For the most obvious reason and by established law it was not. At that time, the law required that a judge, juror or any other tribunal, charged with the duty of deciding property rights, should be absolutely disinterested. Even a trial justice in the most trivial case could not sit upon a question, in which his town was to receive the slightest financial benefit. The decision of our own court upon this point has already been referred to in *Conant's Appeal*, supra; and so particular is our court upon this question, today, that, where one of the selectmen who signed the return upon the petition for a way, also signed the petition for laying out the way, although an appeal from the action of the selectmen was taken to the Supreme Judicial Court and a disinterested committee appointed, who reported to the court, yet the court held that the whole case should abate because of the interest of the selectman who signed the petition and the return. See *Conant's Appeal*, supra.

Pearce v. *Atwood*, 13 Mass. 324, decided in 1816, is a case in which a justice of the peace, who received the complaint and issued the warrant, was an inhabitant of the town to whose use a moiety of the penalty to be recovered was to be applied. It was held that "he was interested in the prosecution and, therefore, could not sit as a judge."

In giving expression to their decision the court used this emphatic language: "It is very certain that, by the principle of natural justice, of the common law, and of our constitution, no man can lawfully sit as judge in a cause in which he may have a pecuniary interest. Nor does it make any difference that the interest appears to be trifling; for the minds of men are so differently affected by the

same degrees of interest that it has been found impossible to draw a satisfactory line. *Any* interest, therefore, *however small*, has been held sufficient to render a judge incompetent. The only exception known, to this broad and general rule, exists where there may be a necessity that the person so interested should act, in order to prevent a failure in the administration of justice."

The court also quotes the language of Lord Mansfield in *Hesketh* v. *Braddock*, a prosecution for a penalty which was only five pounds, in which he said: "There is no principle in the law more settled than this, that any degree, even the smallest degree, or interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned; and the minuteness of the interest will not relax the objection; for the degrees of influence cannot be measured; no line can be drawn, but that of a total exclusion of all degrees whatever."

This language is held to apply to a judge or magistrate as well as a juror and to bring him within this general exclusion on account of interest.

This was the law of Massachusetts when our constitution was adopted. A disinterested tribunal was the one required by the law at that time. And the common law of Massachusetts, not the common law of England, is the law of the land which controls the interpretation of our constitution. *State* v. *Knight*, 43 Maine, at page 123. Now, while it is not contended that the land owner was, as a matter of right, entitled to a jury trial, it is confidently insisted that the constitution contemplated that he was entitled to be finally heard, if he desired, by a disinterested tribunal. The query, therefore, presented upon this phase of the case is, if the legislature by positive statute had undertaken to subject the land owner's rights to the final decision of a tribunal, interested in fact, without appeal, would it be such a tribunal as was contemplated by the constitution? If not, then the defendant must fail, for it could not be permitted to do indirectly, by mistake or omission, what it could not do directly.

There is still another ground upon which we think the defendant must fail.

A full compliance with the method of giving just compensation prescribed by statute, must be regarded as a condition precedent to the right of a municipality to assert legal ownership. It should be noticed upon this phase of the case, that it is not incumbent upon the private owner to begin any kind of a proceeding to obtain just compensation. It is the bounden duty of the taker to make it before he can acquire title. Although the owner, if dissatisfied, must take an appeal yet the burden is still upon the taker to make just compensation. The appellant need do nothing but appeal to impose this duty. The question of taking is not at all involved. The statutory procedure of taking being legally accomplished then the constitutional duty of making compensation begins. The appeal brings up the question of compensation and nothing else. But the taking, although in all other respects regular, is not completed until just compensation is awarded. R. S., ch. 23, sec. 8. It is incumbent upon the taker to observe all requirements of law in order to complete the taking and make it legal. *Leavitt* v. *Eastman*, 77 Maine, 117; *Conant's Appeal*, 102 Maine, 477. He must therefore prosecute the appeal to judgment.

Unforeseen pitfalls and dangers are obstacles which the movers must encounter and overcome, and not the owners. The appellant has nothing to do but wait for a tender of "just compensation" awarded in compliance with law. She need put in no evidence, either before the original or appellate tribunal. She may suffer thereby, but she can remain passive if she likes. But it is still incumbent upon the taker to proceed to the end, and procure a judgment of just compensation. In other words such judgment is clearly intended as a condition precedent to the right of the city to obtain legal title to the land of Mrs. Hayford. It was the duty of the city to comply with the law and not Mrs. Hayford's duty to make them. The burden of procuring a judgment of just compensation rested upon the city from the beginning to the end. This interpretation of duty will probably not be disputed by the defendant.

But how does it undertake to discharge this duty? By simply saying that an unforeseen accident having happened on account of

which it is unable to continue its present process, it will abandon the only question pending in court and one which by express statute it was bound to determine, and return to the very judgment from which the appeal was taken, leaving the land owner's appeal unheard, as entitled by the law prescribing the method of procedure when the taking was begun.

Besides the force of reason and fair dealing against such a procedure we believe *Comins* v. *Bradley*, 10 Maine, 447, fully sustains the contention that compliance with the provisions of the law prescribing the manner of determining just compensation, is a condition precedent. This was a case in which the legislature authorized the taking of land for a State road without providing for compensation. It was argued that the State being the taker, the defendant might go to the legislature and have just compensation determined there. But the court, after commenting upon the scrupulous regard with which this constitutional right had been treated, proceeded to say: "It is insisted that the present action ought not to be sustained; inasmuch as the plaintiff might have full justice done him upon petition to the legislature. But this could not have been the mode, by which to obtain the indemnity, contemplated by the constitution. It is too precarious and uncertain a character. Compensation must be made or provided for, when the property is taken. It is upon that condition, alone, that such taking is authorized."

It is manifest from this opinion that in taking private property for a public use, just compensation is the principal, and the taking, the incidental thing to be considered. Transpose the phraseology of the constitution and its meaning becomes more readily apparent. It would then read "without just compensation private property shall not be taken." The determination of compensation is the part of the procedure of taking which the legislature cannot leave even to itself, as we have already seen in the case last cited.

Therefore a legal taking in the end is dependent upon a legal award of just compensation and cannot, in a perfected appeal, be separated from the appeal. With the fall of the appeal by abatement through death, the whole case must go. The city, therefore,

being unable to prosecute Mrs. Hayford's appeal to a judgment of just compensation the whole proceeding abated and became void ab initio.

It is well settled that cases of this class come within the equity jurisdiction of the court. *Richie* v. *Bar Harbor Water Co.*, 75 Maine, 91.

Appeal sustained.
Decree reversed.
Temporary injunction made permanent.
New decree in accordance with this opinion.

INHABITANTS OF ORONO, Appellants,

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion June 1, 1909.

Statutory Construction. Municipal Bridges. Street Railroads Passing over Same. Repairs on such Bridges. Apportionment of Expense of such Repairs. Railroad Commissioners to Determine such Apportionment. Decision of Same Must Stand Unless Illegal or Unjust. Private and Special Laws, 1826, chapter 390; 1854, chapter 281; 1865, chapter 528; 1887, chapter 51. Revised Statutes, chapter 51, section 75.

The real meaning of a statute is to be ascertained and declared even though it seems to be in conflict with the words of the statute.

The literal import of language used in statutes is often seemingly at variance with what was obviously intended. In such case the intention and not the literal import is to govern.

That which is within the intention of a statute, is within the statute, as if it were within the letter of it.

Revised Statutes, chapter 51, section 75, provides as follows: "Sec. 75. Bridges erected by any municipality, over which any street railroad passes,

shall be constructed and maintained in such manner and condition as to safety, as the board of railroad commissioners may determine. Said board may require the officers of the railroad company and of the municipality to attend a hearing in the matter, after such notice of the hearing to all parties in interest as said board may deem proper. Said commissioners shall determine at such hearing the repairs, renewals or strengthening of parts, or if necessary, the manner of rebuilding such bridge, required to make the same safe for the uses to which it is put. They shall determine who shall bear the expenses of such repairs, renewals, strengthening or rebuilding, or they may apportion such expense between the railroad company and the city or town, as the case may be, in such manner as shall be deemed by the board just and fair, and shall make their report as hereinafter provided."

Held: That this statute is not necessarily limited to bridges actually "erected" by the municipality, but includes all highway bridges which municipalities are bound to maintain and keep in repair, and over which any street railroad passes.

The legislature having left to the board of railroad commissioners the whole question of how bridges over which street railroads pass shall be constructed and maintained, as to safety, and given them authority to apportion the expense between the railroad and the town, "in such manner as shall be deemed by the board just and fair," their decision of apportionment must stand unless manifestly illegal or unjust.

Where the railroad commissioners examined a bridge over which a street railroad passes, determined what repairs were necessary, approved plans and specifications for those repairs, required the work to be done to their satisfaction, gave hearings to all parties in interest, and made their decision that the town should pay a little less than one-half part of the amount the railroad claimed to have paid for the repairs under a written contract, *held,* that the decision of the railroad commissioners was not manifestly illegal or unjust.

Where it was provided in the charter of a street railroad company that "said corporation shall keep and maintain in repair such portions of the streets, town or county roads, as shall be occupied by the tracks of its railroad, and shall make all other repairs of said street or roads which shall be rendered necessary by the occupation of the same by such railroad," *held,* that the street railroad company was not necessarily required by this provision in its charter to maintain and keep in repair the entire structure of a bridge over which its railroad passes, but to what extent certain repairs made on the bridge were rendered necessary by the occupation of it by the railroad company was a question for the determination of the railroad commissioners.

Where a bridge over which a street railroad passes, was for sixty years a toll bridge and formed a part of a highway in a town, and more than twenty years ago the town, by voluntary municipal action, took over the bridge, making it free forever after, and thereby assumed the duty to keep and

maintain it as a part of its highway, and has performed that duty ever since, *held*, that the bridge comes within the purview of Revised Statutes, chapter 51, section 75, irrespective of the fact that it was not originally erected by the town or that the town may not have acquired a good and sufficient title thereto when it purchased the bridge.

On report. Decision of Railroad Commissioners sustained and affirmed.

Appeal by the inhabitants of the town of Orono, Penobscot County, from a decision of the Railroad Commissioners apportioning to that town a part of the expense of certain repairs upon the bridge therein across the Stillwater branch of the Penobscot river, over which bridge the street railroad of the defendant passes, and which said appeal was duly entered in the Supreme Judicial Court in said county. The matter was heard in said court and at the conclusion of the evidence and by agreement of the parties the case was reported to the Law Court for determination.

The case is stated in the opinion.

Charles J. Dunn, and Louis C. Stearns, for plaintiffs.

E. C. Ryder, for defendant.

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

KING, J. On report. An appeal by the inhabitants of the town of Orono from a decision of the Board of Railroad Commissioners apportioning to that town a part of the expense of certain repairs upon the bridge therein across the Stillwater branch of the Penobscot river, over which bridge the street railroad of the defendant passes.

The statute under which the decision was made (chap. 51, sect. 75, R. S.) is as follows: "Bridges erected by any municipality, over which any street railroad passes, shall be constructed and maintained in such manner and condition, as to safety, as the board of railroad commissioners may determine. Said board may require the officers of the railroad company and of the municipality to attend a hearing in the matter, after such notice of the hearing to all parties in interest as said board may deem proper. Said

commissioners shall determine at such hearing the repairs, renewals or strengthening of parts, or if necessary, the manner of rebuilding such bridge, required to make the same safe for the uses to which it is put. They shall determine who shall bear the expenses of such repairs, renewals strengthening or rebuilding, or they may apportion such expense between the railroad company and the city or town, as the case may be, in such manner as shall be deemed by the board just and fair, and shall make their report as hereinafter provided."

March 4, 1908 the Board of Railroad Commissioners, upon petition of the defendant, and after notices to all parties in interest and hearings, made their decision (so far as material here) "that the Bangor Railway and Electric Company shall repair the bridge under the direction of the Railroad Commissioners, so as to make it safe for the passage of cars and teams and carriages over it. We estimate the cost of repairing the bridge to the satisfaction of the Board of Railroad Commissioners, to be in the neighborhood of six thousand dollars, and we apportion the expense between the municipality and the railroad company as follows: The Bangor Railway and Electric Company shall repair the bridge, and the town of Orono shall pay said Bangor Railway and Electric Company towards said repairs, when the Board of Railroad Commissioners shall have given its certificate of safety, the sum of twenty-five hundred dollars."

The bridge was originally built as a toll bridge by the Proprietors of the Stillwater Bridge, a corporation chartered and organized under chapter 390 of the Private and Special Laws of Maine, approved February 13, 1826, by which it was provided that "the tolls shall commence on the day when said Bridge is first opened for passengers and continue for and during the term of thirty years next ensuing." It does not appear when the bridge was "first opened for passengers." By an Act of the legislature, approved April 1, 1854, all rights under the charter were extended ten years, and authority was granted to the company to sell and to the town of Orono to buy the bridge at any time during the extension. Again, by an Act approved February 24, 1865 the charter was extended thirty years more, with provisions under which the bridge

could be sold to the town during that period. And, lastly, by an Act approved February 7, 1887 the charter was further extended for twenty years; "and all the rights, privileges, immunities and liabilities granted and insured, by the act of incorporation of said Proprietors, approved February thirteen eighteen hundred and twenty-six, by the act of extension approved April one eighteen hundred and fifty-four, and by the further act of extension approved February twenty-four eighteen hundred and sixty-five, are hereby continued and extended for said period of twenty years," which language is sufficient to extend all the provisions for sale of the bridge as specified in the extensions referred to. This Act, however, did not go into effect until thirty days after the recess of the legislature passing it, or until April 17, 1887. The appellants introduced some evidence tending to support the claim that the extension granted by the Act approved February 24, 1865 expired by limitation in March 1887, and they maintain that because of such expiration of its chartered rights the bridge company became thereby divested of all its rights and property in the bridge, which then became and has continued to be the property of the State, and therefore that no title to the bridge was acquired by the town under the attempted purchase of it from the bridge company as hereinafter noted.

At a meeting of the inhabitants of Orono legally called for the purpose a committee, appointed at the previous annual meeting to negotiate a trade, if possible, with the Stillwater Bridge Company for the purchase of the bridge, made report recommending its purchase and that $500 be at once expended on it in repairs. The report was accepted. The town voted to buy the bridge and raised money for that purpose and to repair it. By deed dated May 7, 1889 the Proprietors of the Stillwater Bridge conveyed to the Inhabitants of Orono "The bridge of the said Proprietors over the Stillwater river in said town of Orono including piers, abutments, and all property of said Proprietors appurtenant to and connected with said bridge, together with all rights and franchises." Subsequently the selectmen of Orono granted permission to the Bangor, Orono & Oldtown Railway Company, the predecessor of the defend-

ant, to run its cars across this bridge, and this permission was approved by a vote of the town at its annual meeting held March 18, 1895. It is unquestioned that this bridge forms a part of a highway in the town of Orono, and that the town has kept the bridge in repair since its purchase in 1889. So much for the history of the bridge and its maintenance to the present time.

1. The first reason of appeal is predicated upon the contention that the statute here invoked "is by its terms applicable only to bridges 'erected' by municipalities," and as this bridge was not "erected" by the town of Orono the Board of Railroad Commissioners had no jurisdiction. We think this contention is not tenable.

It will be conceded that the letter of the language used imports the meaning attributed to it by appellants, "but the literal import of language used in statutes is, often, seemingly at variance with what was obviously intended. In such case the intention, and not the literal import is to govern." *Seiders* v. *Creamer*, 22 Maine, 559. The meaning and intent of this statute is more readily perceived, perhaps, if the purposes to be accomplished by it are considered. Under statutory provisions street railroads were permitted to pass along and over our highways and bridges which our municipalities were then maintaining safe and convenient only for travellers with their horses, teams and carriages. Hence arose a necessity that all the bridges in our highways over which any street railroad passes should be made and maintained sufficiently strong for this added use. To secure a prompt and efficient fulfillment of this necessity the statute in question was passed, giving the board of railroad commissioners full and complete control over the construction and maintenance, as to safety, of such bridges, with power to place the burden of the expense thereof upon those who ought justly to bear it.

It was obviously the intention of this statute to include in its provisions all highway bridges which municipalities were bound to maintain and keep in repair, and over which any street railroad passes, and full effect should be given to that intention. That which is within the intention of a statute, is within the statute, as if it were within the letter of it. *Holmes* v. *Paris*, 75 Maine,

559. "The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute." *Landers* v. *Smith*, 78 Maine, 212.

But the appellants further say, as noted above, that the town did not acquire a good title to the bridge structure, and for that reason this statute cannot apply to it. We think it has not been made to appear that the town did not acquire title to the bridge. But it is not necessary here to pass upon the questions raised by the appellants involving the sufficiency of the town's title to this bridge structure, for the application of this statute to any particular bridge cannot, we think, depend upon the correct determination of nice questions respecting the title to the structure. Our interpretation of the statute is that it applies to any and all bridges which a municipality is bound to maintain and keep in repair, and over which a street railroad passes.

This Stillwater bridge, so called, has formed a part of a highway in Orono for upwards of eighty years; for sixty years it was a toll bridge, but more than twenty years ago Orono, by voluntary municipal action, took over the bridge, making it free forever after, and thereby assumed the duty to keep and maintain it as a part of its highway. It has performed that duty ever since. Under these facts and circumstances we hold that the statute applies to this bridge irrespective of the fact that it was not originally erected by the municipality of Orono, and irrespective also of the question whether or not the town acquired a good and sufficient title to the structure of the bridge in its voluntary purchase of it in 1889.

2. The second reason of appeal is that the Railway Company was obliged to keep this bridge in repair at its expense under the provisions of its charter, or that of its predecessor, that "Said corporation shall keep and maintain in repair such portions of the streets, town or county roads, as shall be occupied by the tracks of its railroad, and shall make all other repairs of said streets or roads which shall be rendered necessary by the occupation of the same by such railroad." Obviously the Railway Company was not necessarily required by this provision of its charter to maintain and keep in repair the entire structure of this bridge. The appellants claim

however that all the repairs made on this bridge were "rendered necessary by the occupation of the same by the said railroad" and, therefore, the expense of the same should have been borne wholly by the Railway Company under the provisions of the charter quoted. But it was a question of fact as to what extent the repairs were made necessary by the use of the bridge by the railroad, and that question was for the determination of the Board of Railroad Commissioners under the express provisions of the statute here in question. We need not here consider whether or not the Commissioners fairly and justly determined that question because that is necessarily raised under the last reason of appeal.

3. The third reason of appeal, that the Railway Company was bound by contract to maintain and repair this bridge, was not pressed in argument before this court, and the reason is not sustained.

4. Lastly, it is claimed by the appellants that the decision appealed from was unfair and unjust to the town of Orono, even if the statute applies to this bridge. They urge that the actual expense of the repairs was much less than the Commissioners determined, and that the burden of that expense should have been placed wholly or chiefly upon the Railway Company because its use of the bridge necessitated the repairs. This court has heretofore expressed its interpretation of another section of this statute, and its power and authority in appeals taken thereunder, in these words: "It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the Railroad Commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust." Mr. Justice Walton in *Railroad Co.* v. *Street Ry. Co.*, 89 Maine, 328, page 335.

It is not for this court to render its decision in place of that of the Commissioners, but to determine if their decision is manifestly illegal or unjust. All the facts upon which the Commissioners acted

in making their decision are not before this court. They made a personal examination of the bridge before their decision was made. The repairs were made in accordance with plans and specifications approved by the Commissioners, but those plans and specifications are not before us. In short there is no sufficient evidence by which this court could determine in any satisfactory way the extent and character of the repairs made to this bridge. The appellants introduced evidence tending to show that the actual expense of the repairs could not have been as much as the contract price claimed to have been paid for the work by the Railway Company. But this evidence was not of the most satisfactory kind, being for the most part estimates of the amount of material and labor put into the work, and those estimates made by outside parties from their observation chiefly. The Commissioners estimated that the cost of the repairs to the bridge, made according to their requirements and to their satisfaction, would be "in the neighborhood of six thousand dollars." The appellants' witness, John W. Storrs, the Bridge Inspector of the Boston & Maine Railroad, who examined the bridge for the town before the repairs were made, estimated the cost of the repairs at $5000. The contract price which the Railway Company paid for the repairs was $5455. It does not seem to this court unreasonable for the Commissioners to accept the amount actually paid by the Railway Company for the repairs, under written contract, as the fair and just expense of the repairs to be apportioned under the provisions of the statute. Under the statute the Commissioners were given authority to apportion that expense between the railroad and the town "in such manner as shall be deemed by the board just and fair." They had full discretion in the matter. Their apportionment must stand unless manifestly illegal or unjust. In this case the Commissioners examined the bridge, determined what repairs were necessary, had plans and specifications made for those repairs, required the work to be done to their satisfaction, and when it was done gave their certificate of safety; they gave hearings to all parties in interest, and heard them, and their arguments, and made their decision that the town should pay a little

less than one-half of the expense of the repairs. It is the opinion of the court that the decision appealed from is not manifestly illegal or unjust.

As none of the reasons of appeal have been sustained the entry must be,

Decision of Board of Railroad Commissioners sustained and affirmed, without costs.

In Equity.

PAULINE P. HILL el als. *vs.* LOUISE H. COBURN et als.

Somerset. Opinion June 5, 1909.

Trusts. Tenants in Common. Deeds. Principal and Agent. Attorney and Client. Wild Lands. Limitations of Actions to Recover Same. Some Continuity of Possession Necessary. Statute, 1895, chapter 162, section 1. Revised Statutes, chapter 9, section 65.

It is undoubtedly a well settled general rule that one co-tenant cannot purchase an outstanding title or incumbrance effecting the common estate for his own exclusive benefit, and assert such right against the other co-tenants. Such a purchase will enure to the benefit of him and his co-tenants, providing the latter elect within a reasonable time to avail themselves of such adverse title and contribute their ratable share of the expenses of acquiring it.

There may be cases, however, when it would not be a breach of trust for a tenant in common to purchase an outstanding title, and retain so much thereof as may be necessary to protect his own interest.

There is no principle of law or equity which makes it the absolute duty of tenants in common to purchase any adverse title which might be asserted either for their own benefit or the benefit of their co-tenants.

It is a well settled rule that a conveyance of all the right, title and interest which the grantor has in the land described in his deed, conveys only the right, title and interest which he actually has at the time of his conveyance. It is not a grant of the land itself or of any particular estate in the land. It

passes no estate which is not then possessed by the grantor, and the covenants of warranty in the deed are limited by the terms of the grant, so that an after-acquired title does not enure to the benefit of the grantee by way of estoppel.

An agent or attorney cannot without the consent of his principal or client, purchase and hold for himself an outstanding claim adverse to his employer's estate, but will be deemed to hold it for his employer, if the employer shall so elect.

The relation between principal and agent and client and attorney rests upon essentially the same basis of trust and confidence as the relation between tenants in common.

No man increases or diminishes his obligations to strangers by becoming an agent. He has agreed with no one except his principal to perform his obligations, and in failing to perform them he wrongs no one but his principal who alone can hold him responsible.

Revised Statutes, chapter 9, section 65, contemplates an actual possession of some kind. It need not be as continuous as the possession of a farm would be expected to be, but there should be some kind of continuity.

Where a person in 1867 purchased wild lands from the State at a tax sale in that year, and continuously paid the taxes thereon for more than twenty years, and from 1867 to 1901 no former owner or person claiming under him, paid any tax on the land, or any assessment by the county commissioners, or did any other act indicative of ownership, and the purchaser operated on the land from 1867 to and including 1872, under such circumstances as indicated exclusive, peaceable, continuous and adverse possession of wild lands as intended by Public Laws, 1895, chapter 162, section 1, now Revised Statutes, chapter 9, section 65, but from 1872 to 1901 there was no evidence of any kind tending to show that any one was in possession of the land for any purpose, *Held:* That the statutory condition of possession had not been proved, and hence the statute did not apply.

In the case at bar, *Held:* 1. That the defendants named in the amended bill hold in trust for the plaintiffs, in common and undivided, one-half of 4,400 acres of certain wild land. 2. That the defendants, Philbrick and Butler, named in the supplemental bill, cannot be held chargeable with any violation of trust or infraction of legal duty.

In equity. On appeals both by plaintiffs and by defendants. Appeals dismissed.

Bill in equity brought by the plaintiffs to establish and enforce a trust in certain lands in Somerset County and Franklin County, and which bill after the same had been filed was amended in several particulars. Answers were filed both to the original bill and amended bill. Afterwards by permission a supplemental bill was brought by the plaintiffs in the original bill against the same defendants and

Samuel W. Philbrick and Amos K. Butler, alleging in substance that Philbrick and Butler were the agent and attorney respectively of the other defendants and while acting as such procured and caused to be recorded certain deeds by which certain interests in the lands in which a trust was claimed against the defendants in the original bill, were conveyed to them and that these conveyances were obtained with intent to deprive the plaintiffs of their rights in said lands and were taken by Philbrick and Butler with knowledge of the trust for the plaintiffs, and praying that Philbrick and Butler be ordered to convey their interests to the plaintiffs and account for the sums received by them from the lands. To this bill the defendants demurred and answered.

The cause was then heard upon bill, amended bill, supplemental bill, answers, demurrer, replications and proof, by the Justice of the first instance who, after hearing, filed decrees sustaining the amended bill and dismissing the supplemental bill. From the decree sustaining the amended bill, the defendants named therein appealed, and from the decree dismissing the supplemental bill the plaintiffs named therein appealed.

The case is stated in the opinion.

Heath & Andrews, Danforth & Gould, Walton & Walton, and Foster & Foster, for plaintiffs.

Amos K. Butler, and Charles F. Johnson, for defendants.

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

WHITEHOUSE, J. The plaintiffs in this case are the heirs or the assignees of the heirs of E. B. Hill of Skowhegan, who died in 1898. The defendants are the heirs of Philander Coburn late of Skowhegan and the legatees and devisees of Abner Coburn of Skowhegan who died in 1885 or the assignees of such heirs and devisees. They are known as the Coburn heirs.

For many years prior to September 1, 1867 and for several years thereafter, Abner and Philander Coburn were co-partners in business under the name of A. & P. Coburn, interested in the owner-

ship and management of extensive tracts of timberlands in Somerset and Franklin counties. From that date until his death, E. B. Hill had been an owner in common and undivided with A. & P. Coburn and their heirs in equal shares in a certain tract in the north half of No. 4, R. 3 west from the Kennebec river in the million acre Bingham-Kennebec purchase so called, and in a tract called the "Pray Tract" in No. 3, R. 5 and in a tract called No. 10 in 4 R. 5.

In this bill the plaintiffs seek to establish and enforce a trust in certain lands in the north half and in all of the south half of 4 R. 3, growing out of certain agreements alleged to have been made between Hill and the Coburns on September 1, 1867.

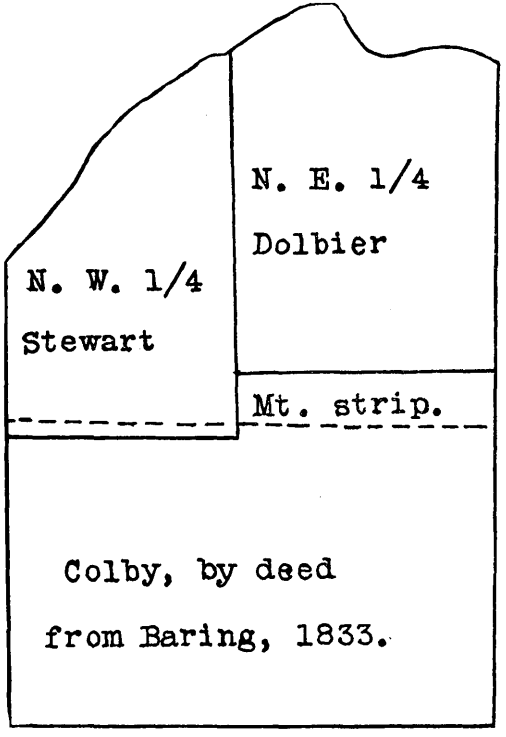
Prior to 1833 the northwest quarter of this township had been conveyed to Daniel Stewart, Jr., and the northeast quarter to Charles Dolbier. As conveyed and marked the southerly line of the northwest quarter was about half a mile farther south than the southerly line of the northeast quarter.

In 1833, Alexander Baring et als., trustees, conveyed to Abraham Colby a tract of land in the south part of the same township No. 4 R. 3, comprising all of the township except what had been previously conveyed to Stewart and Dolbier in the north half and excepting also two public lots of 320 acres each and one lot of 218 acres sold to one Keene. The area of the land thus conveyed by the Colby deed was estimated to be 10,300 acres more or less.

In 1835, Colby conveyed to James Smith 4500 acres of land in common and undivided being a part of three undivided fourth parts of the south part of the same township. The title to this 4500 acres came to the Coburns by mesne conveyances and has remained in them with the exception of 100 acres sold in 1884 to one Hinds.

In 1837, Colby conveyed to William K. Eastman one undivided fourth part of the tract purchased by him in township No. 4, R. 3, known by the name of Bigelow Township. This quarter interest conveyed to Eastman amounted to 2575 acres. Deducting this amount with the 4500 acres conveyed to Smith from the 10,300 acres and there would be left 3,225 acres still belonging to Colby. The east and west county line between Somerset and Franklin counties

run somewhat to the north of the south line of the northwest quarter or Stewart tract and about 135 rods south of the south line of the northeast quarter or Dolbier tract. Thus between the Dolbier tract and the county line in the north half of the township is a strip of land about 135 rods in width extending from the middle of the township to the east line. This tract is known as the "mountain strip" and contains approximately 700 acres east of the northwest quarter. It was embraced with the south half in the original Colby deed of 1833. The 4500 acres conveyed to James Smith and the "one fourth" conveyed to Eastman were undivided parts of the mountain strip as well as of the south half. Mount Bigelow was in the north half of the "south half." The situation is illustrated by the following diagram.



The dotted line thus - - - - approximately represents the location of the county line above mentioned. The trust which the plaintiffs seek to enforce relates to the south half and to the mountain strip in the north half.

From that portion of the findings of the presiding Justice conceded to be correct, the following facts also appear.

Subsequently to 1837 the N. W. quarter by conveyance was divided by a north and south line into two parts of equal width and the N. E. quarter of Dolbier tract was divided into two unequal parts by a north and south line.

September first, 1867, the ownership of the entire township irrespective of settlers' lots and public lots was as follows: The west half of the N. W. quarter was owned by one Miles Standish. Next toward the east was the east half of the N. W. quarter containing 2500 acres which was owned equally by the Coburns and E. B. Hill in common and undivided. This was sometimes called the "Nubble" or the "Black Nubble." The next parcel toward the east and in the northeast quarter was what was known as the Getchell tract supposed to contain about 4000 acres. It is not in controversy that Franklin Smith having a record title conveyed this Getchell tract to Abner Coburn December 9, 1879. Next and last to the east line was the so called Moulton tract containing from 1200 to 1500 acres. It does not appear that either the Coburns or Hill ever had any ownership in the Standish or Moulton tracts. The "south half" to the Stewart line and the mountain strip between the county line and the Getchell and Moulton tracts, being all of the original Colby tract, were owned as follows: 4500 acres in common and undivided by the Coburns; one-fourth of the Colby tract or 2575 acres in common and undivided by the heirs or assigns of Eastman and the remainder 3225 acres in common and undivided by the heirs or assigns of Colby. The last two statements of acreage are based upon an estimate of 10,300 acres for the whole and the findings respecting the titles are made without considering the effect of sales made by the State for non-payment of taxes.

It appears that the practice of the State Treasurer was to receive the taxes from those claiming to own timberlands according to their

respective acreages and at the proper time to sell the number of acres which had not been paid for, that is to say, enough to make up the total number assessed and to give deeds thereof.

It is not in controversy therefore that the Coburns owned 4500 acres undivided in the two tracts and that of this 4400 acres are now held by the original defendants. The Coburns also held tax deeds which covered the whole tracts including the 4400 acres. By virtue of these tax deeds they claimed title to the whole of the two tracts and for many years their claim was uncontroverted.

It is alleged in the amended bill upon which the case was heard that the sum of $600 was paid by E. B. Hill to the Coburns for the title to one undivided half part of the north half of 4 R. 3, south of the Nubble, Getchell and Moulton tracts and a like sum for the title to one undivided half of the south half; that an agreement was made at the time that the Coburns should continue to hold the full title to all of this real estate; that the same should be managed and controlled by the Coburns and Hill as owners; that the title should be held for the benefit of the Coburns and Hill; that the timber cut should be divided equally and that the Coburns should hold the half title belonging to Hill as trustees for him; and that the Coburns always claimed to hold an undivided half of the same and the title thereof for Hill and expressed their intention to convey to him. In the defendant's amended answer it is admitted that on September first, 1867, Abner Coburn was owner in fee simple of 4500 acres in common and undivided out of the entire south half of 4 R. 3, and that on about that date A. and P. Coburn purchased under sale for taxes the tax title to all of said south half and that in the same month they sold or agreed to sell to E. B. Hill this tax title so far as it related to one-half of all the timber on said south half for $600. But the defendants deny that they sold any part of the record title of the 4500 acres or that they ever agreed to sell to Hill any title or interest or tax title only to one-half of the total timber on the south half. They admit that they made full settlement with Hill and paid him one-half of the net proceeds of the timber cut from 1867 to 1872 but deny the payment to him of any moneys received from the timber based on any ownership in him of any other interest than that of the tax title.

It is further alleged that the Coburns having purchased at tax sale the tax title purporting to cover the whole of the north half in September, 1867, sold or agreed to sell to E. B. Hill for $600 this tax title so far as related to one-half of the timber on that part of the north half of Nubble, Getchell and Moulton tracts but deny that they sold or agreed to sell any other or greater interest in the north half.

With respect to the issue thus raised the presiding Justice found as follows.

"Taking the situation as it was in 1867, taking the admissions of the Coburns in the lists of 1881 and 1884, considering the prices paid in the light of the values affixed by Gov. Coburn in the 1881 and 1884 lists; taking the general conduct of the Coburns and their successors for more than thirty years, in which Hill was treated as an equal owner, not of the timber merely, but of the land, and especially the equal division of the taxes upon the entire tract, including the 4500 acres of which the Coburns held a record title, for the same period, I am led to believe, and I therefore find that it was the intention of the Coburns to sell to Hill an undivided equal interest with themselves in the south half and the mountain strip in the north half, and that Hill should be an equal owner with them in all of the Colby tract, including their 4500 acres. They were claiming the whole, and I think intended to sell one-half of the whole. And if so, the defendants now hold in trust for the plaintiffs the equitable title thus created for Hill, and the trust can be enforced in this proceeding."

In considering the extent of the equitable title thus created for Hill and now held in trust for the plaintiffs, the presiding Justice found that the tax deed held by the Coburns covering the territory in question had no validity and that they had no valid title to any part thereof except the 4500 acres acquired through the deed from Colby to James Smith and that the remainder of the territory belonged to the heirs or assigns of Colby and Eastman unless their titles had become forfeited or barred under the provisions of the act of 1895 now R. S., chapter 9, section 65. The plaintiffs claim that these titles to Colby and Eastman had been extinguished or

barred by that statute. That act provides that when the State has taxed wild land, and the treasurer of State has conveyed it, or part of it for non-payment of tax by deed purporting to convey the interest of the State by forfeiture for such non-payment and his records show that the grantee, his heirs or assigns has paid the State and county tax thereon or on his acres or interest therein as stated in the deed continuously for the twenty years subsequent to such deed and it appears that the person claiming under such a deed and those under whom he claims have during such period held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in this State and that no former owner has paid any such tax or done any other act indicative of ownership no action shall be maintained by the former owner or those claiming under him to recover such land or to avoid such deed unless commenced within said twenty years. "Said payment shall give said grantee or person claiming as aforesaid, his heirs or assigns a right of entry and seizin in the whole or such part in common and undivided of the whole tract as the deed states or as the number of acres in the deed is to the number of acres assessed."

Upon this branch of the case the presiding Justice made the following findings and stated the following conclusion.

"After the tax deed of September 3, 1873, of the south half, was taken by Abner Coburn, the taxes were paid continuously for more than twenty years by the Coburns, or Coburn estate, for themselves and Hill, or by the Coburn heirs and Hill. It so appears by the state treasurer's record. That deed was not recorded in Franklin county, but that was not necessary under the first clause of the statute.

I find that during all the period from 1867 to 1901, no former owner, or person claiming under him, paid any tax on the lands, or any assessment by the county commissioners, or did any other act indicative of ownership. I find that the Coburns and Hill were operating on the tract from 1867 to and including 1872, under such circumstances as indicate exclusive, peaceable, continuous and adverse possession of wild lands, as intended by the statute in ques-

tion. But from 1872 to 1901 there is no evidence of any kind tending to show that anyone was in possession of these lands for any purpose. I think the statute contemplates an actual possession of some kind. It need not be as continuous as the possession of a farm would be expected to be, but there should be some kind of continuity. A gap of more than 25 years is too long. I therefore find that the statutory condition of possession has not been proved.

It follows that the only land affected by the trust is the 4500 acres originally owned by the Coburns, less 100 acres sold in 1884. The bill will be sustained with costs, and a decree will be made to declare and enforce a trust for the plaintiffs as to one half in common and undivided of 4,400 acres in the Colby tract, namely, the south half of 4 R 3 and in the mountain strip in the north half, and for an accounting."

In accordance with these findings a decree was entered in favor of the plaintiffs against the defendants named in the amended bill. The defendants took an appeal from that decree and now have the burden of showing that the decree is manifestly wrong.

With respect to the extent of the equitable title created by the Coburns in favor of Hill, the defendants earnestly contend that the conclusion of the presiding Justice was clearly unwarranted. They say that of the tract of land in question comprising 10,300 acres, the Coburns had an indefeasible title to 4500 acres and a tax title to the remaining 5800 acres; and while they do not deny that they sold to Hill an undivided half of the tract, they insist that under the agreement of the parties Hill was to take his undivided half from the 5800 acres which they held by a tax title only, and allow them to retain the 4500 acres held by an indefeasible title and as much more from that held by tax title as was necessary to make up one-half of the tract. But in the list of "A & P. Coburn's wild lands January 1881," found in the handwriting of Abner Coburn, the following items appear with others:

"No. 4, R. 3, W. Black Nubble,	We own with Hill	½ of Nubble 2500 A —	1250 A
	" "	½ of North the Mt. say	1250 A
		½ of South of Mt. 10,000,	5000 A
		Whole of Getchell piece,	4000 A.
		" " one P. lot	320 A.
			11,820 A.

Three years later, the year before the death of Abner Coburn, another list was made by him restating his ownership with E. B. Hill in this tract of land in almost precisely the same terms employed in the list of 1881. In neither instance was there any suggestion that the Coburns' interest was in any respect different from or superior to that of E. B. Hill.

When therefore these important admissions are considered in connection with all the other evidence in the case, and with the tersely stated reasons in the summary of the presiding Justice above quoted, it is the opinion of the court that his conclusion upon this point is not only not shown to be erroneous, but that it appears to be fully warranted by the evidence and clearly correct.

But it appears that the plaintiffs contended at the hearing before the single Justice, and in the argument on the supplementary bill, still claim that the Colby and Eastman titles had been extinguished or barred by operation of the act of 1895, (R. S., ch. 9, sec. 65); and they insist that the findings of the presiding Justice that there was "no evidence of any kind tending to show that any one was in possession of these lands for any purpose" between 1872 and 1901, is not justified by the evidence and the "ordinary management of wild lands." It is not disputed that the Coburns and Hill were operating in the tract from 1867 to 1872, and it is suggested that after such unequivocal acts of ownership and occupancy a presumption of continued possession on the part of the person so operating ought to prevail, for the reason that owners of wild lands after cutting timber and permitting operations upon them are ordinarily compelled to wait a long time for such a growth of the trees left standing as will justify another operation.

In *Soper* v. *Lawrence Bros. Co.*, 98 Maine, 268, page 279, the various acts enumerated as indicative of ownership were "cutting timber and permitting operations, leasing portions of the land for the erection and maintenance of permanent sporting camps, and employing agents to protect the township against fire." But the finding in the case at bar is that there was no evidence of any kind to show that any one was in possession of the tract in question for a period of twenty-five years. This cannot be deemed ordinary,

but rather extraordinary and exceptional management of wild lands during the period named. In view of such an entire absence of any acts of ownership for such a period of time, it cannot be said that there is any presumption of fact that there was "exclusive and continuous" possession on the part of a claimant under a tax title. His conduct is equally consistent with the hypothesis that the invalidity of his tax title and his consequent trespasses in operating had been discovered and that he had been prohibited by the true owner from making further operations on the tract.

Furthermore this contention on the part of the plaintiffs is inconsistent with the whole theory and purpose of their supplementary bill. In that they allege that Philbrick and Butler are holding the Colby and Eastman titles as trustees for the plaintiffs and ask for a conveyance of those titles to them; and in the same proceeding the plaintiffs attempt to show that the Colby and Eastman titles have become barred by the act of 1895, and practically extinguished. According to their contention, the Coburns, having the right of entry and actual seizin by virtue of this tax title, under the operation of the act of 1895, would have no occasion to ask for a conveyance from Philbrick and Butler of any extinct and worthless titles of Colby and Eastman, and the plaintiff's supplementary bill would be superfluous.

But the statute of 1895 does not apply. The Colby and Eastman titles have not been forfeited, or extinguished, and must be held superior to the Coburn tax titles.

It is accordingly the opinion of the court that the conclusion of the presiding Justice respecting this proposition was also correct, and that the defendant's appeal from the decree rendered on the amended bill cannot be sustained.

In October, 1906, the plaintiffs by permission filed the supplemental bill in question against the original defendants and Samuel W. Philbrick and Amos K. Butler. It is alleged in this bill in substance that Philbrick and Butler were the agent and attorney respectively of the other defendants and while acting as such procured and caused to be recorded certain deeds by which the interests of the Eastman and Colby heirs were conveyed to them, that these

conveyances were obtained with intent to deprive the plaintiffs of their rights in said lands and were taken by Philbrick and Butler with knowledge of the trust for the plaintiffs. The bill therefore prays that Philbrick and Butler may be ordered to convey their interests to the plaintiffs by quit claim deed and to account for the sums received by them from the lands so purchased.

The allegations in the bill respecting an unrecorded deed are not proved and require no further consideration.

It is admitted that the interests of the Eastman heirs comprising about 2575 acres were conveyed to Mr. Philbrick by deed dated October 15, 1901, finally acknowledged May 16, 1902, and delivered in June, 1902, and that one-half of these interests was conveyed by him to Mr. Butler by deed dated July 16, 1902, and recorded in 1903. For these Eastman titles the sum of $1158 was paid.

It is also admitted that the Colby interests embracing 3225 acres were conveyed to Mr. Philbrick by two deeds, one dated August 3, 1903 and the other August 13, 1903, and that Mr. Philbrick conveyed one undivided half of the same to Mr. Butler by deed dated September 1, 1903. For these deeds the sum of $8500 was paid.

The defendants, Philbrick and Butler insist that all of the land comprised by the deeds of the Eastman and Colby titles was purchased by them in entire good faith and for valuable consideration, and they deny that the plaintiffs at any time had any right, title or interest in the lands embraced in any of the conveyances in this supplemental bill and deny that they were obtained by them with the purpose or intent of depriving the plaintiffs of any right whatever or with any improper or fraudulent purposes of any kind.

With respect to the issue thus raised by the supplemental bill and answer the findings and conclusion of the presiding Justice were as follows:

"I find that the purchase of these interests were made on joint account of Philbrick and Butler. Mr. Philbrick by prearrangement took the deeds in his own name, and afterwards conveyed half to Mr. Butler. I find that Philbrick and Butler made the purchases on their own account and not on account of the Coburns heirs, and that they paid for them out of their own funds. At the time they

knew of the plaintiff's claims, or of enough to make them chargeable with notice.

At the time they made their purchases their relations with the Coburn heirs, as attorney and agent, were such in my opinion as made it their duty to disclose to the Coburn heirs any information they had respecting any defects which existed to the Coburn title. Mr. Philbrick had been told there were defects several years before he became agent. He communicated some or all of his information to Mr. Butler.

In 1899 Butler was employed by the Coburn heirs to make from the registry of deeds an abstract of the title to 4 R. 3. He did so, made an abstract showing the defects and gave it to Mr. Philbrick, as the agent, and Mr. Philbrick placed it on file where it was open to inspection by the heirs. But the heirs, fifteen in number, were widely scattered, and it is not shown that they all saw the abstract or knew of the defects, prior to the purchases by Philbrick and Butler. But I think that since the purchases, the Coburn heirs have acquiesced and assented to the purchases by Philbrick and Butler. At any rate, I think Philbrick and Butler are now accountable to no one else. The matter now lies, I think, wholly between the Coburn heirs and Philbrick and Butler.

I have held that the Coburns and the Hills are equitable co-tenants in 4400 acres and in no more. They were both co-tenants with the Eastmans and Colbys. The Coburns, as co-tenants in the 4400 acres, were not obligable to buy the interests of the Eastmans and Colbys. The interests of the Eastmans and Colbys were not outstanding titles as against the 4400 acres. Anyone might lawfully buy them. The Coburn heirs might stand by and see them sold to third persons, or lawfully assent to a sale after it was made to their agent and attorney. Such sale did not affect the rights of the Hills in the 4400 acres, and they had no other rights.

Nor in my judgment did the Hills have any equitable interest under the invalid tax title which will afford them equitable relief against one who while he was agent or attorney of the Coburns purchased the interests of the other co-tenants on his own account. The only equitable interest which they owned was in the 4400 acres."

A decree was accordingly entered dismissing the supplementary bill with one bill of costs for the defendants.

From this decree the plaintiffs took an appeal.

The solution of the somewhat novel question thus presented for determination is apparently attended with more difficulty than that involved in the original and amended bill, but a discriminating application of the established rules of co-tenancy and the equitable principles of agency and of trusts leads irresistibly to but one conclusion.

The findings of fact made by the presiding Justice appear to be supported by the evidence, and it only remains to consider the correctness of the conclusions deduced from them.

It is undoubtedly a well settled general rule that "one co-tenant cannot purchase an outstanding title or incumbrance affecting the common estate for his own exclusive benefit, and assert such right against the other co-tenants." Am. & Eng. Enc. of Law, Vol. 17, page 674. Such a purchase "will inure to the benefit of him and his co-tenants, providing the latter elect within a reasonable time to avail themselves of such adverse title and contribute their ratable share of the expense of acquiring it." There may be cases, however, when it would not be a breach of trust for a tenant in common to purchase an outstanding title, and retain so much thereof as may be necessary to protect his own interest. Cyc. of Law and Proc. Vol. 23, page 492; *Van Horne* v. *Fonda*, 5 Johnson, Ch. 388. In that case Chancellor Kent, after laying down the general doctrine as above stated, adds this qualification: "I will not say, however, that one tenant in common, may not in any case purchase in an outstanding title for his exclusive benefit."

But it is unnecessary to consider specifically the nature and extent of the qualifications and apparent exceptions to the general rule, for it is not claimed in the case at bar that Philbrick and Butler were co-tenants with the plaintiffs when they purchased the outstanding titles of the Eastman and Colby heirs. Nor is there any legal basis for the proposition that at the time of these purchases, the Coburns themselves were tenants in common with the Hills as to anything more than the 4400 acres to which the Coburns had an

undisputed title. It has been found that these tax titles to the remainder of the tract were absolutely without validity and that they had not been in possession of the tract under these titles for more than twenty-five years. Without such exclusive and continuous possession their tax titles did not fall within the scope of the act of 1895, and failed to receive any support or protection or acquire any validity from its provisions. The Coburns received from the State a tax deed of its "right, title and interest" in the tract in question. But at the date of the deed the State had no legal interest whatever in the land therein described and could therefore convey none to the Coburns, and the Coburns thereby acquired nothing which they could convey to the Hills.

It is a well settled and familiar rule that "a conveyance of all the right, title and interest which the grantor has in the land described in his deed, conveys only the right, title and interest which he actually has at the time of the conveyance . . . . It is "not a grant of the land itself or any particular estate in the land. It passes no estate which is not then possessed by the party." *Coe* v. *Persons Unknown*, 43 Maine, 432, and cases cited. In such a case the covenants of warranty in the deed are limited by the terms of the grant, so that an after-acquired title could not inure to the benefit of the grantor by way of estoppel. *Ballard* v. *Child*, 46 Maine, 152. The sale to the Hills by the Coburns of an undivided half of a void tax title was not sufficient to create between them a tenancy in common in the land; and according to this rule of law, if the Coburns had executed a formal deed of this tax title with covenants of warranty an outstanding title subsequently purchased by the Coburns would not inure to the benefit of the Hills. In accordance with this view was the decision of the Court of Appeals, of New York, in *Sweetland* v. *Buel*, 164 N. Y. 451, (58 N. E. Rep. 663) announced in the year 1900. In the opinion the court say: "The appellants further contend that, as Asa Rice and Joseph Clark were tenants in common under a title obtained by virtue of the sheriff's sale and a deed given in pursuance thereof, Clary could not purchase the outstanding title of Williams Holt for his own benefit, but that, as between him and Asa Rice, the purchase

enured to the benefit of Rice as well as himself; Rice being chargeable with his proportionate share of the expense. The answer to this proposition is that neither Rice nor Clary, nor both together, obtained any title under the sheriff's deed, as the title vested in Williams Holt before such sale, as against them, under and by virtue of the deed from Elijah Holt, and consequently they never occupied the relation of tenants in common."

If the Coburns and Hill could properly be deemed co-tenants between 1867 and 1872, while they were in actual possession of the tract in question and operating upon it under these tax titles, they were not tenants in common after they had been out of exclusive possession for more than twenty-five years, their tax titles were known to be worthless and by reason of the failure of the statutory condition of possession prescribed by the act of 1895, they were not protected by the limitation of that act, but open to an attack from the true owners; and the obligation which attaches to a tenant in common, necessarily ceases after the co-tenancy has ceased to exist. 23 Cyc. page 492, and cases cited.

As above stated the Coburns and Hills must be held to be co-tenants in the 4400 acres, and thus both were co-tenants with the Eastmans and Colbys. But there was no defect in the title to the 4400 acres, and the interests of the Eastmans and Colbys were not outstanding titles as to that acreage. If therefore the Coburns were not under the obligation of tenants in common towards the Hills as to anything more than the 4400 acres at the time of the purchase of the Eastman and Colby interest, a fortiori, the defendants Philbrick and Butler, as their agent and attorney, owed the Hills no such duty.

But assuming by way of argument that the relation of tenants in common did exist between the Coburns and Hills at the time in question in the tract covered by the tax titles, it would not be controverted that any adverse titles actually acquired by the Coburns would inure equally to the benefit of the Hills, under the general rule above stated, provided the latter elected within a reasonable time to avail themselves of it and contributed their ratable share of the expenses; and it would of course be immaterial whether such

adverse title was acquired by the Coburns directly or by their agent and attorney.

But no authority has been cited by counsel or otherwise brought to the attention of the court, nor has any principle of law or equity been invoked, which would make it the absolute duty of the Coburns to purchase any adverse title which might be asserted either for their own benefit or the benefit of their co-tenants. In fact the Coburns did not purchase the outstanding interests of the Eastmans and Colbys, either for themselves or for the common benefit of themselves and the Hills, for the case finds that "Philbrick and Butler made the purchases on their own account and not on account of the Coburn heirs, and that they paid for them out of their own funds." It cannot be doubted, however, that the Coburns had full opportunity to acquire these adverse titles before they were purchased by their agents.

It is not in question that the relation of Philbrick and Butler with the Coburn heirs, as their attorney and agent, made it their duty to disclose to the heirs any knowledge they obtained of the existence of defects in the Coburn title. Philbrick had been informed that there were defects several years before he became agent, and conveyed this information to Butler. In 1899, by request of the Coburn heirs, Butler made an abstract of the title to No. 4, R. 3, disclosing the defects and gave it to Philbrick, who was the agent, and he placed it on file where it was open to the inspection of the Coburn heirs. But these heirs were fifteen in number, and while it does not distinctly appear that they all saw the abstract or knew of the defects, the case finds that after the purchase by Philbrick and Butler they all acquiesced in and assented to them. Those of the Coburn heirs who were recognized as the managing representatives of the estate, appear to have been well informed and intelligent persons who were competent to safeguard its interests. The husband of one of these heirs, a gentleman at the head of an important department in the federal government at Washington, and one who had taken an active and prominent part in the affairs of the estate, was called as a witness in behalf of the defendants. He states in substance that the titles to the lands in question and

the Hill claims were a matter of common knowledge and frequent discussion among the Coburn heirs resident in Skowhegan; that their understanding was that they had a valid title to the 4400 acres and that the Hill claim related only to the tax titles; that the Eastman and Colby titles were earlier and better than the tax titles which they believed to be void; that it was the distinct policy and purpose of the heirs not to make any investments in the purchase of "outside" and independent interests which "did not involve the tax titles," and that Mr. Philbrick as their agent, never had any general authority to make such purchases in behalf of the heirs, and never had purchased any outstanding titles for their benefit without specific directions, and that Mr. Philbrick never had any instructions or authority to purchase any outstanding titles for the Coburn heirs in the township in question. He further testifies that after the purchase of the Eastman interest and before the purchase of the larger Colby interest by Philbrick and Butler, he had an interview with Mr. Butler in which these questions were all considered between them and he then said to Mr. Butler that he understood that they were entirely within their rights in what they had done in purchasing the Eastman titles, and in what they proposed to do in purchasing the Colby interests, and that there was no objection on the part of the Coburn heirs, as "they were not in the business of buying titles from other people."

With respect to the special deposit set apart in 1902, "to assist in perfecting defective titles," it appears from the uncontradicted testimony of the defendant Philbrick that he had no authority to purchase outstanding titles with this fund without specific directions from the heirs and that he had never in fact bought any such interests, except "in cases where they were liable under a deed given, or a suit had been brought upon an adverse claim which they bought in." It also appears that in 1904, the entire amount of the "special deposit" was in fact divided among the heirs.

There is no evidence that Philbrick or Butler made any false representation to their principals, the Coburn heirs, or fraudulently concealed from them any material facts, in relation to these titles. Their conduct met the full approbation of their principals. Nor

is there any evidence or suggestion that there was any collusion between the Coburn heirs and their agents whereby the former were to derive any secret benefit from the transaction. They employed an agent not for the purpose of making new investments in timber lands, but solely to manage and protect the property which they had.

Thus, even upon the assumption that a co-tenancy existed between the Coburns and Hills under the tax titles at the time of the purchase of the Eastman and Colby interests, there is no recognized principle of law or equity whereby the Coburn heirs could be compelled to purchase those outstanding titles for the benefit of the Hills, when it was against their policy, their wishes and their judgment to purchase for their own benefit. The Hills had an opportunity to investigate the titles in that township for themselves, and to purchase any outstanding interests which they might find for sale. Even before the purchase of the Eastman title in 1901, the Coburn heirs had information of the adverse claim made by the Hills against them, and before the purchase of the Colby titles this equity suit had been commenced. The Hills had then become open litigants against the Coburns respecting these titles. The defects inherent in the tax titles themselves it was impossible to remedy, and if by superior diligence on the part of the Coburn heirs, the antecedent and better titles of the Eastmans and Colbys, entirely distinct from the tax title, had been discovered, there was no duty imposed by law or equity upon the Coburns even as tenants in common, to communicate such discoveries to the Hills. But as already shown, the Coburns did not sustain the relation of tenants in common with the Hills as to the tax title, at the time of the purchase of the Eastman and Colby titles.

The plaintiffs still insist, however, that the defendants Philbrick and Butler, as agent and attorney of the Coburns, occupied a fiduciary relation to them which the exercise of good faith would have extended to the Hills, and required them to communicate to the Hills the information which they had attained respecting those independent outstanding titles.

It is familiar law that an agent or attorney cannot without the consent of the principal or client, purchase and hold for himself an

outstanding claim adverse to the employer's estate, but will be deemed to hold it for his employer, if the employer shall so elect. It has been seen that the presiding Justice properly found that the relation of Philbrick and Butler, as agent and attorney, made it their duty to disclose to the Coburn heirs any information they had respecting the defects which existed in the Coburn title, and that this was in fact done to the satisfaction of the heirs. But the relation between principal and agent and client and attorney rests upon essentially the same basis of trust and confidence as the relation between tenants in common. It has been seen however that the Coburn heirs were not trustees for the Hills as to the tax titles at the time of the purchase of the Eastman and Colby interests, and Philbrick and Butler were agent and attorney for the Coburn heirs and not for the Hills who were adverse claimants at the time of the first purchase and adversaries in litigation at the time of the second. The Coburns and Hills were equitable co-tenants only as to the 4400 acres, and as to that acreage the interests of the Eastmans and Colbys were not outstanding titles. The fiduciary relation which Philbrick and Butler sustained to the Coburn heirs did not extend to the Hills. "No man increases or diminishes his obligations to strangers by becoming an agent. . . . He has agreed with no one except his principal to perform them. In failing to do so he wrongs no one but his principal who alone can hold him responsible." *Delaney* v. *Rochereau*, 34 La. Annuals, 1123; 44 Am. Rep. 456.

With the consent of the Coburn heirs Philbrick and Butler purchased the Eastman and Colby titles for their own benefit as any stranger might lawfully have done. In so doing they cannot be held chargeable with any violation of trust or infraction of legal duty.

With respect both to the original bill as amended and the supplementary bill, the certificate must therefore be in each case,

Appeal dismissed.
Decree of single Justice affirmed, with one bill of additional cost in each case.

In Equity.

LOUISE H. COBURN et als. *vs.* EDWARD P. PAGE et al.

Somerset. Opinion June 5, 1909.

Trusts. Tenants in Common. Adverse Title Purchased by Co-tenant. Such Co-tenant holds the Same in Trust for All Co-tenants.

Tenants in common stand in such confidential relation to one another in respect to their interests in the common property, and the common title under which they hold it, that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title and thereby injure and prejudice the interests of his co-tenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his co-tenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures.

It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself and thus undermine and oust his companion.

Community of interest produces community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseise and expel his co-tenant.

On February 19, 1902, the defendant, Edward P. Page, and the original plaintiffs were tenants in common of a certain township of land in Somerset county known as Moxie Gore. Mr. Page owned one-fourth and the plaintiffs three-fourths. About that time Mr. Page, and some, at least, of the other co-tenants, learned that their common title to the township was derived through a chain of conveyance beginning with a mortgage title as far back as 1835 and 1836, and that the equity of redemption thereof had never been foreclosed or released, being apparently still outstanding. Thereupon Mr. Page, without any arrangement or understanding with his co-tenants, purchased at his own expense three-fifths in common and undivided of such outstanding right of redemption of the common property and had the same conveyed to his wife Lizzie M. Page, the other defendant. Mrs. Page paid no part of the consideration, and no question was raised but that this interest so conveyed to her was subject to the same

trusts, if any, as it would have been if Edward P. Page had taken the deed in his own name. The plaintiffs and the defendant Edward P. Page, jointly, and those under whom they claimed title, had been in possession of the common property for many years, using and enjoying it as owners, and claiming and supposing that their common title was the absolute title to it. After the purchase of the outstanding right of redemption by Mr. Page, the plaintiffs seasonably made request upon him for their share of his purchase and offered to reimburse him proportionally for his expenses incurred, and he refused their request. Thereupon the plaintiffs brought a bill in equity to obtain a decree that each of the defendants held all title in any way acquired by either of them by virtue of said deed to Mrs. Page in trust for, and must convey the same to, all the plaintiffs as tenants in common with said Edward P. Page to the extent and in proportion to their respective ownerships therein, and a decree to that effect was made and the defendants appealed.

Held: 1. That under such facts and circumstances the outstanding right of redemption under the old mortgages must be held to be an adverse claim to the common interests and title, and that it would be inequitable to permit Mr. Page to assert that portion of such adversary claim which he had bought in for his own exclusive benefit, to destroy the common title under which he and his co-tenant for many years held joint possession of the property.

2. That the ruling that the want of demand on Mrs. Page was important only as bearing on the matter of costs against her, was not error.

3. That the decree of the sitting Justice must be sustained.

In equity. On appeal by defendants. Dismissed. Decree sustained.

Bill in equity brought by the plaintiffs, eighteen in number, against Edward P. Page and Lizzie M. Page, his wife, praying that a certain outstanding right of redemption of certain real estate owned by the plaintiffs and the said Edward P. Page as tenants in common, and which said outstanding right had been purchased by their co-tenant, the said Edward P. Page, and by his direction conveyed to his said wife, be conveyed to them in accordance with their respective interests in the real estate. Answers were duly filed by each of the defendants.

The cause was heard by the Justice of the first instance on bill, answers and proof, and who, after hearing, ordered, adjudged and decreed as follows:

"1. That the bill be sustained against both defendants, and with costs against defendant Edward P. Page.

"2. That the defendants respectively hold all title acquired by them, or either of them, by virtue of the deed of Frank B. Devereaux, Marian Devereaux, and Eliza D. Devereaux to Lizzie M. Page, of township numbered one, Range 5, east of the Kennebec River, in what is known as Bingham's Kennebec Purchase, dated February 19, 1902, and recorded in Somerset Registry of Deeds, Vol. 237, page 236, in trust for all the plaintiffs as tenants in common with the defendant Edward P. Page in said land, and to the extent and in proportion to their respective ownerships therein, to wit: all the plaintiffs, except John P. Clark, Charles H. Clark, and Hiram Moore, one half; the said John P. Clark, Charles H. Clark and Hiram Moore each one twelfth, and the defendant Edward P. Page, one fourth.

"3. That upon payment or tender to Edward P. Page by said plaintiffs of their respective or collective share of the expense incurred by said Page in procuring the above mentioned deed, to wit, their share being three fourths of $765.27, and interest on $400 of that sum from February 19, 1902 to the time of payment or tender, and interest on the remainder ($365.27) from July 1, 1902, to the time of payment or tender, within sixty days from the date of the filing of this decree, or if appeal be taken, within sixty days from the receipt of the final certificate from the law court, the defendants, and each of them, convey to the plaintiffs all title held by either of said defendants under the deed aforesaid of Frank B. Devereaux and others to the extent of and in proportion to the plaintiffs' respective ownerships in said land, as aforesaid.

"4. That if the plaintiffs shall fail to pay or tender the aforesaid amount within the time aforesaid, the defendants shall hold the title that they, or either of them, has under said deed, free and discharged of said trust in favor of the plaintiffs."

From this decree the defendants appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

The case is stated in the opinion.

Butler & Butler, and Charles F. Johnson, for plaintiffs.

Walton & Walton, E. F. Danforth, and Foster & Foster, for defendants.

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

KING, J. Bill in equity before this court on defendants' appeal.

On February 19, 1902 the defendant, Edward P. Page, and the original plaintiffs were tenants in common of a certain township of land in Somerset county known as Moxie Gore. Page owned one-fourth and the plaintiffs three-fourths. About that time Page, and some, at least, of the other co-tenants, learned that their common title to the township was derived through a chain of conveyances beginning with a mortgage title as far back as 1835 and 1836, and that the equity of redemption thereof had never been foreclosed or released, being apparently still outstanding.

Thereupon Edward P. Page, without any arrangement or understanding with his co-tenants, purchased at his own expense three-fifths in common and undivided of such outstanding right of redemption of the common property and had the same conveyed to his wife, Lizzie M. Page, the other defendant, by deed dated February 19, 1902. Mrs. Page paid no part of the consideration, and no question is raised but that this interest so conveyed to her is subject to the same trusts, if any, as it would have been if Edward P. Page had taken the deed in his own name.

The bill is brought to obtain a decree that each of the defendants holds all title in any way acquired by either of them by virtue of said deed to Mrs. Page in trust for, and must convey the same to, all the plaintiffs as tenants in common with Edward P. Page to the extent and in proportion to their respective ownerships therein. The presiding Justice so decreed and this appeal is from that decree.

It is the well settled doctrine that tenants in common stand in such confidential relation to one another in respect to their interests in the common property, and the common title under which they hold it, that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title and thereby injure and prejudice the interests of his co-tenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his

co-tenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures.

This subject has been much discussed in the decisions and text books, with varying statements of the principles upon which the doctrine rests and the reasons to be considered in its application to particular cases, but nowhere is the general principle seriously questioned, and we think it stands supported by almost universal authority. *Van Horne* v. *Fonda*, 5 Johns. ch. 407; *Venable* v. *Beauchamp*, 3 Dana (Ky) 321; (28 Am. Dec. 74 and note), *Booker* v. *Crocker*, 132 Fed. 7; *Bracken* v. *Cooper*, 80 Ill. 229; *Barnes* v. *Boardman*, 152 Mass. 391, page 393; Freeman on Cot. and Part. Sec. 154 et seq.; Am & Eng. Ency. Law (2nd ed.), Vol. 17, page 674 and cases cited in notes.

The leading case upon the subject in this country is *Van Horne* v. *Fonda*, supra, where Chancellor Kent thus stated the doctrine:

"I will not say however that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interest, that one of them should not effect the claim, to the prejudice of the other. It is like an expense laid out on a common subject by one of the owners in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces community of duty, and there is no real difference, on the ground of policy and

justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseise and expel his co-tenant."

Judge Story fully approved the doctrine as laid down by Kent, saying: "It stands approved equally by ancient and modern authority, by the positive rule of the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America." *Flagg* v. *Mann*, 2 Sumn. 524.

There are some cases, however, in which the suggestion is made that the rule is applicable to tenants in common only when their interest accrues under the same instrument, or act of the parties, or of the law, or where there is some understanding among them which creates such a trust. The suggestion seems not to be much regarded. In *Rothwell* v. *Dewees*, 2 Black, 613, the Supreme Court of the United States applied the principle to the husband of a tenant in common who had bought in an outstanding title or incumbrance, and Mr. Justice Miller there said: "In this connection much stress is laid by counsel upon the language of the court in *Van Horne* v. *Fonda*, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned Judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated."

In *Bracken* v. *Cooper*, supra, in speaking of this suggested qualification of the doctrine as applied to tenants in common, the court said: "We do not find sufficient authority or reason to induce us to adopt the qualification of the doctrine, as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the accidental circumstance whether the relationship of the parties be constituted by the same instrument or act of the parties or of the law, or not."

In *Hunter* v. *Bosworth*, 43 Wis. 583, Chief Justice Ryan said: "The rule rests, not upon the strict relation of joint tenants, or tenants in common, but upon community of interests in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the others." Mr. Freeman in his work on Cotenancy, previously cited, says: "As the rule forbidding the acquisition of adverse titles by a co-tenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold under the same title. Their union of interest and of title is so complete that beyond a doubt such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the others in relation to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors; their only unity is that of right to the possession of the common subject of ownership. . . . . An examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the co-tenants are not in joint possession of the premises." It will be noted that the author does not approve the suggested qualification of the doctrine that tenants in common are not subject to it unless they have acquired title under the same instrument, or act of the parties, or of the law. The distinction which he points out between joint tenants and tenants in common respecting the application of this rule appears to be this: That in the case of the former the essential relation of trust and confidence necessarily exists as the result of their union of interest and title; while in the case of the

latter such essential relation does not necessarily exist in the legal status of the co-tenants, but it may be, and often is, created and developed out of the co-tenancy. And when such a relation of trust and confidence does exist between tenants in common, in respect to the common property and title, so that it would be inequitable for one to procure and assert for his exclusive benefit an adverse title against his co-tenants, this doctrine is applicable and should be enforced. We think this is a fair and conservative statement of the rule as applicable to tenants in common.

But the defendants do not contend here against this doctrine. They admit that they hold some of their purchase in trust for the plaintiffs, but they say it is only the excess of the three-fifths over what is required to fully protect Page's undivided quarter in the common property against the whole adversary claim. Or in other words, that Page, holding 1-4 or 5-20 of the common property, and having purchased only 3-5 or 12-20 of the adversary claim, is entitled to retain 5-20 to cover fully his original interest, and therefore should be required to convey to the plaintiffs but 7-20 instead of 9-20 as they claim. The learned counsel for the defendants in their brief say: "But it is equitable, that having protected his one-fourth interest, which would be five-twelfths, then he should be compelled to relinquish and give up all claim to the seven-twelfths interest, because that was not necessary for his own protection. It inured, in other words, for the benefit of the plaintiffs in this case."

Admitting, as the defendants do, and, as we think, in accord with reason and authority, that the general doctrine forbidding one tenant in common to procure and assert against his co-tenants an outstanding adverse claim, applies in this case, and that the defendants hold some part of their purchase in trust for the plaintiffs, we do not perceive on what reasonable grounds the defendants can maintain the position which they here contend for. We have cited the authorities above not merely to show that the rule is firmly established in judicial precedent, but to indicate the principles and reasons underlying the doctrine, and their application to cases arising between co-tenants, which principles and reasons must, we think, control in the determination of the defendants' contention as made here.

Previous to 1871 Abner and Philander Coburn claimed to be the owners of this township. The title of all the co-tenants is derived from them — most of them as heirs and devisees, some through mesne conveyances, including Page, who acquired his title in 1890.

While it does not so appear, we assume, from the circumstances, that the possession of the property was in all the tenants in common, and that they had been and were receiving such rents and profits in stumpage as the property yielded from time to time.

The claim acquired by the deed to Mrs. Page of February 19, 1902, was an outstanding right to redeem three-fifths of this common property from mortgages. It is no doubt true that ordinarily one tenant in common of a mortgage title may buy in the equity of redemption thereof and hold it for his exclusive benefit, if in so doing he does not injure or prejudice the interest of his co-tenant in the debt thereby secured. In such case it may be said that the right to redeem is not an adverse claim to the mortgagees' title. But that is not this case. Here the co-tenants supposed that they were the absolute owners of the common property. They had possessed and enjoyed it for many years, using it as they saw fit as owners. They may have materially decreased its value by hard cutting of timber, or they may have increased its value by improving the facilities for getting the lumber therefrom. Under such facts and conditions these discovered outstanding rights of redemption must be regarded as adverse claims to the common interests and title.

In *Bracken* v. *Cooper*, 80 Ill. 221, it is held that where a mortgagee in possession died, claiming to own the property and by his will, devised it to his sons, a grantee of one of the sons, and tenant in common of the others, could not purchase the equity of redemption of the mortgage for his own exclusive benefit as against his co-tenants, but such purchase would enure to the common benefit of himself and his co-tenants, at their option.

Was the relation between Page and his co-tenants such that it would be inequitable for him to enforce the redemption of the common property from these old mortgages? We think it was. The right of redemption may be contested, in which case one tenant in common would be prosecuting a suit against the others to extinguish

the common title. The mortgages have been standing a very long time, during which the plaintiffs and defendant jointly, and those under whom they claim, have had the possession. Manifestly much difficulty and conflict of interest would necessarily arise in ascertaining the rents and profits, and the amount due under the mortgages. Indeed, in such a case, because of the long joint possession, and the relation of trust and confidence naturally existing as the result of that possession, the co-tenant prosecuting redemption proceedings against the common property might have the sole knowledge and control of the essential evidence for his co-tenants' defense.

It would be inequitable to permit Page, by asserting this equity of redemption, to undermine and destroy the common title under which he and his co-tenants have for years held joint possession of the property, for, in the language of Chancellor Kent above quoted: "It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created."

If this be so, and Edward P. Page, at the time he purchased in this interest in the adversary claim, stood in such relation of trust and confidence to his co-tenants that he is not permitted to assert the whole of that interest against them, then, how may he be permitted to assert any *disproportionate* share of it against them? Because of this relation of trust and confidence his purchase enured to the benefit of all. The whole purchase must be impressed with the trust or none. If he is permitted to assert against the common title any greater share of these three-fifths than his proportionate part, which would be 1-4 thereof, or 3-20, to that extent he will have an advantage over his co-tenants, and to that extent there will be the same breach of the relation of trust and confidence, and to that extent the same evils and inequities will arise, as if he were asserting the whole purchase. The argument that it is equitable for him to retain enough of his purchase to protect his interest seems at first plausible and reasonable, but it is in fact not well founded. It cannot be harmonized with the reasons and principles of the general doctrine.

The doctrine here invoked by the plaintiffs is founded in equitable principles. It is to enforce that good faith and fair dealing required

between those who stand in close and intimate relations as to their property ownerships. A failure to enforce it may result in great injustice, while under its enforcement substantial justice is always obtained, for the purchasing co-tenant is to be fully reimbursed for all his necessary expenditures for the benefit of the common property.

We think the doctrine is especially applicable to the case at bar and should be enforced so that each co-tenant, upon a pro rata contribution, will receive his pro rata share of the whole three-fifths of the equity of redemptions purchased by Page, and as conveyed to his wife, Lizzie M. Page.

The defendants can take nothing by their objection that no demand was made upon Mrs. Page. The presiding Justice found that the plaintiffs seasonably made request upon Edward P. Page for their share of his purchase and offered to reimburse him proportionally for his expenses incurred, and he refused their request. Mrs. Page was the holder of the title of the interest purchased by her husband, either as his trustee or his voluntary donee. The presiding Justice ruled that the want of demand on Mrs. Page was of "no importance, except as to the awarding of costs against her." We think this ruling was correct.

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

Decree of single Justice affirmed.

JOSHUA T. BALDWIN *vs.* INHABITANTS OF PRENTISS.

Penobscot. Opinion June 28, 1909.

Towns. Money Loaned to Towns. Antecedent Authority or Subsequent Ratification Necessary to Maintain Action Therefor. Town Treasurer.

1. An action will not lie against a town for money loaned to it, through its officers, without antecedent authority, unless their action has been ratified by the town, even if the money has been used to pay legitimate obligations of the town.
2. If a town treasurer pays a town order with his own money, it is essentially a loan to the town, and he cannot recover the money from the town without proof that the town previously authorized or subsequently ratified his action.
3. A town treasurer is not the financial agent of the town. His duty is simply to receive and safely keep the public money and disburse it upon lawful warrant.

On report. Judgment for defendants.

Action for money had and received. Plea, the general issue with brief statement invoking the statute of limitations. At the trial, the presiding Justice submitted to the jury certain questions for special answer and after their answer had been returned the case was reported to the Law Court for determination.

The case is stated in the opinion.

P. H. Gillin, for plaintiff.

H. H. Patten, for defendants.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

SAVAGE, J. This is an action for money had and received, to which the defendant pleaded the general issue and the statute of limitations. The plaintiff contends that on October 13, 1905, he as town treasurer of the defendant town, and acting for the town, took up and paid to the holder, with his own money, a town order dated March 22, 1900. There was no money in the town treasury at that

time. The defendant contends that the plaintiff bought the order on his own account, and that the statute of limitations applied to the order before the date of the writ, which was May 4, 1907.

The presiding Justice submitted to the jury the following questions for special answer: — "Did the plaintiff pay the town order in question as town treasurer, to be extinguished and used only as a voucher, or did he purchase it to hold as a town order?" and the jury answered, "Paid." Thereupon the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

In the view we take of the case, it is immaterial whether the plaintiff bought the order, or paid it. If he bought it, it was barred by the statute of limitations when suit was commenced. If he paid it with his own money, and especially if, as he testified, he expected to get interest on his advancement, it was to all intents and purposes a loan to the town, and hence not recoverable from the town without proof of previous authority from the town, or subsequent ratification by it. Neither appears in this case.

It is well settled by a long line of cases in this State, the last of which was *Pierce* v. *Greenfield*, 96 Maine, 350, that an action will not lie against a town for money loaned to it, through its officers, without antecedent authority, unless their action has been ratified by the town, even if the money has been applied to the discharge of legitimate obligations of the town. See *Lovejoy* v. *Foxcroft*, 91 Maine, 367, where the proposition was elaborately discussed.

It does not seem to be open to dispute that a town treasurer can no more bind the town by loaning his own money to it without authority, than he can by hiring money for it from others. In *Lovejoy* v. *Foxcroft*, supra, the court used this language: — "The town treasurer is not the town's financial agent, and has no power whatever, as such, to bind the inhabitants of the town to repay money borrowed by him for the town and used by him in discharging liabilities of the town. He has no more power than a highway surveyor in this respect. He is unlike the cashier of a bank or the treasurer of a trading corporation. He is simply a public officer

charged by law, not by the town, with the duty of receiving and guarding the public money and disbursing it upon lawful warrant."

It is the policy of the law in this State that a town may always invoke the doctrine of ultra vires as a defense to a contract, express or implied, made for it by its officers, which it has neither authorized nor ratified. The general principles of equity and good conscience which are applied to individuals and business corporations cannot alone be the basis of an action against a town. *Lovejoy* v. *Foxcroft*, supra. We cannot say that a town must pay, simply because in good conscience, or even in common honesty, it ought to pay.

If the plaintiff paid the order, as he claims, with his own money, he took the chances of the town's being willing, later, to reimburse him. It seems that for some reason,—and whether the reason is good or bad is immaterial,—the town is unwilling. That is an end of the plaintiff's case.

Judgment for the defendants.

JULIA B. PANCOAST *vs.* DAVID E. DINSMORE.

Piscataquis. Opinion June 28, 1909.

Contracts. Principal and Agent. Liability of Agent. Undisclosed Principal. Nudum Pactum.

1. Money paid in advance as part of the purchase price of real estate may be recovered back, if the owner fails to make a conveyance in accordance with his contract.

2 Where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, the agent is liable as a principal so long as he stands in his original position, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it.

3. When one has contracted to take a deed with covenants of warranty from another who is the ostensible owner, but who is really the agent of an undisclosed principal, he is not obliged to accept a deed from the principal,

when discovered, though he may do so. A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.

4. If an intending purchaser, having contracted to take a deed from one who is the ostensible owner, agrees afterward, without consideration, to accept a deed from the real owner, in lieu of the deed contracted for, he is not bound by such agreement. It is a new contract and requires a new consideration.

On exceptions by defendant. Overruled.

Action of assumpsit for money had and received, with specifications of what the plaintiff expected to show and prove under the money had and received count. Plea, the general issue. During the trial, the presiding Justice excluded certain evidence offered by the defendant, and at the conclusion of the testimony ordered a verdict for the plaintiff. To these rulings the defendant excepted.

The case is stated in the opinion.

J. B. & F. C. Peaks, for plaintiff.

C. W. Hayes, for defendant.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

SAVAGE, J. This case comes up on defendant's exceptions to the exclusion of evidence, and to the ordering of a verdict for the plaintiff. The evidence in the case shows that the plaintiff negotiated with the defendant for the purchase of a farm. The negotiations ended in a written contract signed by the defendant as agent for one Hilton. By the terms of the contract, Hilton was to execute and deliver to the plaintiff, at a time and place certain, a warranty deed of the farm, with the usual covenants, and the plaintiff was to pay four hundred dollars down, that is, at the execution of the contract, and to pay or secure the balance of the purchase price at the delivery of the deed. The plaintiff paid the four hundred dollars to the defendant, and he still holds the money. And it is not claimed by Hilton. At the date of the contract Hilton did not own the farm, nor did he own it at the time fixed for the delivery of the deed, nor has he owned it at any time since, and he has never executed or tendered any deed of it. He might have put himself

in a position so that he could perform the contract on his part, by seasonably procuring title in his own name, but he did not. After the time specified for the delivery of the deed had passed, and after demand for the repayment of the money, the plaintiff brought this suit to recover of the defendant the four hundred dollars, advanced towards the payment for the farm.

Under these circumstances, it is not questioned, and cannot be, that the defendant, though only an agent, is liable in this action for the money received by him, unless some of the defenses tendered by him, and to be referred to later, are valid and effective. The rule is that where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, the agent is liable as a principal so long as he stands in his original position and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. 1 Am. & Eng. Ency. of Law, page 1129. In this case, Hilton, the principal, had utterly failed to perform his contract. He could neither enforce payment of the unpaid part of the purchase price, nor rightfully retain that part which had been paid. *Richards* v. *Allen*, 17 Maine, 296; *Jellison* v. *Jordan*, 68 Maine, 373. Therefore, so far as the case has yet been stated, the plaintiff has a clear right to recover in this action.

But the defendant, not controverting the facts thus far outlined, claimed and offered evidence to show that Hilton himself was acting as the authorized agent of the real owner of the farm to sell it, and that the plaintiff's husband knew this fact before the time fixed for the delivery of the deed, and also knew who was the true owner. But it is not claimed that either the plaintiff or her husband knew these facts at the time the contract was made, except from the clause in the contract describing the farm as "belonging to the estate of William S. Perkins."

The defendant further offered to show that the plaintiff's husband, acting as her agent, (and we assume with authority from her) after the time specified in the contract for the delivery of the deed, and waiving strict performance as to time, agreed, first with the authorized attorney of the owner, and later with another agent of the

owner, upon a later time for the delivery of a deed; that a deed from the owner direct to the plaintiff, and a mortgage back, were exhibited to Mr. Pancoast, and that they were satisfactory; that in pursuance of an arrangement made with Mr. Pancoast, the deed of the owner and the mortgage were brought to Dover, for the purpose of transfering the title to the plaintiff; that that deed was seasonably tendered to the plaintiff; that the plaintiff refused to pay or secure the unpaid balance of the purchase price, as stipulated in the contract; and that the deed tendered would have conveyed a complete title to the plaintiff.

The defendant also offered to show that the contract between the plaintiff and Hilton was ratified by the real owner.

All this evidence was excluded, and no other being offered, a verdict was ordered for the plaintiff.

The position of the defendant is that the real owner, a Mrs. Coughlan, was an undisclosed principal, of whom Hilton was the agent, and that a tender of a deed by Mrs. Coughlan was as effectual to hold the plaintiff, as would have been a tender of a deed by Hilton, had the title been in him. But this conclusion does not follow. The plaintiff's contract was with Hilton as a principal. She contracted with no one else. Doubtless, if the owner had placed the title in Hilton for sale as agent, and he had performed his contract by the execution and delivery of a deed, by the principles of the law of agency, the undisclosed owner might have held the plaintiff for the price. Doubtless, too, the plaintiff might have held the owner, as undisclosed principal, to the performance of the contract made by her agent. This rule is well settled, and is the doctrine of *Kingsley* v. *Siebrecht*, 92 Maine, 23. But this case does not fall within these rules. Here the defendant, instead of seeking to bind an undisclosed principal to a third party who contracted with the agent, seeks to bind a third party to an undisclosed principal, in the case of an unperformed contract.

It is good sense, as well as sound law, that, in case of a purely executory contract, a party dealing with another as principal, though in fact he is agent, is not compellable, at all events, to accept performance from the undisclosed principal, when discovered, though

he may do so. He may well say:—"This is not the contract I made." In case an agent, in making a contract with a third party, acts in his own name, and does not disclose the name of his principal, or the existence of an agency, the agent becomes, as to that third party, the contracting party. 1 Am. & Eng. Ency. of Law, page 1164. And the third party may stand on the contract which he has made. It was well said in *Boston Ice Co.* v. *Potter*, 123 Mass. 28:—"A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, ... he may contract with whom he pleases, and the sufficiency of his reasons for so doing cannot be inquired into." And were such reasons open to inquiry, it is easy to see that one might be willing to take the warranties of one person in a deed, when he would not take those of another. At any rate, he is only obliged to take the deed which he contracted to take. It follows that the plaintiff was not bound in law to accept Mrs. Coughlan's deed, when tendered.

But the defendant says further that the plaintiff by her agent waived the contract in respect to who should give the deed, and agreed to accept a deed from the owner direct, in lieu of one from Hilton. If so, this constituted a new contract. It made, as to the plaintiff, a new contracting party. For this contract, no consideration has been shown or offered. It was nudum pactum, and not binding upon the plaintiff. She still had the right to stand upon her original bargain.

It is thus seen that the evidence offered, if true, presented no defense. It was immaterial, and was rightfully excluded. And the verdict for the plaintiff was properly ordered.

Exceptions overruled.

In Equity.

ALMA TURNER *vs.* MICAJAH HUDSON.

Piscataquis. Opinion June 28, 1909.

Bankruptcy. Composition has Effect of a Discharge. Discharge in Bankruptcy Cannot be Annulled by a State Court. U. S. Bankruptcy Act, 1898, sections 13, 14 c.

1. In a case where a bankrupt offered, under the Bankrupt Act, a composition to his creditors, which was accepted by the creditors and confirmed by the bankruptcy court, it is *held* that so long as the order confirming the composition stands, it has the effect of a discharge, and bars all remedies for the enforcement of claims by creditors, either against the debtor or his property.
2. When a debtor has been discharged from his debts on a composition in bankruptcy, a bill in equity by a creditor, charging that the debtor fraudulently concealed and omitted from his schedule of assets, filed in the bankruptcy court, money and property of his own which should have been included therein, and that the creditor relying upon the correctness of the schedules was induced thereby to accept the composition, does not lie, in the State court, at least, to reach the property thus concealed and omitted, and apply it to the payment of the creditor's claim.
3. A discharge in bankruptcy cannot be annulled nor disregarded by a State court. It must be attacked for fraud in its procurement in the Federal courts, if anywhere. And the same rule applies to fraud in the proceedings for a bankruptcy composition.

In equity. On exceptions and appeal by plaintiff. Exceptions overruled. Appeal dismissed.

Bill in equity brought in the Supreme Judicial Court, Piscataquis County. The bill of exceptions states the case as follows:

"This is a bill in equity brought by the plaintiff against the defendant wherein it is alleged that the said defendant did conceal from his creditors and did withhold from his schedule of assets, in bankruptcy property of great value which in equity belonged to his said creditors, and did after his discharge by the Court of Bankruptcy take to himself said withheld and concealed property, to the damage of said plaintiff who was, and is a creditor of said defendant, in

fraud of said plaintiff; and in said bill said plaintiff asks for relief from said court, and that said defendant account to her as such creditor for said property so withheld and concealed by him."

The defendant demurred to the bill, the demurrer was sustained, and the plaintiff excepted and appealed.

The case is stated in the opinion.

J. S. Williams, for plaintiff.

Hudson & Hudson, for defendant.

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

SAVAGE, J. Bill in equity. The defendant demurred. The Justice of the first instance sustained the demurrer and dismissed the bill with costs. The plaintiff both excepted and appealed. Either would have been sufficient. It was not necessary to do both.

The plaintiff in her bill charges, in substance, that on Aug. 29, 1904, she was a creditor of the defendant, that he on that day filed his voluntary petition in bankruptcy in the proper Federal Court, with the required schedules of assets and liabilities, under oath, which schedules purported to contain a true and correct inventory of his property, and a full and true statement of his debts, and was adjudicated a bankrupt; that the plaintiff was named in the schedules as an unsecured creditor, and that she seasonably made proof of her debt; that subsequently the defendant offered a composition to his creditors, under the terms of the bankruptcy act, which was duly accepted by the requisite creditors in number and amount, and was confirmed by the bankruptcy court; that the plaintiff accepted the terms of the composition and received the percentage, and that she did so under the full and reasonable belief that the defendant's schedules of assets contained an accurate inventory of his property, relying upon, and being thereto induced by, the defendant's representations, statements, and inventory under oath as aforesaid; that the defendant, with the intent to cheat and defraud the plaintiff of the same, knowingly withheld, concealed and omitted from said schedules, a large amount of money and property, which was his own, and not exempt, to secure the same

for his own use and behoof, and which he has since taken and appropriated to his own use; that she was ignorant of the facts so charged as to fraud until a brief time before she filed her bill; and that she is willing to return the percentage received.

Upon these allegations, which for the present must be assumed to be true, the plaintiff claims that a trust has arisen in her favor in the property so fraudulently omitted from the bankruptcy schedules, and asks that the property may be applied in payment of her debt.

Several grounds of demurrer are suggested in argument, but we shall have occasion to notice only one. The plaintiff seeks to establish a trust for the payment of her claim,—a trust growing out of a fraud by which the acceptance of the offer of composition was procured. If the claim might be tenable under any circumstances, concerning which we express no opinion, it could only be upon the theory that her claim against her debtor is enforceable in some way, at law or in equity. If she has no enforceable claim against the debtor, she has none against his property, for the latter claim is founded upon the former. The alleged trust vanishes.

The bill shows a composition in bankruptcy accepted and confirmed. Section 14, c. of the Bankruptcy Act of 1898 provides that the confirmation of a composition shall discharge the bankrupt from his debts, with exceptions not material in this case. The confirmation works a discharge by operation of law. *In re Merriman*, No. 9479 Federal Cases. Therefore the defendant was discharged from his debt to the plaintiff. While such a discharge remains in force, it cannot be set aside or annulled by a State court. It is conclusive. *Corey* v. *Ripley*, 57 Maine, 69; *Symonds* v. *Barnes*, 59 Maine, 191; *Bailey* v. *Corruthers*, 71 Maine, 172. It must be attacked for fraud in the court of bankruptcy, if anywhere. Collier on Bankruptcy, 7th Ed. 242. The authority of Congress is paramount over the subject of bankruptcy. It may make such laws and provide such remedies as it sees fit. It may limit the time within which such remedies must be sought, and it may prescribe the remedial procedure. It may determine the effect of a discharge, and how and when it may be attacked for fraud. The federal jurisdiction is exclusive. Neither the State legislature nor the State court has any

jurisdiction over these matters. If this court were to attempt to grant the relief sought, it could only be done by disregarding the defendant's discharge, and that the court has no right to do so.

The plaintiff's brief calls our attention to the declaration of a text writer on bankruptcy to the effect that "the order confirming a composition is not a bar to a suit to collect the debt when the composition was procured by fraud. The reason for this rule is that fraud vitiates the whole composition and leaves the debtor and the bankrupt in the same position that they were in before the composition was attempted." If this be so, then every composition and every discharge in bankruptcy is open to attack in the State courts, on the ground of fraudulent procurement, a doctrine which is opposed to sound reason and all authority. But the cases cited by the learned writer do not support the text. One is *Brownville Mfg. Co.* v. *Lockwood*, 11 Fed. Rep. 705. This was the case of a composition at common law, and not in bankruptcy, and of course has no proper application in this case. Another was *Pupke* v. *Churchill*, 91 Mo. 81. This was a case where a debtor failed to carry out a composition agreement after it had been accepted and confirmed, which has no bearing on this case. And the third was *Ex parte Halford*, 19 L. R. Eq. 436. This was an English case. It is evident that the jurisdiction of English courts in bankruptcy matters can in no sense be a precedent in this country, where the jurisdiction of the Federal court and the want of jurisdiction of the State court are the result of constitutional limitations. We have not been able to find any authority which sustains the contention of the plaintiff.

The Bankruptcy Act itself provided a remedy for the kind of a fraud of which the plaintiff now complains. Under section 13, a composition may be set aside for fraud in its procurement. And that this includes the fraudulent omission of property from the schedules has been held in *In re Ronkeus*, 128 Fed. Rep. 645, and *In re Wrisley Co.*, 133 Fed. Rep. 388. It is true as the plaintiff says, that application for the setting aside of a composition must be made within six months after the confirmation, and that she did not discover the fraud in season to take advantage of the statute.

In re Jersey Island Packing Co., 152 Fed. Rep. 839. But that does not change the statute. As we have said, Congress had paramount authority to grant such remedies as it saw fit, and to prescribe a statute of limitation within which, and not beyond, wronged parties might avail themselves of them. The remedy provided by Congress is exclusive.

The defendant obtained a discharge in bankruptcy. It has never been revoked nor set aside. So long as the order confirming the composition stands, it must have the effect of a discharge. Collier on Bankruptcy, 7th Ed. 294. It is a complete bar to the plaintiff's claim, and to all remedies for its enforcement against the defendant or his property. Accordingly the plaintiff's bill was properly dismissed.

Exceptions overruled.
Appeal dismissed with additional bill of costs

ADA O. FOGG, Appellant from Decree of Judge of Probate, in re estate of JOHN H. FOGG.

Cumberland. Opinion July 10, 1909.

Executors and Administrators. Descent and Distribution. Will. Provisions of Will Waived by Widow. Widow's Distributive Share of Personal Estate after Waiver. Legacies. Statute, 1909, chapter 260. Revised Statutes, 1883, chapter 75, section 9; 1903, chapter 77, sections 1, 13, 18.

1. When a widow has seasonably waived the provisions of her husband's will in her behalf, and has claimed her share of the personal estate, under Revised Statutes, chapter 77, section 13, she is entitled to one-third of the personal estate if there are issue, and one-half, if no issue, after deducting the widow's allowance and the debts, funeral charges and expenses of administration.

2. Legacies are not to be deducted before distribution to the widow. They are to be borne by the remainder of the personal estate, after her share is taken out.

3. A legacy given to the executor in lieu of commissions is to be regarded as an expense of administration, and not a legacy proper.
4. Whether a widow who has waived the provisions of her husband's will is entitled in any event to one-third of the personal estate, free of debts, under Revised Statutes, chapter 77, section 1, *quaere*.

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

Appeal by the widow of John H. Fogg, late of Portland, deceased testate, from a decree of distribution made by the Judge of Probate, Cumberland County. The appeal was duly entered in the Supreme Judicial Court, sitting as the Supreme Court of Probate, in said county, at the January term, 1909, at which time an agreed statement of facts was filed and the case was then reported to the Law Court "to render such judgment as the rights of the parties may require."

The case is stated in the opinion.

Sewall C. Strout, and Charles A. Strout, for plaintiff.

Anthoine & Talbot, for heirs at law of John H. Fogg.

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

SAVAGE, J. This case arises on an appeal by the widow from a decree of distribution of the testate estate of John H. Fogg, and comes to this court on report. Mr. Fogg left no issue. The widow seasonably waived the provisions of the will and claimed her share in the personal estate. The decree of the Probate Court gave her one-half of the personal estate, after deducting the debts, costs of administration, allowance to the widow, funeral expenses and legacies.

The widow claims that she is entitled as distributee to one-half of the personal estate, without any deductions; or, that in any event, the legacies should not have been deducted, before distribution.

The widow's rights depend upon the construction to be given to the following clause in section 13 of chapter 77 of the Revised Statutes, as it read prior to statutes of 1909, chapter 260, namely: "When a provision is made in a will for the widow of a tes-

tator . . . . and such provision is waived as aforesaid, such widow . . . . shall have and receive the same distributive share of the personal estate of such testator . . . . as is provided by law in intestate estates," The question then is, what would have been her share, if there had been no will? As to her, the estate is to be regarded as intestate,—as if her husband had died leaving no will.

The descent of personal property in intestate estates is regulated by R. S., c. 77, sect. 18, in these words: "The personal estate of an intestate, except that portion assigned to his widow by law and by the judge of probate, shall be applied first to the payment of debts, funeral charges, and charges of settlement; and the residue shall be distributed or shall escheat by the rules provided for the distribution of real estate." And the rule for the distribution or descent of real estate applicable to this case is found in R. S., c. 77, sect. 1, in these word: "If he leaves a widow and issue, one-third to the widow. If no issue, one-half to the widow. And if no kindred, the whole to the widow." This is the same rule which was formerly found in R. S., (1883) c. 75, sect. 9, relating solely to personal property. In the revision of 1903, this latter section was omitted, and the rule, for purposes of condensation, was stated by reference to the rules for distribution of real estate, which, so far as this case is concerned, were the same.

The widow in this case, claims, first, that the phrase in section 18 of chapter 77,—"that portion assigned to his widow by law,"—relates, in part, at least, to her distributive share under section 13, and that it is expressly excepted from that part of the personal estate which is available for the payment of debts and charges. This construction is not the correct one. If it were so, the widow would not only receive one-half of the personal estate under section 13, but would receive also one-half of the residue after payment of debts and charges, under section 18. It is plain that this is not the purpose of the statute.

The phrase "distributive share" in section 13 refers to that share which the widow would receive in the distribution of the residue of an intestate estate under section 18. In the administration of

intestate personal estate, the widow in the first instance is preferred. Out of the personal estate she is entitled, before the payment of debts and charges, to whatever the law assigns to her, not including what comes by distribution. She is, in the same way, entitled to the allowance made to her by the Judge of Probate. Then, the debts and expenses are to be paid out of what remains. Then, the residue of personal estate yet remaining is to be distributed, and of this, the widow is entitled to her "distributive share," one-third, if there are issue, and one-half, if no issue, and the whole, if no kindred. And this is the rule, so far as the determination of the widow's share in the personal estate is concerned, in the administration of testate estates, in cases where the widow has waived the provisions of the will, and has claimed her share. In this way, she receives "the same distributive share of the personal estate of the testator as is provided by law in intestate estates."

In the Probate Court, this rule was followed. The allowance to the widow, and the debts and expenses of administration were properly deducted before distribution of the personal estate. Hence the widow's appeal on this ground cannot be sustained.

But the Judge of Probate also deducted legacies, and decreed distribution of the balance only. This was error. The widow was entitled to the same distributive share as if the estate had been intestate. In an intestate estate there are and can be no legacies. It is plain that the legislature did not intend legacies to be deducted before distribution. There is no language which indicates it. To hold that they should be so deducted would be destructive of the purpose of this very beneficent statute. The statutory intention is that a widow shall have a way to obtain a certain, definite share of her husband's personal estate, though it may have been his purpose, as expressed in his will, to cut her off with less. So far, she is guaranteed by law against the shortsightedness, or caprice, or indifference, or even the hostility of her husband. To construe the statute otherwise, would be to say that a husband may entirely cut off his wife from any share in his personal estate, and defeat the statute, by bequeathing it all to others. Such a construction is not permissible. The burden of the legacies must fall upon that part

of the personal estate which is not distributed to the widow, under the rule we have stated, and not at all upon the widow's share. The legacies should not have been deducted before distribution to the widow. On this ground, therefore, her appeal must be sustained.

It appears that the testator in his will gave the executor a legacy in lieu of commissions. Taking into account the relative sizes of the estate and this legacy, we think that the legacy should be regarded as a payment for services, and thus an expense of administration, and not as a gift, or legacy proper. It should, therefore, be deducted before distribution to the widow.

In her reasons of appeal, the widow claims that she is entitled in any event to one-third of the personal estate, free from the payment of debts, under the last clause of paragraph 1, section 1, chapter 77 of the Revised Statutes. But in this case, it is not necessary, or even proper, to decide whether that clause includes personal as well as real estate, because that question does not arise here. The case shows that the widow will receive in any event more than one-third of the entire personal estate.

Since the change in the amount to be distributed to the widow will also change the amounts to be distributed to others, whose names and relationships, to the estate are not stated in the report, this court cannot prescribe what the decree of the Supreme Court of Probate should be, in its entirety. The appeal is sustained, and the case will go back to the Supreme Court of Probate, where a decree will be entered in accordance with this opinion.

Appeal sustained.
Case remanded.

STATE OF. MAINE *vs.* WINFIELD EDMINSTER et als.

Waldo. Opinion August 6, 1909.

Bail. Recognizance. Scire Facias. Variance. Revised Laws (Mass.) chapter 217, section 73. Revised Statutes, chapter 134, section 27.

Revised Statutes, chapter 134, section 27, provides as follows:

"Sec. 27. No action on any recognizance shall be defeated, nor judgment thereon arrested, for an omission to record a default of the principal or surety at the proper term, nor for any defect in the form of the recognizance, if it can be sufficiently understood, from its tenor, at what court the party or witness was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same." The purpose of this statute is to modify the strictness of the common law and to prevent the thwarting or delaying of justice by mere technicalities and in carrying out its spirit a liberal construction has been adopted by the court of Maine.

Where in an action of scire facias on a recognizance, the condition of the recognizance as alleged in the writ was to "appear before the Supreme Judicial Court next to be holden at Belfast, etc., . . . to answer to a complaint found against" the principal "and now pending in said court, for keeping and depositing intoxicating liquors at Belfast," etc., while the condition of the recognizance was "to appear and prosecute his said appeal," *Held:* That to appear in the higher court and answer to a complaint there pending, necessarily implied that it was pending there on appeal; that the nature of the offense as set forth in the writ showed that the higher court could have no original jurisdiction of the matter and that if pending there it must be on appeal; that the allegation in the writ and the recital in the recognizance were in effect only different methods of stating the same effect.

Where in an action of scire facias on a recognizance, the writ alleged a recognizance, taken before "Reuel W. Rogers, Judge of the Police Court of the City of Belfast," while the recognizance purported to have been given "at a Police Court holden at the Police Court Room in said City," *Held:* That the variance claimed as to the description of the court taking the recognizance was without merit. The words are exact equivalents. One court and one alone was designated.

Where in an action of scire facias on a recognizance, the writ, alleged that the principal "although solemnly called upon said complaint," did not appear, etc., and that the sureties "although solemnly called upon said

indictment to bring in the body" of the principal did not appear, etc., while the record was of a default of the defendants on a recognizance to prosecute an appeal from a sentence of the Police Court of the City of Belfast, *Held:* That the word "indictment" instead of "complaint" in the writ was a mere clerical error, self evident and harmless. After alleging that the three defendants gave the recognizance on "a complaint" and that the principal had made default "on said complaint" the averment that the sureties in the same recognizance had defaulted "on said indictment" was such an apparent clerical error and referred so unmistakably to the complaint already set forth that no one could be misled thereby.

On exceptions by defendants. Overruled.

Scire facias against the defendant Edminster as principal and Ben D. Field and William A. Clark as sureties, upon a recognizance taken before the Judge of the Police Court for the City of Belfast, and in which said court said Edminster had been duly arraigned on a search and seizure warrant issued against him under the provisions of Revised Statutes, chapter 29, section 49, and upon being found guilty and sentenced had appealed.

The action was duly entered in the Supreme Judicial Court, Waldo County, and the defendants filed the following plea:

"And the said defendants, by their attorneys James S. Harriman and Dunton & Morse, come and defend the wrong and injury, when, etc., and say that there is not any record of the said supposed recognizance and recovery, in the said scire facias mentioned, remaining in the said Supreme Judicial Court of said Waldo County, Maine, in manner and form as the said plaintiff the State of Maine, hath in the said scire facias, mentioned and alleged; and this they are ready to verify; wherefore they pray judgment if the plaintiff ought to have and maintain its aforesaid action thereof against them, etc."

To this plea, the State replied as follows:

"And the State of Maine, by H. C. Buzzell, County Attorney for the County of Waldo, as to the plea of the defendants, says that the State of Maine, by reason of anything in that plea alleged, ought not be barred from having its aforesaid action, because, it says, that there is such record of the said recognizance and recovery remaining in the said Supreme Judicial Court in said County of Waldo as it has in its said writ of scire facias alleged and this the

State of Maine is ready to verify by the said record, etc., and it prays that the same may be seen and inspected by the Court here and the judgment of the Court rendered thereon."

When the action came on for hearing "upon the writ, pleadings and proofs," the presiding Justice admitted the recognizance in evidence and upon the introduction of the record of default of the defendants on the recognizance, gave judgment for the State, and thereupon the defendants excepted.

The case is stated in the opinion.

H. C. Buzzell, County Attorney, for the State.

E. F. Littlefield, *James S. Harriman*, *and Dunton & Morse*, for defendants.

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

CORNISH, J. Scire facias upon a recognizance taken before the Judge of the Police Court for the City of Belfast. The defendants pleaded nul tiel record, and the case comes to this court on exceptions to the ruling of the presiding Justice, admitting the recognizance in evidence and giving judgment for the State upon the introduction of the record of default of the defendants on said recognizance.

The defendants contend that in three respects there was a fatal variance between the allegations in the writ and the recitals in the recognizance and record.

1. That the condition of the recognizance alleged in the writ is "to appear before the Supreme Judicial Court next to be holden at Belfast, etc. . . . to answer to a complaint found against said Winfield S. Edminster and now pending in said court, for keeping and depositing intoxicating liquors at Belfast etc." while the condition of the recognizance is "to appear and prosecute his said appeal."

2. That the writ alleges a recognizance taken before "Reuel W. Rogers, Judge of the Police Court of the City of Belfast" while the recognizance purports to have been given "at a Police Court holden at the Police Court Room in said City."

3. That the writ alleges that said Edminster "although solemnly called upon said complaint," did not appear, etc., and that the sureties "although solemnly called upon said indictment to bring in the body of said Winfield S. Edminster" did not appear, etc., while the record was of a default of the defendants on a recognizance to prosecute an appeal from a sentence of the Police Court of the City of Belfast.

These three objections must be considered in the light of R. S., ch. 134, sec. 27, which provides as follows: "No action on any recognizance shall be defeated nor judgment thereon arrested for an omission to record a default at the proper term, nor for any defect in the form of the recognizance, if it can be sufficiently understood from its tenor, at what court the party or witness was to appear, and from the description of the offence charged, that the magistrate was authorized to require and take the same."

The purpose of this statute, originally passed in 1841, is to modify the strictness of the common law and to prevent the thwarting or delaying of justice by mere technicalities, and in carrying out its spirit a liberal construction has been adopted by this court. *State* v. *Hatch*, 59 Maine, 410; *State* v. *Cobb*, 71 Maine, 198; *State* v. *Howley*, 73 Maine, 552; *State* v. *Gilmore*, 81 Maine, 405. A similar statute in Massachusetts, Rev. Laws, ch. 217, sec. 73, has received a similar construction from the highest court of that State. *Commonwealth* v. *Nye*, 7 Gray, 316; *Same* v. *Green*, 138 Mass. 200; *Same* v. *Teevens*, 143 Mass. 210.

The recognizance in the case at bar fulfills all the requirements of the statute. The court at which the defendants were to appear was the April term, 1908, of the Supreme Judicial Court for Waldo County; and the offense charged was one within the jurisdiction of the Police Court of Belfast and in which the Judge of that Court was authorized to require and take bail. The Court therefore from which the appeal was taken, the judgment appealed from, and the court at which the conusors were to appear, were all set forth in the recognizance.

The alleged variances contended for by the defendants are immaterial and inconsequential. We will consider them in the order raised.

1. To appear in the higher court and answer to a complaint there pending, necessarily implies that it is pending there on appeal. The nature of the offense as set forth in the writ shows that the higher court could have no original jurisdiction of the matter and that if pending there must be on appeal. The allegation in the writ and the recital in the recognizance are in effect only different methods of stating the same fact.

2. The variance claimed as to the description of the court taking the recognizance is without merit. The words are exact equivalents. One court and one alone was designated. *State* v. *Regan*, 63 Maine, 127.

3. The word "indictment" instead of "complaint" in the writ is a mere clerical error, self evident and harmless. Its occurrence is easily explained. The original writ, which is before this court for inspection, was a printed form containing the word "indictment" in three places. In two places that word was erased and "complaint" was inserted in its stead, in order to make the writ conform to the facts. In the third place this alteration was overlooked by the person preparing the writ for service. But after alleging that these three defendants, stating their names, gave the recognizance in question on a complaint and that the principal had made default on "said complaint," the averment that the sureties in the same recognizance had defaulted on "said indictment" is such an apparent clerical error and refers so unmistakably to the complaint already set forth that no one could be misled thereby. It was a single recognizance taken in a single complaint.

All the objections raised by the learned counsel for defendants are more ingenious than sound.

Exceptions overruled.

WARREN S. WILBUR, In Equity, *vs.* ROLLA V. TOOTHAKER et al.

Franklin. Opinion August 10, 1909.

Oral Contracts for Conveyance of Land. Evidence to Prove Such Contracts must be Full, Clear and Convincing. Laches.

When recorded muniments of title are assaulted by parol evidence, the proof must be full, clear and convincing in order to be effective.

Human memory is so treacherous that too much reliance cannot be placed upon the attempted recital, however honest, of a conversation that took place twenty-five years before the trial of a cause and between other parties concerning a matter in which the witness had no special interest.

The plaintiff, in 1908, brought a bill in equity asking the specific performance of an oral contract, alleged to have been made in 1884 by one Toothaker for the conveyance to the plaintiff of a certain lot of wild land.

Held: 1. That the evidence fell far short of proving the contract alleged by the plaintiff.

2. That even if the original contract could have been proved and all other obstacles overcome, yet the plaintiff had been guilty of such laches as to preclude any just claim for equitable interference.

In equity. On report. Bill dismissed.

Bill in equity brought in 1908, praying for the specific performance of an oral contract, alleged to have been made in 1884 by one John R. Toothaker for the conveyance to the plaintiff of a certain lot of wild land. The defendants demurred and also answered.

The cause was heard before the Justice of the first instance "on bill, answer and proofs," and at the conclusion of the hearing the case was reported to the Law Court for determination.

The case is stated in the opinion.

Elmer E. Richards, for plaintiff.

Enoch O. Greenleaf, for defendants.

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

CORNISH, J. This is a bill in equity asking the specific performance of an oral contract, alleged to have been made in 1884 by one John R. Toothaker for the conveyance to the plaintiff of a certain lot of wild land in Rangeley known as the mill lot. The

plaintiff claims that the contract embraced three parcels, that two were conveyed to him by Toothaker in accordance with the contract, but the third or mill lot was not conveyed. One of the defendants is the son of John R. Toothaker and holds title to the lot in question, in part by descent and in part by purchase from the other heirs, but with notice of the plaintiff's claim prior to purchase, while the other defendant is the administrator of the estate of said John R. Toothaker. The power of this court to grant such relief is well settled. *Green* v. *Jones*, 76 Maine, 563; *Woodbury* v. *Gardner*, 77 Maine, 68. Such an application, however, is addressed to the sound discretion of the court and so many obstacles stand in the way here that the plaintiff's request must be denied.

At the very threshold the court should be satisfied from the evidence that such a contract was in fact made, and on that issue the evidence must be full, clear and convincing. When recorded muniments of title are assaulted by oral evidence, the proof must be plenary in order to be effectual. The case at bar falls in line with those where attempts are made to reform a deed, to prove a lost will or an agreement to bequeath by will and related cases in all of which this full measure of proof is required. *Parlin* v. *Small*, 68 Maine, 289; *Moses* v. *Morse*, 74 Maine, 472; *Connor* v. *Pushor*, 86 Maine, 300; *Liberty* v. *Haines*, 103 Maine, 182; Wigmore Ev. Vol. 4, sec. 2498.

The evidence here falls far short of persuading us that such a contract as to any third parcel, was ever made. A single witness, a man well advanced in years, testifies that twenty-five or twenty-six years ago he heard a conversation between Toothaker and the plaintiff wherein the former agreed to sell to the latter for seven hundred and twenty-five dollars the Collins farm so called and on being pressed further says that the mill lot in controversy was to go with the Collins farm although he admits that he knows nothing about the lines. Human memory is so treacherous that too much reliance cannot be placed upon the attempted recital, however honest, of a conversation that took place a quarter of a century ago between other parties and concerning a matter in which the witness had no special interest.

The plaintiff also introduces three receipts given to him by John R. Toothaker. The first dated April 21, 1884, for $120.50, recites that it is "to be allowed on notes for farm he now lives on" and gives a brief description of the premises. The second is dated January 24, 1888, for $333.78 "on account with him for the farm he now lives on." The third is dated January 28, 1892, for $253.17 "in full payment for farm and I agree to give him a deed as soon as convenient to do so." On September 28, 1892, nine months after the last receipt, John R. Toothaker as administrator of the estate of Abner Toothaker, under license to sell, granted by the Probate Court on May 31, 1894, did give a deed to the plaintiff of two parcels of land for the consideration of $500, and the defendants claim that all was then conveyed that was ever agreed to be conveyed. The total amount paid by the plaintiff as represented by the receipts was $707.45 a little less than the $725 which the plaintiff claims was the agreed price eight years before, and much less if interest were added, while it is a little more than the $500 with interest as claimed by the defendants.

However, the significant and persuading fact is that the parties themselves on September 24, 1892, regarded the transfer of that date as closing the transaction. The deed was then delivered and doubtless the notes referred to in the first receipt were then surrendered. If the deed was not correct the plaintiff must have known it and need not have accepted it. Its acceptance without protest and its retention for fifteen years without seeking further relief are almost conclusive proof of the fact that all that had been bargained for had been conveyed. Especially is this true in view of the fact that John R. Toothaker lived until January 18, 1906, and during this time, more than thirteen years after the conveyance, was a near neighbor of the plaintiff. Why was not the error or fraud discovered or remedied during the lifetime of Mr. Toothaker? Why wait until death and the statute should deprive the court of the testimony of both parties to the transaction. Such silence on the part of the plaintiff is utterly inconsistent with his present claim.

It is unnecessary to consider at length other points in defense all possessing merit and all rendering a decree of specific performance

inadvisable, such as the indefiniteness or ambiguity in description, and the failure to satisfactorily prove any possession of the property by the plaintiff or any such conduct on the part of John R. Toothaker as to create an equitable estoppel based on an equitable fraud, which is the very essence of this proceeding. *Woodbury* v. *Gardner*, 77 Maine, 68-70.

Again, while the contract is alleged to have been made by John R. Toothaker in his individual capacity, the title to the property was not in him but in Abner Toothaker, of whose estate he was administrator, and it was by an administrator's deed that the farm was conveyed to the plaintiff, and that too, nearly seven years after the license therefor had expired under R. S., ch. 73, sec. 17. Finally if the original contract could have been proved and all obstacles overcome, the plaintiff has been guilty of such laches as to preclude any just claim for equitable interference. He has slept too long upon his rights. *Spaulding* v. *Farwell*, 70 Maine, 17; *Frost* v. *Walls*, 93 Maine, 405, *Clark* v. *Chase*, 101 Maine, 270.

The entry must be,

Bill dismissed with a single bill of costs for defendants.

HARRIETTE W. YOUNG *vs.* DWIGHT BRAMAN.

SAME *vs.* SAME.

Hancock. Opinion August 10, 1909.

Deeds. Boundaries. Ways. Right of Way. Obstruction of Same. Damages for Obstructing Same. Estoppel. Words and Phrases.

If land be conveyed as bounded on a street or by reference to a plan which shows it to be bounded on a street, and the grantor, at the time of the conveyance, owns the land over which the street passes, he and his successors in title will be estopped to deny to the grantee and his successors in title the use of it as a street.

The plaintiff purchased from the defendant on March 28, 1904, a certain lot of land in Sullivan, with a dwelling house thereon, described in the deed as follows:

"All that lot of land at Sullivan Harbor bounded southerly in front by Waukeag Avenue, on the East by land now or late of White 184 feet, on the North by land now or late of White and land now or late of Tredick, 90 feet 5 inches, and on the West by the driveway to the Manor Inn, containing 10,900 square feet be the same more or less, said premises being shown on the diagram below." The diagram showed the lot in question to be bounded on one side by Waukeag Road, and on another by what was delineated as "Driveway to the Manor Inn." The fee of the driveway as well as that of the Manor Inn to which it led was in the grantor at the time of the conveyance and the driveway at that time and for some time prior thereto and for two seasons thereafter was used by the occupant of the house upon the plaintiff's lot without question. In August, 1906, the defendant built a fence along the easterly line of the driveway completely shutting the plaintiff from the use of the same.

Held: 1. That the lot in question, having been conveyed as bounded on a driveway and by reference to a diagram delineating said driveway, the grantor, at the time, being the owner of the lot over which the driveway had been constructed was estopped to deny to the plaintiff the use of the same as a street.

2. That only nominal damages should be awarded. The inconvenience complained of was suffered more by others having business at the house than by the plaintiff herself.

The Standard Dictionary defines, "driveway" to be "a road for driving" and that is the meaning that at once suggests itself. It doubtless implies that it is over private land and is not a public way, but it does not imply that it is exclusive.

State v. *Clements*, 32 Maine, 279, overruled in part.

On report. Judgment for plaintiff.

Two actions on the case for the obstruction of a driveway. Plea, the general issue in each case. The two actions were tried together, and at the conclusion of the evidence the cases were reported to the Law Court for determination, with the stipulation that "if judgment is for the plaintiff, the court to assess the damages."

The facts are stated in the opinion.

NOTE. In connection with this case see *Cleaves* v. *Braman*, 103 Maine, 154.

Deasy & Lyman, for plaintiff.

Littlefield & Littlefield (of the New York Bar) for defendant.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

CORNISH, J. Actions on the case for obstruction of a way.

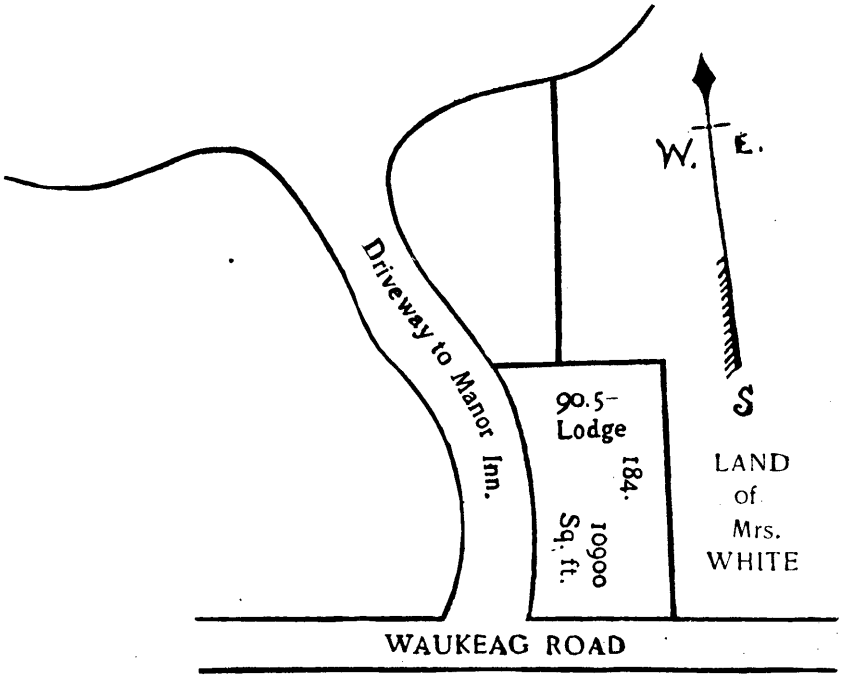
The Sullivan Harbor Land Company was at one time the owner of a large tract of land in Sullivan embracing the property in question, and caused the same to be surveyed and a plan to be made, showing lots and streets, which plan was recorded in the Hancock County Registry of Deeds, June 25, 1889. Subsequently that company sold and conveyed ten lots to various parties referring in the description to this recorded plan. By mesne conveyances the defendant became the owner of the unsold portion of the company's property and on March 28, 1904, conveyed one lot to the plaintiff, with a dwelling house thereon, the description in the deed being as follows:

"All that lot of land at Sullivan Harbor bounded southerly in front by Waukeag Avenue, on the East by land now or late of White 184 feet, on the north by land now or late of White and land now or late of Tredick, 90 feet 5 inches, and on the West by

the driveway to the Manor Inn, containing 10,900 square feet be the same more or less, said premises being shown on the diagram below."

The diagram incorporated in the deed is as follows:

DIAGRAM OF PREMISES.



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In the summer of 1906 the defendant built a fence between the plaintiff's lot and the driveway to Manor Inn completely shutting the plaintiff from the use of the same. The single issue is whether the plaintiff has any rights in the driveway which were invaded by this obstruction. The plaintiff claims such rights on two grounds, first under her deed, second, because of an alleged dedication to the public. It will be necessary to consider the first ground alone as that establishes the plaintiff's right to maintain these suits. This

involves a construction of the plaintiff's deed. What did she take by it? In Massachusetts it is a rule of construction that a boundary on a private way, includes the soil to the center of the way, if owned by the grantor. *Fisher* v. *Smith*, 9 Gray, 441; *Peck* v. *Denniston*, 121 Mass. 17; *Pinkerton* v. *Randolph*, 200 Mass. 24.

In this State a different rule obtains, viz, that such grantee takes title only to the side line of the way. *Bangor House* v. *Brown*, 33 Maine, 309; *Ames* v. *Hilton*, 70 Maine, 36; *Winslow* v. *Reed*, 89 Maine, 67.

But the courts of both States in a long line of decisions have uniformly and without dissent recognized another rule of construction, namely, that if land be conveyed as bounded on a street or by reference to a plan which shows it to be bounded on a street, and the grantor, at the time of the conveyance, owns the land over which the street passes, he and his successors in title will be estopped to deny to the grantee and his successors in title the use of it as a street. *Parker* v. *Smith*, 17 Mass. 413; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Tufts* v. *Charlestown*, 2 Gray, 271; *Franklin Ins. Co.* v. *Cousens*, 127 Mass. 258; *N. E. Structural Co.* v. *Everett Distilling Co.*, 189 Mass. 145; *Sutherland* v. *Jackson*, 32 Maine, 80; *Bangor House* v. *Brown*, 33 Maine, 309; *Warren* v. *Blake*, 54 Maine, 276-281; *Bartlett* v. *Bangor*, 67 Maine, 460; *Heselton* v. *Harmon*, 80 Maine, 326; *Atwood* v. *O'Brien*, 80 Maine, 447-449. *Dorman* v. *Bates Mfg. Co.*, 82 Maine, 438-447.

The two early cases cited by the learned counsel for the defendant as holding a contrary view, *State* v. *Clements*, 32 Maine, 279, and *Clap* v. *McNeil*, 4 Mass. 589, so far as they intimate any different rule, and such intimation is rather in the nature of dictum, have been overruled by the long line of decisions just cited.

But the defense further claims that such a rule of interpretation if legally sound should not govern in the case at bar because a contrary intent appears in the deed itself viewed in the light of surrounding circumstances.

First, because the very words of the deed "driveway to the Manor Inn," the fee to the driveway and the Inn being in the defendant, necessarily imply a private driveway, one reserved for the grantor's

personal use and convenience, and not intended to be used by others. We think this is an attempt to inject into the word driveway more than it ordinarily imports. The Standard Dictionary defines "driveway" to be "a road for driving" and that is the meaning that at once suggests itself. It doubtless implies that it is over private land and is not a public way, but it does not imply that it is exclusive. The rule above stated applies to ways over private land and its application is not a matter of terminology. In *Franklin Ins. Co.* v. *Cousens*, 127 Mass. 258, where the words "Cedar Square" were used, the court said: "If the plaintiff's northerly line had been described as bounded upon a way or passageway thirty feet wide it is too clear to admit of discussion that the grantor and the defendant claiming under him would be estopped to deny the plaintiff's right to a way thirty feet wide between Cedar Street and McLean Place. It can make no difference that the way is called by another name. The question is whether the thing intended as a boundary was in fact a way; if it was, it is immaterial whether it is called a way, or a street, avenue, lane, road, place or court."

The following are illustrations of the variety of terms employed, all of which fall within the rule. "Contemplated passageway," *Tufts* v. *Charlestown*, 2 Gray, 271; "A forty foot way" *Lewis* v. *Beattie*, 105 Mass. 410; "A Proprietor's way," *Gaw* v. *Hughes*, 111 Mass. 296; "A way twenty feet wide;" *LeMay* v. *Furtado*, 182 Mass. 280; "To a driveway, thence easterly on said driveway," *Bowland* v. *St. John's Schools*, 163 Mass. 229. "The driveway to the Manor Inn" would seem to properly belong in the same class as the foregoing.

Second, the defendant says that as the plaintiff's lot fronted on Waukeag Avenue or Road as it is called on the diagram, a public highway, there was no occasion for a right of way over the driveway. It is true this was not a way of necessity, but that is not a determining nor even an important element to be considered. The Massachusetts court have met this point in a very recent case in these words: "The deed is operative by estoppel to create the easement so far as the grantor's title will support it. Such a way is not

a way of necessity and the right exists even if there be other ways either public or private leading to the land." *N. E. Structural Co.* v. *Everett Distilling Co.*, 189 Mass. 145-152.

Third, the defendant says that there is no reference to the plan recorded by the Sullivan Harbor Land Company in 1889. That is true. The plaintiff's rights, however, are not based upon that plan but upon the description in her own deed and so much of that plan as is incorporated into and made a part of her deed. The plaintiff claims both by the calls of the deed and the "diagram of premises" embodied in the deed. This diagram shows a corner lot with Waukeag Road on the south and the Driveway to Manor Inn on the west. A single line marks the boundary of the lot on each way and there is apparently nothing to restrict the grantee's rights in the one any more than in the other. The same rights in both are given by law in the absence of some restriction or some language from which a contrary intent can be inferred.

Fourth, and finally the defendant says that the right of sewer connection in the driveway was expressly granted in the deed and that if the grantor had intended to grant a right of way that also would have been expressly conveyed. This point merits consideration but we do not think it is of sufficient force to overcome the rule. The granting of the sewer right was necessarily expressed. No rule of interpretation could imply such an easement, but the law by implication gives the right of way. That need not be expressed.

On the whole the surrounding circumstances reinforce the interpretation which we have adopted.

It appears that the defendant Braman, prior to giving the deed to the plaintiff, had conveyed the land on the opposite corner and extending nearly the whole length of the driveway to one Cleaves, together with "a right of way for all purposes of a way over a piece of land forty feet wide in every part lying easterly of and adjoining said lots and extending from the north easterly corner of the last described lot to the county road;" and, while the right was expressly granted in that deed, the fact that it was thus expressly given militates against the theory that the defendant intended to

keep this driveway to himself. The construction of the Cleaves deed may be found in *Cleaves* v. *Braman*, 103 Maine, 154.

More persuasive still is the fact that at the time of the conveyance in suit the driveway had been constructed many years and was then used in connection with the plaintiff's lot without question. It was the ordinary and common thoroughfare by which the public road was reached from the house, which was situated on the rear of the lot.

One witness testified that it was used so commonly as an entrance to the house that there had never been any other, until one was built, some time after the plaintiff bought the property.

Such was the situation when the plaintiff purchased and this same use was continued by her for two seasons after the purchase without objection, when, for some reason, the defendant built a fence on each side denying the right both of Cleaves and of the plaintiff. This actual use prior to, at the time of and subsequent to the conveyance, without protest on the defendant's part independent of the verbal promises and representations alleged to have been made by the defendant to the plaintiff, which are not to be considered here, aids the adopted rule of construction as showing the intent of the parties and is satisfying evidence that a just conclusion has been reached.

After carefully considering all the evidence, it is the opinion of the court that only nominal damages should be recovered. The inconvenience complained of was suffered more by others having business at the house than by the plaintiff herself. The main thing is the settlement of the legal rights of the parties. That has been accomplished.

Judgment for plaintiff for one dollar damages and costs, in each suit.

KATE GURNEY *vs.* MICHAEL PIEL.

Somerset. Opinion August 10, 1909.

Highways. Teams. Automobiles. Negligence. Verdict.

The law requires automobilists like all other citizens to have regard for the rights of others. It may be convenient and even fascinating to reach one's destination at the earliest possible moment, but the safety of travellers must not be sacrificed to speed.

While it is true that both a person with an automobile and a person with a team has the right to use the highway with his respective vehicle, yet it is also true that each is obliged to exercise his rights with due regard to the corresponding rights of the other, and neither has a monopoly of the highway.

The plaintiff recovered a verdict for $237.00 for personal injuries sustained in a collision between her team and the defendant's automobile, alleged to be due to defendant's negligence. On motion to set the verdict aside, *Held:* That the evidence of the plaintiff, if believed, together with certain facts developed by the defense, warranted the verdict. The narrowness of the road, the frightened appearance of the plaintiff's horse, and the space between the two vehicles were all apparent to the defendant. If he took his chances or miscalculated the space he cannot now complain. Had he been willing to wait a few minutes, he could have passed with entire safety as there was a wide space a short distance ahead.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff in a collision between her team and the defendant's automobile, caused by the alleged negligence of the defendant. The writ also contained a count in trespass for running into the plaintiff's carriage and throwing her violently to the ground. Plea, the general issue. Verdict for plaintiff for $237. The defendant filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

E. F. Danforth and Gould & Lawrence, for defendant.

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

CORNISH, J. The plaintiff recovered a verdict of $237 for personal injuries sustained in a collision between her team and the defendant's automobile, alleged to be due to defendant's negligence. The case is before the Law Court on defendant's motion to set aside the verdict as against the evidence.

On September 14, 1905, the plaintiff was driving north on the Canada road towards and near Jackman Village, in a covered carriage, drawn by a single horse. A short distance south of the village she was overtaken by defendant in his automobile and in the attempt on the defendant's part to pass the plaintiff's team, there was a collision, the rear right wheel of the plaintiff's carriage and the front left wheel of the automobile coming in contact. The plaintiff was thrown from the carriage and sustained injuries not serious. Due care on the part of the plaintiff is not controverted and the single issue is whether the jury was warranted from the evidence in finding negligence on the part of the defendant.

The case shows that the plaintiff was driving at the rate of four or five miles an hour and was entirely unaware of the approach of the automobile before the collision occurred. The Parish priest who was in the convent grounds shouted and attempted to attract her attention and to warn her of the machine which he saw approaching from behind but he was unable to do so. The reason which she gives is that her attention was fixed upon managing her horse, that was showing signs of fear as she was passing the convent, which she attributed to the noise connected with the working of a derrick on the convent grounds, but which evidently was caused by the approaching automobile, the noise of which had caught the ear of the horse but not her own. She says that she was driving in the center of the road, the wrought part of which at that point was only fourteen to sixteen feet wide. The horse "kept going faster and faster" as she described it and when nearly opposite the Murtha house the crash came and she was suddenly thrown against the dasher and thence upon the ground. The defendant's version is that he first saw the team about a thousand feet ahead, when he was travelling at the

rate of seven or eight miles an hour; that he sounded his horn frequently in order to warn the plaintiff of his approach; that he slowed down until when within about one hundred feet of the team they were travelling at the same rate, that this continued for a short time, when the plaintiff turned her horse somewhat towards the left of the road, and thinking there was space enough he attempted to pass on the right, moving at about six miles an hour, and that when the two vehicles were nearly abreast, the plaintiff's horse swerved towards the car bringing her right hind wheel in contact with the left forward wheel of the car and causing the accident; in other words that the team ran into the car instead of the car running into the team. The plaintiff replies that the defendant's speed was far greater than he admitted, that the plaintiff did not turn towards the left, as she had no occasion to do so, not knowing of any approaching car, and that if the horse did in his fright swerve slightly towards the car at the moment of passing, it was a condition that the defendant if acting with due care and with a proper regard for the rights of the plaintiff should have anticipated and avoided.

These issues and inferences were sharply before the jury. It was for them to decide in the first instance just what the conditions were and then to say whether under those conditions the defendant conducted himself as the ordinarily prudent man would, or whether he fell below the required standard. The jury have found negligence on the defendant's part, and we see no reason to disturb their finding. The evidence of the plaintiff if believed, together with certain facts developed by the defense, warranted the verdict. The narrowness of the road, the frightened appearance of the plaintiff's horse, and the space between the two vehicles were all apparent to the defendant. If he took his chances or miscalculated the space he cannot now complain. Had he been willing to wait a few moments, he could have passed with entire safety as there was a wide space a short distance ahead. The plaintiff testifies that immediately after the collision she said to the defendant "I should have thought you would have waited a minute," and his reply was "I thought I would go by you." The defendant, who was sitting on the front seat with the chauffeur seems to have paid slight atten-

tion to the plaintiff or her team as appears from the following significant testimony:

"Q. Did you see the woman pulling on the reins?

A. I didn't take so much interest at all in the thing.

Q. You didn't look to see?

A. I was looking on my business; you understand that was another thing. Always we go ahead and don't think of such things like that you know."

The law requires automobilists, like all other citizens, "to think of such things" and to have regard for the rights of others. It may be convenient and even fascinating to reach one's destination at the earliest possible moment, but the safety of travellers must not be sacrificed to speed. It is true that both the plaintiff and the defendant had the right to use the highway with their respective vehicles but it is also true that each was obliged to exercise his right with due regard to the corresponding rights of the other and neither had a monopoly. In a very recent case this court has laid down the general principles governing the mutual rights and duties in these words: "Automobiles are now recognized as legitimate means of conveyance on the public highway. The fact that horses unaccustomed to see them are likely to be frightened by the unusual sound and appearance of them, has not been deemed sufficient reason for prohibiting their use, but it is an element in the question of due care on the part of the driver of both horses and motor cars, and a consideration to be entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation." *Towle* v. *Morse*, 103 Maine, 250.

Whether this collision occurred through the negligence of the defendant in attempting to pass in too narrow a space, "in attempting to take the opening" as the defendant's son expressed it, or through his failure to properly appreciate the conduct of the horse, as the defendant himself rather admits, or both combined, or whether it was an unavoidable accident, was for the determination of the jury in the first instance and it is the opinion of the court that their finding was authorized by the evidence.

Motion overruled.

STATE OF MAINE *vs.* HENRY BARTLEY.

Somerset. Opinion August 11, 1909.

Intoxicating Liquors. Liquor Nuisance. Indictment. Evidence. Prior Convictions as Common Seller in Another County. Who may be Charged as Principal.

1. Where evidence of an act done by a party is admissible, his declarations made at the time, which tend to qualify, explain or give character to the act, are admissible.
2. Prior convictions of the defendant, as a common seller of intoxicating liquors, and for maintaining a liquor nuisance, in another place, are not admissible for the purpose of showing the intent with which the defendant kept liquors at the place described in the indictment for a liquor nuisance.
3. One who aids in maintaining a liquor nuisance, may be charged as a principal.

On exceptions by defendant. Sustained.

Indictment against the defendant for maintaining a liquor nuisance at Somerset Junction, Somerset County. Verdict, guilty. The defendant excepted to several rulings made during the trial.

The case is stated in the opinion.

Leroy R. Folsom, County Attorney, for the State.

George W. Gower, for defendant.

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

SAVAGE, J. This was an indictment against the defendant for maintaining a liquor nuisance at Somerset Junction in the County of Somerset. During the trial, the result of which was the conviction of the defendant, the State introduced an apparently incriminating letter written by one Williams at the dictation of the defendant. On the cross-examination of Williams, the defendant sought to draw out from him the reasons for writing the letter, as stated to him by the defendant, in connection with the dictation. The answer was excluded and an exception was taken.

We think the witness should have been permitted to answer. Where evidence of an act done by a party is admissible, his declarations made at the time, which tend to qualify, explain or give character to the act, are admissible. They are part of the res gestae. *State* v. *Walker*, 77 Maine, 488. The difficulty is not removed by the fact that the defendant was afterwards permitted to testify as to his reasons for writing the letter. The jury might have given more credence to the witness than they apparently did to the defendant himself. And they might have attached more importance to reasons given at the time the letter was written than to reasons given at the trial, while the defendant was under the temptation to escape, if possible, the consequences of a conviction of crime. The exclusion of the evidence was prejudicial to the defendant.

The State was also permitted, against objection, to show prior convictions of the defendant, in Piscataquis county, as a common seller of intoxicating liquors, and for maintaining a liquor nuisance. To this ruling exceptions were taken.

The State offered this evidence avowedly for the purpose of showing the intent with which intoxicating liquors were kept by the defendant at Somerset Junction. The evidence was not admissible for this purpose. The intent with which intoxicating liquors were kept or handled by the defendant in another county or place had no legitimate tendency to show his intention at the place in Somerset Junction described in the indictment. Selling intoxicating liquors, or keeping a liquor nuisance, in one place is not evidence of intent to keep such a nuisance in another place. *State* v. *Hall*, 79 Maine, 501.

It is true that after the evidence of these convictions had been admitted, the defendant became a witness. And then evidence of his prior convictions was admissible to impeach his credibility. And if the jury had been instructed to limit the effect of this evidence solely to the question of credibility, the court would have had to consider the question whether its being prematurely admitted was prejudicial to the defendant. But that question does not arise, for the jury were not so instructed. They were on the contrary

instructed that it was competent for the State to show prior convictions in another county on the question of intent involved here. The evidence was not only inadmissible, but it was likely to be extremely prejudicial.

The defendant also excepted to the overruling of his motion that the jury be instructed to return a verdict of not guilty. This exception must be overruled. In considering exceptions to the overruling of a similar motion, the court, in *State* v. *Cady*, 82 Maine, 426, said:—"When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty." But an examination of the evidence leads us to conclude that there was sufficient evidence in this case to warrant a jury in finding that the place described in the indictment was a nuisance, and that the defendant, if not the proprietor, aided in maintaining it. If so, he was guilty as charged in the indictment. *State* v. *Sullivan*, 83 Maine, 417.

But the other exceptions, which we have discussed, must be sustained.

Exceptions sustained.

EDWARD GRANT et als. *vs.* GEORGE L. SPEAR.

Cumberland. Opinion August 11, 1909.

Petition for Review. Same Granted. Decision not Reviewable on Exceptions. Revised Statutes, chapter 91, section 1, paragraph VII.

If the presiding Justice, hearing a petition for review, finds that through fraud, accident, mistake or misfortune justice has not been done, and that a further hearing would be just and equitable, and grants the petition, his decision is not reviewable on exceptions.

On exceptions by defendant. Overruled.

Petition for writ of review brought in the Supreme Judicial Court, Cumberland County. The presiding Justice granted the review and the defendant excepted.

The case is stated in the opinion.

George C. Wheeler, and Elmer E. Richards, for plaintiff.

James A. Connellan, and William A. Connellan, for defendant.

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

SAVAGE, J. This is a petition for a writ of review, and the case comes up on exceptions to the ruling and decision of the presiding Justice, granting a review.

The case shows the petitioners, who were the original defendants, were sued; that they intended to appear and defend; that they retained an attorney to appear for them in the suit; that the attorney neglected to enter an appearance for them at the return term, in consequence of which they were defaulted. The neglect of the attorney arose through a mistaken belief or recollection that he had written to the clerk and requested an appearance to be entered.

It is not necessary in this case to inquire under what circumstances a party may be debarred of a review by the negligence of his attorney. Doubtless there are cases in which he should be debarred, and in others not. *Knight* v. *Bean*, 19 Maine, 259; *Shurtleff* v.

Thompson, 63 Maine, 118; *Sherman* v. *Ward*, 73 Maine, 29; *Donnell* v. *Hodsdon*, 102 Maine, 420. In this case the presiding Justice found that the negligence of the attorney was such "accident, mistake or misfortune" on the part of the petitioners as would entitle them to a review under R. S., c. 91, s. 1, par. VII. That statute provides that "a review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment." And the presiding Justice also found that "justice had not been done" and that "a further hearing would be just and equitable."

It was said by this court in *Donnell* v. *Hodsdon*, 102 Maine, 420, that "if the presiding Justice is satisfied" of all three of these elements, (1) fraud, accident, mistake or misfortune, (2) failure of justice thereby, and (3) that a further hearing would be just and equitable, "and grants the petition, or is not satisfied of some one of them, and denies the petition, his decision is final, and not subject to review upon exceptions." This rule is decisive of this case. Here the presiding Justice found all these elements in favor of the petitioner, and his decision concludes the matter, while in the case of *Donnell* v. *Hodsdon*, only one of the three elements had been found by the presiding Justice, and exceptions to his decision granting a review were on that account sustained.

Exceptions overruled.

FANNIE E. WEYMOUTH *vs.* CHARLES E. GOODWIN.

Cumberland. Opinion August 12, 1909.

Contracts. Agreement to Purchase Stock. Offer or Tender of Stock before Suit not Necessary, When. Statute of Frauds. "Note or Memorandum." Letters. Executors and Administrators. Revised Statutes, chapter 113, section 4.

1. In an action to recover damages for the breach of a contract to purchase certain shares of stock, it is not necessary to allege or prove an offer or tender of the stock before suit brought, when, by the terms of the contract, the plaintiff was to hold the stock and deliver it to the defendant "when called for" by him and when in fact it never was called for.
2. It is sufficient "note or memorandum" within the statute or frauds, if letters signed by the party to be charged or his agent, contain by direct statement, or by reference to letters written by the other party, all the essential parts of the bargain.
3. Letters written by the other party, and forming a part of the correspondence between them, are admissible and pertinent, if they disclose the terms of the oral contract, to which the party to be charged referred in his letters. His reference thereto, signed by him, is a sufficient "note or memorandum" to satisfy the statute of frauds.
4. In the case at bar, the defendant's letters, by reference therein to other letters, are deemed to constitute a sufficient "note or memorandum."
5. It is not unlawful for an executor to transfer at par, in settlement of a legacy, stock that is worth less than par, and at the same time to agree to repurchase the stock later, at an advance price on his personal account. In such a transaction the estate can lose nothing.

On exceptions by defendant. Overruled.

Action of assumpsit brought in the Superior Court, Cumberland County, to recover damages for breach of a contract to purchase twenty-five shares of stock of the Biddeford National Bank. Plea, the general issue with brief statement as follows: "That the contract declared upon and alleged in plaintiff's writ and declaration was not in writing and signed by the defendant or his agent, and no part of the goods in said writ and declaration mentioned was ever accepted by the defendant, and none of said goods were ever

received by the defendant, and the defendant did not give anything in earnest to bind the bargain or in part payment thereof."

The case was heard by the Judge of said Superior Court without a jury, who made certain findings of fact, rulings in law, and rendered judgment for the plaintiff for $597.72. The defendant excepted to the rulings.

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

Foster & Foster, for plaintiff.

Geo. F. & Leroy Haley, for defendant.

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

SAVAGE, J. Action to recover damages for breach of contract to purchase twenty-five shares of stock of the Biddeford National Bank. The case was heard by the Judge of the Superior Court for Cumberland county without a jury, who made certain findings of fact, and rulings in law, and rendered judgment for the plaintiff. To the rulings, the defendant excepted.

The facts found by the court below, relating to the making of the contract of purchase, so far as it is necessary to state them, are, in brief, these. The plaintiff was one of the legatees under the will of one Almeda L. Ripley, of which the defendant was executor. The defendant was cashier of the Biddeford National Bank. The bank stock in question belonged to the estate and had been appraised at one hundred and twenty dollars a share. On January 22, 1906, at a meeting between the defendant and the plaintiff's husband, who was her agent, negotiations were had looking to a settlement of the plaintiff's share in the estate. The defendant proposed to turn over the bank stock to the plaintiff, as a part of her share, at par, and charge off the loss from the appraised value, on his account. In fact, the stock, at that time, was worth less than par. The plaintiff's husband, Mr. Weymouth, declined this proposition. And after further negotiations, it was orally agreed between the parties, that the plaintiff would accept the stock at par, as part of her share of the estate, and that the defendant, personally, and not as executor, should repurchase the stock of the plaintiff within one year at one

hundred and twelve dollars a share, and the accrued interest at the rate of 4% from the date of the last dividend on the stock, and that the stock should not be disposed of by the plaintiff, but should be held, and delivered to the defendant when called for by him. Later, on February 17, 1906, at another meeting, Mr. Weymouth pointed out to the defendant certain errors in his executor's account as made up. And the defendant, not wishing to change the figures in his account, agreed to purchase back the stock in question at one hundred and fifteen dollars a share, instead of one hundred and twelve dollars. The three dollars was added to off-set the errors in defendant's account, as claimed by the plaintiff. No other modification of the oral contract of January 22 was made. At this meeting on February 17, the plaintiff agreed to accept a definite stated amount as her share in the estate, and the defendant agreed to reduce to writing and sign his contract for the purchase of the stock as hereinbefore set forth, and send the written contract to the plaintiff. The consideration for the defendant's promise is found to be that the arrangement entered into "would relieve him of embarassment and remove certain obstacles to his early settlement of the estate." The defendant afterwards delivered the stock to the plaintiff in settlement of her share in the estate, but he never signed or delivered to her the contract for a repurchase, reduced to writing, as he had agreed to do.

The plaintiff alleged and the court found that she has at all times been ready and willing to perform her part of the contract, and has requested the defendant to perform on his part. But the plaintiff has not alleged nor proved an offer or tender of the stock to the defendant within one year from February 17, 1906, or at any other time. The court below ruled that the plaintiff was not bound to allege or prove such an offer or tender, and the correctness of this ruling is challenged by the defendant.

The ruling was right. This case does not fall into the class of cases cited by the defendant which hold that a plaintiff, suing upon a mutual contract of purchase on the one hand, and sale and delivery on the other, is bound to show an offer to perform on his own part, before he can maintain his action. By the terms of the contract

itself the plaintiff was bound to deliver the stock only when "called for" by the defendant. It never was "called for." Therefore the plaintiff had no occasion to offer or tender. The first step must have come from the other side. Allegations and proof that she was ready and willing to deliver the stock were all that was required in the case of this contract. *Low* v. *Marshall*, 17 Maine, 232; *White* v. *Mann*, 26 Maine, 361.

Next, the defendant contends that the oral contract relied upon is within the statute of frauds and hence invalid, because of the want of "a note or memorandum thereof made and signed by the defendant or his agent." R. S., c. 113, s. 4. The court below ruled that the correspondence introduced as evidence, all of which is set forth in the bill of exceptions, "is, without resort to extraneous proof, a sufficient note or memorandum to satisfy the statute of frauds."

It is well settled that the "note or memorandum" called for by the statute of frauds is not required to be found in a single writing. It may be supplied by documents, letters, telegrams and memoranda written and signed at various times. It may be gathered from a protracted correspondence if the letters are so connected as fairly to constitute one writing. It is sufficient, if the letters or other writings, signed by the party to be charged, or his agent, contain by statement, or by reference to others of the writings, all the essential parts of the bargain. *Kingsley* v. *Siebrecht*, 92 Maine, 23; *Lerned* v. *Wannemacher*, 9 Allen, 412; *Peck* v. *Vandemark*, 99 N. Y. 29; *Hickey* v. *Dole*, 66 N. H. 336. And even letters written to a third party may supply the memorandum. *Hickey* v. *Dole*, supra.

It is settled, too, that the note or memorandum is not the contract, but is evidence of it. The language of the statute implies that an oral contract may be made first, and a memorandum of it given afterwards. *Bird* v. *Munroe*, 66 Maine, 337. And in *Bird* v. *Munroe*, it was also held that the statute was satisfied by a memorandum made after there had been a breach of the contract.

We think the correspondence shows a sufficient memorandum to satisfy the statute. On February 21, 1906, the defendant wrote to Mr. Weymouth enclosing a check for the cash payment of the plain-

tiff's share in the estate, "as agreed upon." In the letter he said, "Later I will have a receipt made to cover the full amount and certificate of stock in this bank for twenty five shares." Two days later, Mr. Weymouth wrote a letter to the defendant, in which he recited fully and precisely the details of the oral contract for the purchase of the stock. And he added,—"If this is not all in accordance with your understanding of the agreement, please advise me at once. March 6, 1906, Mr. Weymouth again wrote to the defendant urging an early settlement. In the letter he said,—"Will you not please mail in to me the stock as we have talked, with the agreement attached, and a receipt in full, and I will promptly return you the receipt properly signed." March 8, 1906, the defendant wrote to Mr. Weymouth, "Yours rec'd and noted. The certificate for 25 shares of this bank has been made in the name of Fannie Emma Weymouth (plaintiff) . . . The matter between us will be all right . . . ." The next day Mr. Weymouth wrote to the defendant calling attention to "the agreement you and I made," and said also, "I only want simply what we agreed upon, nothing more, and get the matter off my mind, for I have a good many things to think of." March 10 the defendant enclosed the certificate of stock in a letter to Mr. Weymouth, saying in the letter "I enclose the certificate for twenty five shares of the stock in this bank which you bought at par for Mrs. Weymouth. . . . As you have so much on your mind, and can't accept any letter I may send you, for my convenience or yours, I concluded to send you the document so you would be easy." May 26, 1906 the defendant's attorney in the probate matter, at the solicitation of Mr. Weymouth, wrote the defendant a letter in which he referred to "an agreement which you had made in reference to some sale or purchase of stock." To this letter the defendant replied by letter, "Yours rec'd and noted. . . . I will say that I will sign any agreement that I have written him (Weymouth) about, and will do everything that will be right in the case."

To the admission of the letters written by Mrs. Weymouth the defendant objected on the ground that they were self serving. But this objection does not apply to this case. All Mrs. Weymouth's

letters are admissible and pertinent, if they disclose the terms of an oral contract, to which the defendant referred in his letters. His reference thereto signed by him would be a "note or memorandum" which would satisfy the statute of frauds. See cases cited supra.

The defendant in his letters seems carefully to have avoided any reference *in terms* to that part of the agreement which related to the purchase of the bank stock. But we think his letters do substantially refer to this agreement. After receiving from Mr. Weymouth one letter in which the terms of the agreement were detailed, and another asking him to mail the stock "with the agreement attached," he replied, — "The matter between us will be all right." This was not mere silence. It was not a mere omission to refer to the agreement. On the other hand it can mean nothing else than a reference to the agreement which the defendant had agreed to write out and sign, and which Mr. Weymouth had been writing about, and in his letters had recited. There is disclosed no other "matter" to be made "all right." In view of the letters of Mr. Weymouth, it is not sensible to say that the defendant in his reply referred merely to the delivery of the stock to Mrs. Weymouth, and not to his agreement to repurchase. In Mr. Weymouth's complaints, the two had been inseparable.

Again in his letter to his attorney, he said "I will sign any agreement that I have written about." He had been writing, as we have seen, about the agreement in question, though in veiled phrases. This, too, was a sufficient memorandum to satisfy the statute. The ruling of the court below was right.

There is nothing in the suggestion that, inasmuch as the plaintiff had alleged in her declaration an oral contract, and that the defendant had promised to reduce it to writing and sign it and that he had failed to do so, the declaration itself showed that the contract was within the statute of frauds. This might all be true, and yet a later memorandum, as we have seen, might take the contract out of the statute.

Lastly, the defendant at the trial contended that the contract was illegal, and could not be enforced, and to the overruling of this defense, he excepted. The defendant's counsel in their brief

have stated their contention in the following words,—"The contract alleged was a contract whereby the plaintiff was to purchase 25 shares of stock for $2500 which the defendant held as executor, and which stock was appraised in the inventory at $3000. The executor was charged in his probate account for its appraised value, and was to charge the estate with a loss of $500 on the stock, and was then to buy it back from the plaintiff for $2825, making a profit to the plaintiff of $325 and a profit to the defendant as executor of $175 and a loss to the estate of $500." It is accordingly contended that the defendant was attempting to act in a double capacity, when he bargained as executor for the sale of the stock, and in the same contract agreed to purchase it back and charge the estate with a loss, and that he could not lawfully at the same time be a seller and a purchaser.

We do not understand the situation as the defendant's counsel do. At the time the contract with the plaintiff was made, the stock, though it had been appraised at $120 a share, was not worth par. But in consideration of the defendant's promise to repurchase, the plaintiff agreed to take it, and did take it at par. There was a loss of $500 from the appraisal, but this was due, not to the contract, but to the lack of actual value in the stock itself. Such a loss would have to be borne by the estate, and the executor, if without fault, might properly credit himself in his account with the loss. So the estate lost nothing, on account of this contract.

But the defendant, for his own reasons, in order to avoid embarrassment, and secure an early settlement of the estate, was willing to repurchase the stock at an advance, on his own account, if the plaintiff would consent to take the stock at par. We see nothing illegal in this. It did not affect the estate, except that as the plaintiff allowed her share to be satisfied with stock at greater than its actual value, it left so much more for other legatees. The only one who stood to lose was the defendant, and he was willing to take the chance. We think he must abide his choice.

Exceptions overruled.

E. M. LEAVITT *vs.* TOWN OF SOMERVILLE.

Kennebec. Opinion August 13, 1909.

Municipal Corporations. Town Debts. Unconstitutional Debts. Invalid Bonds. Accretions of Unpaid Interest. Evidence. Town Records. Burden of Proof. Presumptions. Constitution of Maine, Article XXII.

1. A town has the right to hire money to refund the debt which it owed in 1878, when the amendment to the constitution limiting municipal indebtedness took effect, even if its debt was then in excess of the five per cent limit.
2. In such case a town cannot constitutionally create a new or additional debt while the former debt remains unpaid to the extent of the debt limit, nor can it hire money to pay a debt thus unlawfully created.
3. If a town, however, does create such an additional, but unconstitutional, debt, and hires money to pay both classes of debt, indiscriminately, the taint of the unlawful part permeates the whole loan, and makes it uncollectible.
4. When a town's debt is in part lawful, and in part unlawful by reason of its being in excess of the constitutional debt limit, a vote to issue bonds "to fund the town debt" applies to the unlawful part of the debt, as well as to the lawful part. And bonds issued in pursuance to such a vote are wholly invalid and uncollectible.
5. The increase of town debt, due to the accretions of unpaid interest on existing lawful indebtedness, is not the creation of a new debt, within the meaning of the constitution.
6. The records of a town, showing reports of the town officers concerning the amount of the town debt, and showing that the reports were accepted by the town, are admissible in favor of the town to show an indebtedness in excess of the constitutional limitation, and are prima facie evidence of the amount of the indebtedness of the town at the time when made.
7. The burden is on one, who would recover a loan made to a town for the purpose of paying its debt, to show that the debt to be paid was within the constitutional limit; and when, for the purpose of showing an existing indebtedness, a plaintiff in an action to recover on a bond issued to pay a town debt, introduces the town record, which also shows the amount of the indebtedness of the town, the whole record is evidence.
8. There is no presumption that an increase in the indebtedness of a town is due to its having left unpaid the accruing interest on a lawful indebtedness, rather than the current town expenses.

9. When, in fact, a town's indebtedness has been increased beyond the debt limit of five per cent, and bonds are issued by the town "to refund the town debt," in a suit to recover on one of such bonds, the burden is on the plaintiff to show that all of the debt, which the loan his bond represents was taken to refund, was a lawful obligation of the town.

On report. Judgment for defendant.

Action of assumpsit on a certain written agreement or certificate (but not under seal) issued by the defendant town under date of October 10, 1887, whereby, it was alleged, the defendant town "for value received promised to pay to the holder of said certificate the sum of five hundred dollars within twenty years from said date, and also that it would pay the interest upon the same annually at the rate of five per cent per annum upon presentation of the interest warrants annexed to said certificate at the office of its treasurer, and thereupon for value received delivered the same, together with twelve interest warrants annexed for the payment of twenty-five dollars each, on the 10th days of October in the years 1898 to 1907 inclusive respectively."

The defendant filed a special demurrer to the declaration. The case was then heard by the presiding Justice at the March term, 1909, Supreme Judicial Court, Kennebec County. At the conclusion of the evidence it was agreed that the case should be reported to the Law Court for determination "upon such evidence as is legally admissible."

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Heath & Andrews, for defendant.

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

SAVAGE, J. In March, 1887, at a legal meeting of the inhabitants of the defendant town, it was voted "to issue coupon bonds running twenty years, or at the option of the town to pay sooner, ... amount of bonds not to exceed $18000." The purpose of the issue was stated in the vote in these words,—"Said bonds is to fund the town debt."

Under this vote bonds were issued to the amount of $17000, and this suit is brought to recover payment for one of the bonds and its coupons.

The defendant denies that this bond ever became a binding obligation of the town, for the reason that the formalities of execution prescribed in the vote of the town were not observed by the town officers who issued it. But we do not find it necessary to decide or consider this point. And we pass on to the more important question raised by the defendants' second contention, which is, that the town debt to pay or fund which this series of bonds was issued, was, in part, at least, illegal, because created in excess of the constitutional limit of municipal indebtedness, as applied to Somerville.

The constitutional limitation is expressed in these words,—"No city or town shall hereafter create any debt or liability, which singly or in the aggregate with previous debts or liabilities shall exceed five per centum of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying . . . . to any loan for the purpose of renewing existing loans . . . . Constitution of Maine, Art. XXII.

It is admitted that at all times from 1876 to and including the year 1888 the valuation of Somerville was less than $100,000, of which sum five per centum is $5000. But the defendant town claims that when the foregoing constitutional provision became effective, January 2, 1878, it was already indebted to the amount of about $17,000, and in excess of the constitutional limit. And so the town contends that while it could afterwards renew or refund the debt which then existed, it could not constitutionally create any new or additional debt, until the municipal debt was within the constitutional limit; and further that any new debt created in excess of that limit was unlawful and not binding upon the town. It claims, nevertheless, that additional and new, but unconstitutional, debts were created thereafter from time to time, until in 1887, when the bonds were authorized and issued, the total debt, old and new, was $22,763.99. And, finally, it contends that the vote to issue bonds "to fund the town debt" applied to the unlawful part as well

as to the lawful part of the debt. And hence that the whole issue was unlawful, because the valid cannot be distinguished from the invalid.

If the defendant's premises are correct, we think its conclusion follows. In fact this position is not controverted by the plaintiff. The town had the right to hire money to refund the debt which it owed in 1878 when the constitutional amendment took effect, even if it was in excess of the five per cent limit. But it did not have the power constitutionally to create a new or additional debt while the former debt remained unpaid, to the extent of the debt limit, nor to hire money to pay a debt thus unlawfully created. If it hired money to pay both classes of debt indiscriminately, the taint of the unlawful part permeated the whole loan, and made it uncollectible. It is impossible to distinguish the good from the bad.

But the plaintiff claims first, that there is in the case no admissible evidence that the town debt in 1887 exceeded the debt in 1878, secondly, that if there was an increase in the debt, it was due to the accretions of unpaid interest on existing lawful indebtedness, and not to the creation of new debts, and thirdly, as is conceded, that under the constitutional provision itself, the town could lawfully make "a loan for the purpose of renewing existing loans," and the unpaid interest thereon.

The only evidence in the case touching the amount of the town debt in the different years are the records of the annual town meetings, containing the reports of the town officers, as accepted by the town. We have before us such reports for 1876, 1880, and 1882 to 1888 inclusive. It is admitted that there is no record of the town debt for 1877, 1878 and 1879. It is also admitted that there are no books in existence kept by the town treasurer or other town officers that would show the state of the town debt from year to year, in the years above given, except as reported to the town in the reports above mentioned.

The plaintiff claims that such records are admissible against the town to show a lawful indebtedness, and hence to show that this loan was made for the lawful purpose of paying a debt, but that they are not admissible in favor of the town to show an indebtedness

in excess of the constitutional limitation, or to show an increase in the debt after 1878. We are unable to concur in the latter view. These records are not obnoxious to the rule which excludes the self serving declarations of parties. They are public records of the official acts of public officers, concerning a matter of public moment, the financial condition of the town. The reports were accepted by the town, and have apparently stood unchallenged. The books of the town treasurer, or of the selectman, if in existence, might furnish more satisfactory evidence, but they are not in existence. We think that these records are probative in their character, and that they are at least prima facie evidence of the indebtedness of the town for the years given.

But there is another view of this question. It is the well settled law of this State that one who would recover a loan made to a town must show that the money was hired by the town for a lawful purpose. *Lovejoy* v. *Foxcroft*, 91 Maine, 367; *Pierce* v. *Greenfield*, 96 Maine, 350. It is incumbent on the plaintiff here to show that the town had a right to hire the money for which this bond was taken, for if not, it was not hired for a lawful purpose. In the process of proof the plaintiff begins with the record of the indebtedness in 1876, of $15,792.92, which we may assume, as the plaintiff does, was lawful indebtedness. But that is not enough. Since his bond was authorized in 1887 to refund the town debt, he must show that there was, in 1887, an existing town debt. He can do this only by the town records for 1887. But if he relies upon the record, we think he must take the whole of it. He cannot show an indebtedness by this record without showing the amount. They are inseparable. Hence we conclude that it is properly established that the town debt of Somerville in 1876 was $15,792.92, and in 1887, $22,763.99.

Taking into account the history of the financial standing of the town, the plaintiff assumes, and fairly so, we think, that the indebtedness on January 2, 1878, when the constitutional limitation took effect, was in the neighborhood of $17,000 so that there had been an apparent increase of about $5,000 when the bond issue was made. What occasioned this increase does not appear. Whether the town

paid its current expenses for schools, roads and paupers and allowed the interest on indebtedness to accumulate, or whether it paid the interest and allowed other obligations to remain unpaid, or whether it paid part of both, is not shown. A comparison of the indebtedness, one year with another, shows that, at least, some of the interest was paid.

In this situation, the plaintiff relies upon a legal presumption, omnia rite acta præsumuntur. His argument is that since the town could legally borrow to refund existing legal debts, and could not borrow for any other purpose, it should be presumed that the increase in indebtedness from year to year was occasioned by legally taking up or renewing existing indebtedness with interest, and not by illegally attempting to create new indebtedness.

We do not think there is any such presumption. The question is one of fact. There is no legitimate inference that the town officers paid current expenses any more than that they paid interest on the debt, or if they gave town orders, that they gave them on account of the debt alone, and not for other pecuniary obligations. It is a matter of proof, and as we have already said, the burden is on the plaintiff to show that the debt—all of it—which the loan his bond represents was taken to refund, was a lawful obligation of the town. This he has failed to do.

Judgment for the defendant.

JOHN A. STUART *vs.* INHABITANTS OF ELLSWORTH.

Hancock. Opinion August 14, 1909.

City Ordinance Repugnant to City Charter, Void. De Facto Officers. Collateral Attack. Private and Special Laws, 1869, chapter 29, section 4; 1873, chapter 228; 1877, chapter 393; 1878, chapter 29.

When the charter of a city provides for the annual election by the board of mayor and aldermen of all necessary subordinate officers for the ensuing year, that all officers shall be chosen and vacancies supplied for the current year and that such officers shall hold their offices during the ensuing year and until others shall be elected and qualified in their stead, an ordinance of the mayor and aldermen providing that such officers shall hold office during good behavior is repugnant to the charter and void.

Where the returns upon the warrants for an election of mayor and aldermen are defective but the persons chosen mayor and aldermen at such election proceed to organize and to perform their respective duties as such, under color of title and claim of right, with the acquiescence of the citizens, they are officers de facto.

In controversies to which he is not a party, the title to his office of an officer de facto and his acts therein cannot be questioned.

On report. Judgment for plaintiff.

Assumpsit on account annexed to recover $45.00 for "services as custodian of the Franklin Street Fire Station and driver of the hose wagon, month of April, 1908," in the defendant city. Plea, the general issue, "with a special plea of tender of $25.20 on October 13, 1908, at 9:30 A. M., which tender was refused and said sum paid into court by defendant.

When the action came on for trial the evidence was taken out and the case was then reported to the Law Court for determination upon so much of the evidence as was competent and legally admissible.

D. E. Hurley, for plaintiff.

John A. Peters, for defendant.

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

Statement of the case by Mr. Justice BIRD, who prepared the opinion.

The plaintiff was elected by the Mayor and Aldermen of Ellsworth at a special meeting held August 19, 1907, custodian of the Franklin Street Fire Station and driver of hose wagon.

By the charter of the city of Ellsworth, approved February 8, 1869, the administration of all the fiscal, prudential and municipal affairs of the city, with the government thereof, is vested in a mayor, a board of aldermen and a common council, which boards are to constitute and be called the City Council: Priv. and Spec. Laws 1869, c. 29, § 2. The charter further provides that "The City Council shall annually, on the last Monday of March, or as soon thereafter as conveniently may be, elect and appoint all the subordinate officers and agents for the city, for the ensuing year, including a chief engineer and other engineers for the fire department, ... and may by concurrent vote remove officers, when in their opinion sufficient cause for removal exists. All officers shall be chosen and vacancies supplied for the current year, except as hereinafter otherwise directed. All the said subordinate officers and agents shall hold their offices during the ensuing year, and until others shall be elected and qualified in their stead, unless sooner removed by the city council" Id. § 4. By an amendment of the charter the annual election for choice of mayor and aldermen is fixed for the first Monday of March, and the organization of the new city government and the election of subordinate officers are to be effected on the second Monday of March: Priv. and Spec. Laws 1877, c. 393. In 1878 the charter was amended by abolishing the common council and giving all the powers formerly exercised by the common council and the mayor and board of aldermen to the mayor and aldermen: Priv. and Spec. Laws 1878, c. 29.

The returns upon the warrants calling the elections for choice of mayor and aldermen in March, 1907, and in March, 1908, did not

allege that the places where the attested copies thereof were posted were either public or conspicuous places.

At the regular meeting of the mayor and aldermen, who were elected in March, 1907, held January 6, 1908, "An ordinance for the government of the fire department" was adopted, which so far as pertinent, was as follows: "Section 1. The fire department shall consist of a chief engineer and two assistants, two drivers, two hose companies and one ladder company. Section 2. The chief engineer and two asistants shall serve for the period of one year. All other members of the department shall serve during good behavior. . . . Section 4. Whenever any charges are preferred against any member of the department, after suitable notice, he shall appear at the mayor and aldermen's room, before a committee consisting of the mayor, the chief engineer and the chairman of the committee on fire department, who shall hear said charges, together with such evidence as he may introduce in his behalf, the decision of said committee to be final.

At the election in March, 1908, one Albert L. Stockbridge was declared to be elected alderman from Ward one and at a meeting of the board of mayor and aldermen held March 9, 1908, the same Albert L. Stockbridge was elected city treasurer. At the same meeting the salaries of drivers of hose companies was fixed at forty-five dollars per month each. No salary appears to have been attached to the office of custodian. Stockbridge qualified by taking the oath as treasurer soon after he was elected to that office "and immediately assumed his duty."

At a meeting of the mayor and aldermen held April 6, 1908, it was voted to repeal the ordinances of the city government in relation to the fire department and at a meeting of the same body held April 13, 1908, it was voted that John A. Stuart be removed as driver of hose team, Stockbridge voting Yes upon both propositions—his vote being needed to ensure the passage of each. No charges were preferred against Stuart, no notice of hearing was given him and no hearing had.

Notice of the adoption of the ordinance of January 6, 1908, was given by posting copies in two public places in defendant city and

by publication January 8, 1908, in a local newspaper. No notice of the repeal of these ordinances on April 6, 1908, appears to have been given.

At the same meeting of the board of mayor and aldermen at which Stuart was removed, one Wallace was elected driver of hose wagon in his place.

On the fifteenth of April, 1908, the plaintiff was forcibly removed from the fire station and thereafter during the remainder of the month reported three times daily for duty which was refused. He brings this action to recover for his services as custodian of the Franklin Street Fire Station and driver of hose wagon for the month of April, 1908, the sum of forty-five dollars. Subsequent to the bringing of the action the defendant tendered to the plaintiff the sum of twenty-five dollars and twenty cents, and the tender being refused, paid the amount of the tender into court.

BIRD, J. The plaintiff claims to recover from the defendant city wages as custodian of the fire station and driver of hose wagon for the entire month of April, 1908, upon the ground that he was never legally removed from office and ever was during that month ready and willing to perform his duty.

It is urged by plaintiff that the ordinance of January 6, 1908, providing that subordinate members of the fire department should hold office during good behavior was never legally repealed. The amended charter, however, provides for annual elections on the second Monday of March by the board of mayor and aldermen of all necessary subordinate officers for the ensuing year, that all officers shall be chosen and vacancies supplied for the current year and expressly provides that such officers shall hold their offices during the ensuing year and until others shall be elected and qualified in their stead: Priv. and Spec. Laws 1869, c. 29, § 4; 1873, c. 228; 1877, c. 393. The provisions of §§ 2 and 4 of the ordinances of January 6, 1908, in so far as they attempt to change the tenure of office of subordinate officers, were repugnant to the charter and therefore void.

The provisions of the charter above cited (Priv. and Spec. Laws 1869, c. 29, § 4) fix the tenure of office of subordinate officers as the current year, that is, the municipal year at the beginning of or during which the election takes place and until others shall be elected and qualified in their stead. The municipal year for which plaintiff was elected expired on the second Monday of March, 1908, when, by the amended charter, the election of subordinate officers was to be held, but, as his successor was not then elected, he held over until his successor was elected and qualified. On the thirteenth of April, 1908, his successor as driver of hose wagon was elected by the board of mayor and aldermen. We are not aware of any requirement for the qualification, by oath or otherwise, of such an officer as custodian of fire station or driver of hose wagon. Upon the election, if legal, of the successor of the plaintiff his term of office was lawfully at an end.

Was the election of Wallace, as the successor of plaintiff, ineffectual by reason of the fact that the return upon the warrants calling the elections were defective? The mayor and aldermen chosen by the citizens proceeded to organize on the day and in the manner provided in the amended charter and apparently were recognized by the citizens as mayor and aldermen and claimed the right to perform and did perform the duties appertaining to the respective offices and the citizens acquiesced in their so doing. Despite the imperfections in the returns (*Hamilton* v. *Phipsburg*, 55 Maine, 193, 195) they were de facto officers and in controversies to which they are not parties their title to their offices and their acts therein cannot be questioned: *Brown* v. *Lunt*, 37 Maine, 423; *Hooper* v. *Goodwin*, 48 Maine, 79; *Dane* v. *Derby*, 54 Maine, 95, 102; *Cushing* v. *Frankfort*, 57 Maine, 541, 542; *Johnson* v. *McGinly*, 76 Maine, 432, 433; *Andrews* v. *Portland*, 79 Maine, 484, 490: See *State* v. *Poulin*, 105 Maine, 224.

Nor, assuming but not determining, that the offices of alderman of a city and city treasurer are incompatible, with the consequence that an election of an alderman to be city treasurer ipso facto legally vacated the former office (*Stubbs* v. *Lee*, 64 Maine, 195, 197,) would the continuance of such officer to act as alderman under color

of title and claim of right with the acquiescence of the public, render him any less an alderman de facto. *Woodside* v. *Wagg*, (Symonds J.) 71 Maine, 207; *Pooler* v. *Reed*, 73 Maine, 129.

The conclusions reached render it unnecessary to consider the other points urged by the plaintiff.

The plaintiff's term of office as driver of hose wagon was legally determined on the thirteenth of April, 1908, and, as no salary was attached to the office of custodian of the fire station, we must find in accordance with the agreement of the parties that there is due plaintiff as wages, as driver of hose wagon, the sum of twenty-two dollars and fifty cents ($22.50), plaintiff having been allowed to serve until the fifteenth day of April, apparently without official notice of his removal. The court at nisi prius is to determine the adequacy of the tender made and to enter judgment for costs accordingly.

JONATHAN CURRIE *vs.* BANGOR AND AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion August 13, 1909.

Eminent Domain. Prescription. Easements. Railroad Location. "Time of Taking." Damages Agreed Upon. Waiver. Railroad Tracks Intersecting Highway. Revised Statutes, chapter 1, section 6, paragraph X; chapter 51, sections 6, 24, 31, 65 to 78; chapter 52, section 26.

Public rights acquired by the exercise of eminent domain are paramount to private rights.

Where the use of a road has been permissive and by the indulgence and license of the owner of the land over which the road passes, such permissive use, no matter how long continued, does not create a prescriptive right to use such road.

It would seem from well established principles of law that an easement acquired by prescription, is extinquished when the land is taken for public uses under the right of eminent domain.

Under the law of Maine the time of the taking of land for a railroad location as between the owner of the land and the railroad company, is the time of the filing of the location as required by statute, and that upon the payment within three years of the damages which constitute the "just compensation" for "private property taken for public uses," the title acquired by the exercise of the right of eminent domain becomes perfected and relates back to the time of such legal taking.

It is immaterial whether the damages for land taken for a railroad location are estimated and awarded by the county commissioners according to the statute or are adjusted by mutual agreement between the land owner and the railroad company.

It is competent for the owner of land taken for public uses to waive the formality of a statutory assessment of damages and when he voluntarily accepts a satisfactory amount agreed upon, the constitutional guaranty of a "just compensation" is fulfilled.

After the legal location of a railroad, the safety of public travel requires that the intersection of any highway or town way with the track of such railroad should be under the regulation and control of the railroad commissioners.

On report. Judgment for defendant.

Action on the case to recover damages for the obstruction by the defendant of an alleged right of way claimed by the plaintiff over

and across the defendant's railroad tracks in Mars Hill, Aroostook County. Plea, the general issue.

Tried at the April term, 1908, of the Supreme Judicial Court in said county. After all the evidence had been taken out, the case was reported to the Law Court "for final judgment; the Law Court to have the same right to pass upon the question of damages that the jury would in case the plaintiff has a cause of action."

The case is stated in the opinion.

Ransford W. Shaw, for plaintiff.

Don A. H. Powers, James Archibald and Bernard Archibald, Louis C. Stearns and Louis C. Stearns, Jr., F. H. Appleton and Hugh R. Chaplin, for defendant.

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

WHITEHOUSE, J. In this action the plaintiff seeks to recover damages alleged to have been sustained by him on account of the obstruction by the defendant of a right of way three rods in width which the plaintiff claims to own leading from his land across the defendant's railroad tracks and location to the highway running to the village of Mars Hill.

The defendant admits that in pursuance of the requirements of section 26 of chapter 52 of the Revised Statutes and the decision of this court in *Wilder* v. *Maine Central R. R. Co.*, 65 Maine, 332, the company did erect and endeavor to maintain legal and sufficient fences on each side of its location at the point in question, and thereby necessarily closed and obstructed the way which the plaintiff claimed to own; but the defendant denies that the plaintiff had any right of way across the locus in question prior to or at the time of the taking of the land by the defendant under eminent domain for the location of its railroad. The original location of the railroad in 1892 was changed in 1894. Among the variations then made was the location over the three rod strip now claimed by the plaintiff as a right of way. This modified location was approved by the railroad commissioners October 2, 1904, and it is conceded that prior to that date no right of way across the land in question had

ever been created by any deed or conveyance or other written instrument. It is contended that the plaintiff in common with such of the public generally as had occasion to use it had traveled across it uninterruptedly for more than twenty years and thereby acquired a prescriptive right to do so before the location of the railroad over it in 1894.

At the time of the location of the defendant's railroad and for some years prior thereto, Frank H. Lavine owned the land covered by it at the point in question. There was a gravel pit on his land at or near the river from which Lavine had been accustomed to sell gravel and sand for many years prior to the location, and it appears from the evidence that the purchasers of the sand during those years had driven their teams over Lavine's land to and from the gravel pit until a well defined farm road appeared where the plaintiff now claims a right of way. In times of drought and as occasion might require, the neighbors were also allowed to drive their horses and cattle over this road to the water at the river. After the year 1900 the plaintiff had driven over this road to his starch factory and mill and continued to cross at that point after the location and operation of the railroad. The principal witness for the plaintiff upon this branch of the case thus testifies: "In the first place it was simply a path. Mr. Lavine, the old gentleman, drove his cattle there in the winter season. We all had access to that to water our horses. And then he had a sand pit down there, and later he sold sand. I have been there many a day with a team in company with other men to the sand pit, and it has been a road for years, long before the railroad."

This is substantially all of the evidence in the case upon which the plaintiff's claim of a right of way by prescription is founded, and it is manifestly insufficient to establish the proposition. Search is made in vain for any evidence having a necessary tendency to show that this way had been traveled by the public generally adversely to the rights of the owners of the land for a period of twenty years. On the contrary it satisfactorily appears from all the evidence that the use of the road by Lavine's neighbors and customers was purely permissive, and it is obvious that no term of

permissive enjoyment of such a privilege, however long continued can be adequate to create a prescriptive right. "If the use of the road has been permissive and by the indulgence and license of the owner of the land over which it passes, then such use does not constitute that adverse use which the law requires." *Mayberry* v. *Standish*, 56 Maine, 342.

In confirmation of this view is the significant conduct of Lavine himself. June 13, 1895, he conveyed to Houghton and Richards a portion of his farm, including a right of way three rods wide extending to the county road, the location of which was identical with the right of way claimed by the plaintiff. It is a justifiable inference that at that time more than eight months after the final location of the railroad approved by the railroad commissioners October 2, 1894, Lavine did not understand that the public had a right of way there acquired by prescription; otherwise he would not be expected to make a conveyance of it to Houghton and Richards in disregard of such prescriptive right in the public.

But even if it be assumed that the plaintiff had a right of way by prescription as claimed by him, it would seem from well established principles of law that such an easement was extinguished when the defendant took the land covered by its location as for public uses. See Revised Statutes, chapter 51, section 24 and chapter 1, section 6, par. X. *Googins* v. *Boston & Albany R. R. Co.*, 155 Mass. 505; 1 Lewis on Em. Domain, section 262 A Note 3.

But the plaintiff contends that he not only had a right of way by prescription, but that he acquired one by deed. He claims that he succeeded by intermediate conveyances to the right of way three rods in width conveyed by Lavine to Houghton and Richards by his deed of June 13, 1895, above mentioned. But as already observed, it appears that the final location of the defendant's railroad with a variation covering the land in question, was approved by the railroad commissioners October 2, 1894, more than eight months before the execution of this deed by Lavine, and that long before that time the defendant had constructed and equipped its railroad and was engaged in running its trains over the location and across the way claimed by the plaintiff. If that part of the three rod strip claimed

by the plaintiff within the limits of the defendant's location was thus legally taken by the defendant before the execution of the Lavine deed of June 13, 1895, it requires no argument to show that it was not in the power of Lavine to create or convey to his grantees a right of way across the defendant's railroad location, and that no such right of way passed to the plaintiff through intermediate conveyances from Lavine's grantees. Public rights acquired by the exercise of eminent domain are paramount to private rights. Whatever private right of way the plaintiff may have had prior to the location of the railway, was enjoyed subject to the taking of the land for public use, and after a legal location of the defendant's railway the safety of public travel required that the intersection of any highway or town way with the defendant's railway track should be under the regulation and control of the railroad commissioners. R. S., chapter 51, sections 65 to 78: *In re Railroad Commissioners*, 83 Maine, 273; *In re Railroad Commissioners*, 87 Maine, 247; *Goding* v. *Railroad Co.*, 94 Maine, 542. And by section 33 of the same chapter, farm crossings are made subject to the order of the county commissioners. There is no evidence that a crossing of any kind over the three rod strip claimed by the plaintiff was ever authorized either by the railroad commissioners or the county commissioners.

It satisfactorily appears that the defendant duly filed its location as stated above and followed and observed all of the preliminary steps and proceedings required by the statute as essential to authorize the company to enter upon the premises in question under and by virtue of its charter. It is provided by section 31 of chapter 51, R. S., that for land thus taken for the location of a railroad, "the owners are entitled to damages to be paid by the corporation and estimated by the county commissioners on written application of either party, made within three years after filing the location."

In *Davidson* v. *B. & M. Railroad Co.*, 3 Cush. 91, Chief Justice Shaw says (page 106): "The act of filing a location is a formal act of the assertion of a right, and it is notice to the public and to all parties interested. It is a mere act of location and the land may be considered prima facie as taken and the party then owner may claim

accordingly and may recover damages therefor." In *Hazen* v. *B. & M. Railroad*, 2 Gray, 574, the court say: "The filing of the location is the act of taking the land. The location when so filed constitutes the written permanent record evidence of the land taken. It sets off by metes and bounds the land subjected to the servitude . . . It is the evidence, the only permanent evidence of what the one has been permitted to take and the other compelled to relinquish . . . The construction of the road bed would mark but a part of the land taken." See also *Charleston B. R. R. Co.* v. *Co. Commissioners*, 7 Met. 78. "In those states in which it is held that compensation need not precede or be concurrent with taking, the time of the taking is usually fixed upon as the date for estimating the damages. In those states the title is held to vest upon filing a certain instrument of location or appropriation, and the compensation is permitted to be adjusted afterward, just as in this case the title would probably be held to vest upon the condition of making compensation, and when made the title would be perfected from the date of appropriation. Though title does not vest until "compensation" is made, the date of entry would seem to be the proper time for estimating the value of the property, as the title relates back to that time when the compensation is paid over. II Lewis on Em. Dom. Sec. 477. It is provided by section 6 of chapter 51, R. S., that after a proposed location under the general law has been approved by the railroad commissioners "a plan of the location of the road defining its courses, distances and boundaries" shall be filed with the clerk of the court of county commissioners of each county through which the road passes. Section 25 declares that "The railroad shall be located within the time and substantially according to the description in its charter, and the location shall be filed with the county commissioners, who shall endorse the time of filing thereon and order said location recorded." In view of the fact that the location with a plan or description defining its boundaries does not become public record evidence of the land taken until it is filed as required by the above statutes, and that the application for damages must be made "within three years after filing the location," it is the opinion of the court that under our

law the time of the taking of land for a railroad location as between the land owner and the railroad company is the time of the filing of the location as required by statute; and that upon payment within three years of the damages which constitute the "just compensation" for "private property taken for public uses," the title acquired by the exercise of the right of eminent domain becomes perfected and relates back to the time of such legal taking.

In this case, however, it has been seen that not only had the approved location with the requisite plan been duly filed covering the three rod strip claimed by the plaintiff, but there had been actual occupation of the land taken and the road had been constructed and in operation more than six months prior to the execution of the Lavine deed June 13, 1895.

It is obviously immaterial whether the damages are estimated and awarded by the county commissioners according to the statute or adjusted by mutual agreement between the land owner and the railroad company. In this case the damages were agreed upon between the parties November 15, 1895, and on the same day were paid to Lavine who was the owner of the land at the time of the taking, and in consideration thereof Lavine gave to the defendant a deed of all the land covered by its location. But all of the other proceedings prescribed by statute as requisite for a legal condemnation had been duly observed and this conveyance for a public use vested in the defendant the same rights that it would have acquired by an assessment and payment of damages according to the statute. In either event the title becomes perfected from the time of "taking the land by filing the location." II Lewis on Eminent Domain, 293-294; Pierce on Railroads, 218. It is manifestly competent for the owner of land taken for public uses to waive the formality of a statutory assessment of damages and when he voluntarily accepts a satisfactory amount agreed upon between the company and himself, the constitutional guaranty of a "just compensation" is fulfilled. It is also competent for the land owner to waive the payment of any compensation whatever. *U. S. Peg Wood Co.* v. *B. & A. R. R. Co.*, 104 Maine, 472.

It is therefore apparent that the defendant secured a valid location for its railroad over the land in question in the year 1894 and that the attempt of Lavine to create a right of way across it by deed in 1895 was wholly ineffectual. It was the right and duty of the defendant to erect and maintain fences on each side of the location according to the requirements of the statute, although the right of way claimed by the plaintiff was thereby obstructed.

Judgment for the defendant.

LEWANNA WILEY *vs.* JOSHUA G. BATCHELDER.

York. Opinion August 16, 1909.

Master and Servant. Unguarded Machinery. Assumption of Risk.

No machinery will be found safe for those who are thoughtless and inattentive or the hapless victims of unavoidable accidents.

The master is not bound to inform the servant what the servant already knew or what by the exercise of ordinary care and attention the servant might have known.

It is the duty of the master to use ordinary care to provide and maintain reasonably safe and suitable machinery for the servant to operate, so that by the exercise of due 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.

If an operative continues in the service of his employer after he has knowledge of the unguarded condition of any machinery in connection with which he is required to labor, and it appears that he fully understands and appreciates the nature and extent of the perils to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to provide suitable guards, protecting rods and hoods for dangerous machines and to have assumed the risks of an employment to which he has thus voluntarily and intelligently consented.

If an operative does not ask for further safeguards or otherwise so conducts himself as to assure his employer that he is content with the machinery and appliances as they are, and will himself take the chance of injury, he cannot after an injury transfer the risk to his employer.

The plaintiff while operating an unguarded steam laundry mangle in the defendant's laundry, received an injury which resulted in the loss of two fingers. Upon consideration of all the evidence introduced by the plaintiff and examined in the light most favorable to her contentions, *Held:* That the danger incident to the operation of the unguarded mangle was so manifest and so fully understood by the plaintiff that she must be deemed to have assumed the risk of the employment to which she thus understandingly consented.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while working on an unguarded steam mangle in the defendant's laundry. Plea, the general issue.

At the conclusion of the plaintiff's evidence at the trial, and on motion of the defendant, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

Allen & Abbott, for defendant.

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

WHITEHOUSE, J. On the seventeenth day of July, 1906, the plaintiff, a woman fifty-five years of age, was employed as an operative in the defendant's steam laundry at Sanford and while engaged in running a table cloth through an ironing mangle received a severe injury to her left hand resulting in the amputation of the first and second fingers. This ironing machine, known as a Ternary Mangle, consisted of a steam-heated drum or cylinder about fifteen inches in diameter over which were three smaller cylinders or rollers about eight inches in diameter padded with cloth. In front of the heated drum and about half an inch from it, was a board about a foot wide called an apron or feed board. The small rollers above were so close to the heated drum that a table cloth placed upon the apron against the revolving drum would be carried up and gripped between the drum and the small rollers and dried and smoothed as it was carried through. It was the duty of the operative to keep it smooth by holding it on the feed board and in some instances to retain her hold upon the corners of it until it was within an inch of the point of contact with the upper rollers.

This mangle had been used by the defendant and his predecessors in the same laundry for more than three years prior to the accident, without any guard rail or protection bar to prevent the hands of the operative from being caught between the cylinders. Indeed it appears from the evidence introduced by the plaintiff that the work which this machine was designed to perform, could be more easily and rapidly done without any guard rail or protecting rod, and that this method of operating it was accordingly preferred by the operatives as well as by the proprietors.

The plaintiff had worked in this laundry at different times for more than a year, and for about four weeks before the accident had constantly operated this mangle. Prior to this month of steady work upon it, she had occasionally operated it with the assistance of another person during the year or more of her employment there and during her entire service in connection with this mangle, no guard rail was ever used upon it. Her description of the mangle and the proper method of operating it, as given in her testimony, discloses a full knowledge and appreciation on her part of the nature and extent of the danger to which she was exposed in operating it without a guard rail. In cross examination she testified that she could see the machine in front of her and knew if she put her hand in there she would get hurt, but added "I didn't put my hand in there; it went in accidently." It also appears that the accident happened during a violent thunder shower, and there is evidence tending to show that after the accident the plaintiff stated that she jumped at a flash of lightning and put her hand into the mangle, and that "there was nobody to blame but herself."

In this action to recover damages for the injury received by the plaintiff, it is contended in her behalf that the mangle in question upon which she was engaged to work was structurally defective and unsuitable by the reason of the absence of a guard rail or protection bar, and that there was a failure of duty on the part of the defendant in this respect and also by his omission to give the plaintiff instruction and warning in regard to the perils incident to the operation of the machine without a guard rail.

At the close of the testimony introduced in support of the plain-

tiff's contention, on motion of the counsel for the defendant the presiding judge ordered a nonsuit to be entered. The case comes to the Law Court on the plaintiff's exceptions to this ruling; but a careful examination of all of the evidence in the light of established principles of law, leads irresistibly to the conclusion that the nonsuit was properly ordered and that the exceptions must be overruled.

The doctrine of the assumption of risks by laborers who engage to operate unguarded machinery similar to that in the case at bar, the dangers of which are manifest and readily discernible, has been repeatedly examined and carefully considered in the recent decisions of this court, and no extended discussion of the principle is now required. It was the primary duty of the defendant to use ordinary care to provide and maintain reasonably safe and suitable machinery for the plaintiff to operate, so that by the exercise of due care on her own part, the plaintiff could perform the service required of her without liability to other injuries than those resulting from simple and unavoidable accidents. But the rule is now equally familiar and well settled at common law that if an operative continues in the service of his employer after he has knowledge of the unguarded condition of any machinery in connection with which he is required to labor, and it appears that he fully understands and appreciates the nature and extent of the perils to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to provide suitable guards, protecting rods and hoods for dangerous machines and to have assumed the risks of an employment to which he has thus voluntarily and intelligently consented. *Cunningham* v. *Iron Works*, 92 Maine, 511, and cases cited. If the operative "does not ask for further safe-guards or otherwise so conducts himself as to assure his employer that he is content with the machinery and appliances as they are, and will himself take the chance of injury, he cannot after an injury transfer the risk to his employer." *Jones* v. *Mfg. Co.*, 92 Maine, 569; *Dempsey* v. *Sawyer*, 95 Maine, 298; *Cowett* v. *Woolen Co.*, 97 Maine, 546; *Babb* v. *Paper Co.*, 99 Maine, 303.

In *O'Connor* v. *Whittall*, 169 Mass. 563, it was held that if a boy who is set at work upon a dangerous machine appreciates and

understands the risk and continues to work on the machine without objecting to the want of a guard, the fact that the machine might have been safer with a guard is immaterial.

Although there is no reported decision of the Law Court in this State involving the application of this familiar doctrine to an unguarded or imperfectly guarded laundry mangle, several cases have been determined at nisi prius by an application of the rule to machinery and situations closely analogous to those at bar, and in other jurisdictions the question has been repeatedly the subject of judicial inquiry by courts of last resort. *Gaudet* v. *Stansfield*, 182 Mass. 451, was an action at common law to recover damages for an injury received by the plaintiff, a French girl nineteen years of age by having her hand caught by the revolving rolls of a steam mangle upon which she had been at work for three weeks, and upon which there appears to have been no effectual guard or protection rod to prevent the hands of the operative from coming in contact with the roll. But there was a brass guide on the edge of the apron over which the clothes were passed by the operator and carried between the roll and the steam chest. The machine was not boxed in and all parts of it could be seen. It is said in the opinion that the danger of having her hands drawn into the roll if she put them outside of the brass guide, was an obvious one of which no warning was necessary, and that being a person of average intelligence she was chargeable with knowledge of it. It was accordingly held that a verdict for the defendants was properly ordered. In *Burke* v. *Davis*, 191 Mass. 20, the protecting rod and guard blade did not afford complete protection, but the plaintiff, a girl seventeen years of age was held to have assumed the risk of the accident which happened to her by having her fingers caught between the cylinders and the rollers. In the opinion the court say: "The plaintiff concedes in argument that if this mangle had not been provided with a guard as above stated, she could have no remedy, for the reason that the danger of the operator's hands being dragged between the rollers was an obvious danger and it was apparent that the only way for her to avoid danger was to keep her

fingers and hands away from the rollers. She would have assumed the risk of such an accident."

In *Hanson* v. *Hammell et al.*, 77 No. West. Rep. (Iowa 1899) the plaintiff's hand was injured by being caught between the rollers of an ironing mangle while she was putting beeswax on one of the rollers. She knew the danger of having her hand caught and knew that the guard in front of the rollers had been removed to enable her to perform the work required of her more readily. It was held that as the particular peril attending the performance of the work as she did it, was apparent to her and fully comprehended, no admonition on the part of the defendants was necessary and she was not entitled to recover. See also *Hoyle* v. *Steam Laundry Co.*, 21 So. Eastern Rep. (Georgia 1894.)

In *Hickey* v. *Taaffe*, 12 No. East. Rep. 286 (N. Y. 1887) there were no guards in front of the rollers of an ironing machine which the plaintiff was operating, and while employed in feeding collars to the machine, her finger was caught in the button hole of a collar and her hand drawn between the rollers and injured. The plaintiff was between fourteen and fifteen years of age and at the time of the injury had worked on the machine about six weeks. It appeared that she fully understood and appreciated the dangers to be apprehended from operating the machine, and it was accordingly held that she assumed the risk incident to the employment.

In *Greef et al.* v. *Brown*, 51 Pac. Rep. 926, (Kansas 1898) it appeared that there was a guard board in the defendant's laundry building, which was designed by the manufacturer of the mangle used by the defendant to protect the operator, but it had never been used, and the defendant was wholly ignorant of its existence. The plaintiff, a girl seventeen years of age, had been at work on the unguarded machine for a day and a half when her hand was caught between the cylinders and injured. It was held that as the danger was entirely open and apparent to even casual observation, no warning or caution could have increased her knowledge of it and that she must be deemed to have assumed the risk.

In *Stager* v. *Laundry Co.*, 63 Pac. Rep. (Oregon 1901) the operative was injured by having her hand caught between the rollers

and the drum of a mangle called the Wendell Annihilator upon which she was at work and in the action for damages her contention was that the guard plate was too high allowing her hand to pass under it into the machine and that she would not have received the injuries if the guard plate had been properly adjusted. She testified that she had worked at other mangles without any guard rail and did not realize the nature and extent of the danger in operating this one because she relied upon the guard plate for protection. Upon this state of facts the court declined to say as a matter of law that she assumed the risk by continuing in the service and held that a non-suit was properly denied. In the opinion, however, the court say: "Now, it is urged that the risk to which the plaintiff subjected herself was both an incident to the business and obvious. The authorities appear to be uniform and conclusive that, where a machine similar to the Wendell Annihilator in principle is operated without a guard plate, the operator assumes the risk; for in such case the method of operation is known, and the peril patent.

In the case at bar it has been seen that the plaintiff was a woman of mature age with at least average intelligence. She had worked in this laundry for more than a year and both by observation and actual experience had obtained full knowledge of the method of operating a mangle without a guard rail, and full opportunity to ascertain and appreciate the dangers incident to the use of such a machine. She had never operated any other mangle, and had no information in regard to the use of a guard rail.

Nor was there any failure of duty on the part of the defendant in omitting to give the plaintiff positive and specific instructions in regard to the liability of having her fingers caught between the cylinder and rollers of this machine.

The extent of the obligation resting upon the employer to give such instruction must be determined with reference to the reciprocal duty resting upon the plaintiff to exercise the senses and faculties with which she was endowed in order to discover and comprehend these dangers for herself. He was not bound to inform her what she already knew or what a person of her experience and capacity, by the exercise of ordinary care and attention might have known. The

machine had been operated successfully and satisfactorily by the defendant and his predecessors in that laundry for more than four years, and was apparently reasonably suitable for the purposes for which it was designed. The fact that the accident might possibly have been avoided by the adjustment of a guard rail has no necessary tendency to prove that the existing conditions did not meet the requirements of reasonable safety. No machinery will be found safe for those who are thoughtless and inattentive or the hapless victims of unavoidable accidents.

Upon consideration of all the evidence introduced by the plaintiff, examined in the light most favorable to her contentions, it is the opinion of the court that the danger incident to the operation of the unguarded mangle was so manifest and so fully understood by her that she must be deemed to have assumed the risk of the employment to which she thus understandingly consented.

Exceptions overruled.

JESSE E. AMES *vs.* JAMES W. YOUNG.

JAMES W. YOUNG, In Error, *vs.* JESSE E. AMES.

Knox. Opinion August 16, 1909.

Judgment. Record of Judgment. Amendment of Record. Evidence. Writ of Error.

If the record of a judgment is erroneous, it may be corrected by an amendment authorized by the court, but until such amendment is made the record must be regarded as true.

When it is alleged that the record of a judgment is erroneous the only evidence admissible to show error is the record itself.

Where an amendment of a record of judgment was authorized and allowed after a writ of error, attacking the service of the writ in the action in which the judgment was recovered, had been entered in court, and no amendment of the writ of error, setting forth the amended record, was presented or granted, *held*, (1) that the amendment should have been made and

incorporated in the record before it was recited in the writ of error; (2) that the amended record when extended was the only evidence admissible to show error; (3) that the amended record was not the record attacked by the writ of error; (4) that the writ of error must stand or fall by the record therein recited; (5) that the record therein recited showed a legal service of the writ in the action in which the judgment was recovered; (6) that the judgment recovered in the action the record of which was recited in the writ of error was still valid and must be deemed res judicata.

On report. Judgment for plaintiff in first named action, and for defendant in last named action.

Two actions. 1. A writ of entry dated August 24, 1906, brought by Jesse E. Ames against James W. Young to recover the possession of certain islands in Penobscot Bay. 2. A writ of error dated November 14, 1907, brought by the said James W. Young against the said Jesse E. Ames attacking the service of a writ of entry dated December 4, 1901, brought by the said Ames against the said Young for the recovery of the possession of the aforesaid islands, and in which said action the said Ames had recovered judgment by default against the said Young.

The two actions were heard together and at the conclusion of the evidence it was agreed to report the same "to the Law Court for that court to determine, upon so much of the evidence introduced in each case as is competent and legally admissible, the rights of the parties and render judgment accordingly."

The cases are stated in the opinion.

Arthur S. Littlefield, for Jesse E. Ames.

Melville A. Floyd, and J. H. Montgomery, for James W. Young.

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

SPEAR, J. The issue in this case is the title to certain islands known as Cross Islands, a part of the Fox Island group situated in Penobscot Bay. The plaintiff Ames upon a writ of entry describing these islands dated December 4, 1901, recovered judgment by default against the defendant, Young, March 28, 1902. The judgment was duly recorded. On the 14th day of November, 1907, the defendant, Young, in the real action above described, brought a writ of error against the plaintiff in that action attacking the service

of the writ therein. The writ of error was returnable and entered at the January term of court 1908. Later at the same term of court, the plaintiff in error, moved to amend the record of the judgment in the real action, as follows: "*Jesse E. Ames* vs. *James W. Young*. Case No. 5438. Writ of entry, March Term 1902. Now comes James W. Young, defendant in said suit, and alleges that the record of such case is erroneous and incomplete in respect to the service upon said defendant of the writ on said case."

Whereupon he does move the court to amend said record where it speaks of service, by adding to the words "the writ is dated December 4, 1901, and was served on the said defendant, December 10, 1901" the following to wit: "In accordance with the endorsement upon the writ in the case which is in the following language: 'December 10, 1901. Service on the within writ is hereby acknowledged.' (Signed) R. I. Thompson, Attorney for James W. Young."

The court granted the motion and directed an amendment to be made in accordance therewith, subject to the plaintiff's objection and exceptions.

It is the opinion of the court that the writ of error as it now stands cannot be sustained; that the record when extended is the only evidence admissible to show error, is now too well established to require citation; that the record if erroneous may be corrected by an amendment authorized by the court and must be regarded as true until such amendment is made, is also well settled. The record cited in the present writ of error shows a proper service of the writ. The amendment is entirely independent of the writ of error and seeks to establish a record showing an improper service of the writ in the real action. This amendment should have been made and incorporated in the record before it was recited in the writ of error. Assuming, arguendo, that the amended record would show a defective service of the writ, it was not the record attacked by the writ of error. The amendment was authorized and allowed after the writ of error had been entered in court, and no amendment of the latter writ, setting forth the amended record, was presented or granted by

the court. The writ of error therefore must stand or fall upon the record that it presents, which shows a legal service of the writ.

This being true the judgment by default in the real action against the defendant Young, of March 28, 1902, is still valid and must be regarded as res judicta as to the premises therein described.

The case must be determined upon the evidence presented and not upon evidence which might hereafter be offered. *Footman* v. *Stetson*, 32 Maine, 18. It would also seem to be immaterial whether the judgment is reversible or not. It has become evidence in the case, is unreversed and unreversible as the case is presented, and must stand as the judgment of the court. *Came* v. *Brigham*, 39 Maine, 39; *Cole* v. *Butler*, 43 Maine, 403.

On the 24th of August, 1906, Jesse E. Ames, the plaintiff in the real action alluded to, brought another writ of entry for possession of the same premises described in the judgment on default. The judgment in the first real action having adjudicated that the premises described in the second real action were in the plaintiff, Ames, the entry according to the stipulation in the report must be,

Judgment for the plaintiff in the real action.
Judgment for the defendant in the writ of error.

INHABITANTS OF NEWPORT *vs.* WALDO H. BENNETT et als.

Penobscot. Opinion August 23, 1909.

Taxation. Collector's Bond. Same Conditioned "to settle in full" on or before a Date Certain. Such Bond Good at Common Law.

At its annual town meeting in 1906, the plaintiff town voted that the collector of taxes should settle in full with the town on February 1, 1907, thereupon the defendant tax collector and his sureties on May 7, 1906, gave to the plaintiff town a bond containing the following condition: "That whereas the said Waldo H. Bennett has been chosen collector of taxes for said town for the year 1906; now if the said Waldo H. Bennett shall well and faithfully perform all the duties of his said office, and shall collect the taxes committed to him within the said year, and shall settle in full with said town on or before February first, A. D. 1907, then this obligation shall be void; otherwise it shall remain in full force and virtue."

Held: 1. That the bond was a voluntary contract on the part of the defendants with the town, founded upon a sufficient consideration, and intended to serve a lawful purpose.

2. That the bond was good at common law.

On report. Judgment for plaintiffs.

Action of debt brought by the plaintiff town on the bond of the defendant, Waldo H. Bennett, given by him as tax collector of the plaintiff town for the year 1906. The action was referred to a referee who found the facts and reported questions of law for the determination of the court, and the case was then reported to the Law Court for determination upon the report of the referee. The report of the referee is stated in the opinion.

W. H. Mitchell, for plaintiffs.

Waldo H. Bennett, and Martin & Cook, for defendants.

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

KING, J. Action on a tax collector's bond, reported to the Law Court for determination of the question submitted by the referee as follows:

"I find that the defendant, Waldo H. Bennett, was duly elected tax collector of the town of Newport for the year 1906, at the annual town meeting in March, 1906; that prior to the election, the town voted that the collector be obliged to settle in full with the town February 1, 1907, and that the tax list be committed May 1, 1906; that the defendants gave the bond in suit, May 7, 1906; that the taxes for 1906 were duly and legally assessed, and were committed to Mr. Bennett for collection by a legal warrant; that the amount of said commitment not yet abated or paid over by Mr. Bennett to the town treasurer is $1,790.96; that of the entire tax committed $23.60 was supplemental, and not committed until September, 1906; that the condition of the bond in suit is in these words: — 'that whereas the said Waldo H. Bennett has been chosen Collector of Taxes for said town for the year 1906; now if the said Waldo H. Bennett shall well and faithfully perform all the duties of his said office, and shall collect the taxes committed to him within the said year, and shall settle in full with said town on or before February first A. D. 1907, then this obligation shall be void; otherwise it shall remain in full force and virtue.' This suit was commenced February 15, 1907. I find that the bond is valid and in force, but whether it is to be treated as a statute-bond, or a bond good at common law only, I submit to the Court upon the foregoing facts. If the Court shall rule as a matter of law that the clause 'and shall settle in full with said town on or before February first A. D. 1907' may be treated as surplusage then I find that the bond is a valid statute bond, but I also find that suit thereon was commenced prematurely and for that reason only — all other defenses being overruled — I award that the plaintiffs be nonsuited, but without prejudice to the right to bring a new action on the bond, and that the defendant recover of the plaintiffs the costs of court to be taxed by the Court. But if the Court shall rule that the bond may not be treated as a statute bond, by regarding said clause as surplusage, then I rule that the bond is good at common law, and I award that the plaintiffs recover of the defendants the sum of seventeen hundred and ninety dollars and ninety-six cents ($1,790.96) with interest thereon from February 15, 1907, debt or damage,

and the cost of reference, taxed at $6.48 and the costs of court to be taxed by the court."

The question presented is not whether Bennett as collector could have been *required* to give this bond, as was involved in *Smith* v. *Randlette*, 98 Maine, 86, for it was given voluntarily.

Nor is the question, we think, whether this bond might not be held binding upon the obligors as a statute bond, notwithstanding this clause in excess of what the statute requires. Here the defendants claim that they are not liable for the breach of that part of the bond which required Bennett to "settle in full with said town on or before February first A. D. 1907." Why not? Their answer evidently is that if they had tendered the bond without this provision the town could have legally required nothing more, as it would then have been a statute bond, hence this clause should be disregarded as surplusage. But they did not tender such bond. They gave this.

We know of no provision of statute which makes such a bond as this void. The purpose of the clause for an early and full settlement with the town is neither unlawful nor immoral, but commendable. The defendants had a right to give a bond containing such a clause, if they saw fit, and the town had a right to accept it, if given. There is no suggestion of coercion or duress of the defendants. Bennett accepted the office of collector upon that express condition, that he should settle in full on or before February 1, 1907. The inference is fair that his compensation was materially increased because of that special obligation. The defendants' bond is a voluntary contract on their part with the town, founded upon a sufficient consideration, and intended to serve a lawful purpose.

The most important part of that contract for the town was this clause in question, and that should not now be disregarded. Language which the parties to a contract intentionally used, and by which their lawful rights and obligations are clearly expressed, and which cannot be disregarded without imparing and destroying those rights and obligations, is not superfluous, and unnecessary, and hence surplusage. It is vital and essential to the contract. If that contract is lawful the parties must be held to abide it. As said

in *United States* v. *Hodson*, 10 Wall. page 409: "If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint the constraint will destroy it. But when it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors."

It is the opinion of the court that the bond in suit should be treated in this action as good at common law.

Accordingly the entry must be, in accordance with the referee's findings,

Judgment for the plaintiffs for $1790.96 with interest thereon from Feb. 15, 1907, and the costs of reference taxed at $6.48, and the costs of court to be taxed by the court.

FRANKLIN NELSON, Petitioner for Certiorari,

vs.

BOARD OF ENGINEERS OF PORTLAND FIRE DEPARTMENT.

Cumberland. Opinion August 26, 1909.

Certiorari. Writ of, Does not Lie to Review Questions of Fact. Private and Special Laws, 1907, chapter 350.

The writ of certiorari lies only to correct errors in law, and not to review and revise the decision of a subordinate tribunal of a question of fact submitted to its judgment.

Chapter 350, Private and Special Laws of 1907, provides among other things, that the members of the fire department of the city of Portland, are subject "after hearing to removal at any time by the board of engineers, subject to the approval of the committee on fire department, for inefficiency or other cause." Under the provisions of this statute, the plaintiff was removed as a permanent member of the fire department by the unanimous vote of the board of engineers. Previous to the hearing which resulted in his removal, written notice was given to the plaintiff stating the charges against him.

Held: 1. That the plaintiff was expressly charged in the notice with inefficiency, the statutory cause for removal, consisting not only of disobedience of orders, but also a lack of capacity, skill and ability to perform the duties required of him in his position.

2. That whether or not the plaintiff was inefficient to perform the duties of the position from which he was removed was a question of fact, and that the board of engineers had jurisdiction under the statute to decide that question, and that their decision of that question was final and could not be reviewed under a writ of certiorari.

3. That there was no error of law in the proceedings complained of.

On exceptions by defendants. Sustained.

Petition for certiorari brought in the Supreme Judicial Court, Cumberland County, praying that the Board of Engineers of the Fire Department of Portland be ordered to certify to said court "the record of their proceedings relative to the discharge" of the plaintiff "to the end that said record or so much thereof as is illegal may be quashed."

"The defendants filed an answer to the petition and requested the court to rule that so much of said answer as was a copy of the record of said Board of Fire Engineers and of the record of the committee on Fire Department of the City Council of said City of Portland be held a good and sufficient answer to the petition." The presiding Justice made a pro forma ruling denying the request, and the defendants excepted. It was also "stipulated and agreed that if the court find the petition good and the portion of the defendants' answer which is a copy of the records of the Board of Fire Engineers and of the committee on Fire Department of the City Council, is not a good and sufficient answer to the petition or the court is of opinion that evidence aliunde the record is admissible upon the petition the case shall be remanded for further hearing at nisi, otherwise petition to be dismissed."

The notice given by the defendants to the plaintiff, and referred to in the opinion, omitting caption and signatures thereto, is as follows:

"You are hereby notified that there will be a meeting of the Board of Engineers of the Portland Fire Department held at their rooms at the Central Fire Station in said Portland, on Thursday, the twenty-first day of May, A. D. 1908, at seven thirty o'clock in the evening, at which time they will act upon the question of your removal from the office or position which you now hold as a permanent member of Fire Department of said City of Portland, on the grounds of inefficiency and other cause, at which time you may be present and show cause, if any you have, why such removal should not be made. Said inefficiency consisting of your inability to perform the duties of permanent fireman of said City of Portland, to wit, the duties of lieutenant of Engine 5 and Chemical 1 Company of the Portland Fire Department, in that on January 6, A. D. 1908, you violated one of the general orders of the Fire Department of the said City of Portland, by leaving the Engine House without first reporting to the floor man on duty that you were to leave the house and where you were going; in that on said January 6, you violated one of the general orders of said Department, by responding to a still alarm for a fire without any fire apparatus; in that on

the thirtieth day of January, A. D. 1908, you violated one of the general orders of said Fire Department, by responding to a still alarm for a fire without reporting the fire to the acting Chief of the Fire Department, who was then and there in your engine house; in that on the thirtieth day of January, you violated one of the general orders of said Fire Department by leaving the engine house without first reporting to the floor man on duty the fact that you were to leave the engine house and where you were going; in that you are generally inefficient, incompetent and unskillful in the performance of your duties at fires; and of your general inability to perform the duties required of you by your said position."

The case is stated in the opinion.

Michael T. O'Brien, for plaintiff.

Emery G. Wilson, for defendants.

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

KING, J. Petition for a writ of certiorari to quash the proceedings of the Board of Engineers of the Fire Department of the city of Portland relative to the removal of the petitioner as a permanent member of said Fire Department. The case is before the Law Court on exceptions by defendants to pro forma rulings of the presiding Justice, together with a stipulation by the parties, and the real question here is whether the record of the proceedings complained of, as shown by the copy thereof contained in the defendants' answer, is a sufficient defense to the petition.

By the provisions of Chap. 350, Private and Special Laws of 1907, members of the Fire Department of the City of Portland were subject "after hearing to removal at any time by the board of engineers, subject to the approval of the committee on fire department, for inefficiency or other cause."

After written notice to the petitioner and a hearing, at which he was present in person and represented by his attorneys, and had a full opportunity to hear all the witnesses against him, and cross examine them, and testified in his own behalf, the Board of Engineers voted unanimously for his removal for inefficiency, and their action was approved by the Committee on Fire Department.

The gist of the petitioner's contention, as stated in his causes of error and in his argument, is that the notice served upon him contained only charges of inefficiency based upon certain alleged violations of the general orders of the fire department; that under that notice the Board of Engineers could not legally have found him inefficient for any other cause, and accordingly their finding is to be construed that he was found inefficient only in respect of those alleged violations of general orders; and that the record in question is not sufficient to support such a finding because it does not allege that there were in fact any such general orders.

Admitting, but without so deciding, that to support a removal of the petitioner for inefficiency based solely on the alleged violations of certain specified general orders the record ought to show that such orders existed, still an examination of the notice served shows unmistakably that the inefficiency charged against the petitioner was not "based wholly upon the infractions of these alleged general orders" as he claims.

On the contrary, in addition to the specifications of violation of general orders, the notice expressly set out that his inefficiency consisted also "in that you are generally inefficient incompetent and unskillful in the performance of your duties at fires; and of your general inability to perform the duties required of you by your said position." This language is explicit. It charged the petitioner with inefficiency because incompetent and unskilful at fires, and because of general inability to perform the duties required of him in his position. These specifications are in addition to and independent of those respecting the violations of general orders.

It appears also from the record that the Board of Engineers, as the result of the hearing, decided unanimously, not only that the charges of violating the general orders, as set out in the notice, were true, but also "that the said Nelson is inefficient and unable to perform those duties, being the duties incumbent upon him to do and perform in his position as a permanent fireman of the city of Portland."

Thus the record shows that the petitioner was expressly charged in the notice with inefficiency—the statutory cause for removal—

consisting not only of disobedience of orders, but also of lack of capacity, skill and ability to perform the duties required of him in that position, and that the Board of Engineers upon hearing found the charges true in each particular. The petitioner's contention therefore that under the notice served on him he could not have been tried and convicted for inefficiency based upon any other ground than the alleged violation of the general orders cannot be sustained.

He further complains in argument that the record is defective "in that it does not state the facts upon which the Engineers based their ruling." If by this he means that the record does not show for what cause he was removed, he is mistaken, for it is there clearly stated that he was removed for being "inefficient."

But evidently he claims that the record should show the evidence upon which the Board of Engineers decided the question of his inefficiency in order that this court may determine if it was sufficient to support their decision.

Such is not the office of the writ of certiorari, It lies only to correct errors in law, and not to review and revise the decision of a subordinate tribunal of a question of fact submitted to its judgment. *Frankfort* v. *County Commissioners*, 40 Maine, 389; *Hayford* v. *Bangor*, 102 Maine, 340; *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. In the last named case Gray, C. J., said: "A writ of certiorari lies only to correct errors in law, and not to revise a decision of a question of fact upon the evidence introduced at the hearing in the inferior court, or to examine the sufficiency of the evidence to support the finding, unless objection was taken to the evidence for incompetency, so as to raise a legal question."

Whether the petitioner was inefficient to perform the duties of the position from which he was removed is a question of fact. The Board of Engineers had jurisdiction under the statute to decide that question. It was decided by them, after a hearing at which the petitioner was present and heard and examined the witnesses against him and testified in his own behalf, and their decision of that question of fact is final, and cannot be reviewed under a writ of certiorari.

Finding no error of law in the proceedings complained of it is the opinion of the court that the record of those proceedings as set forth in the defendants' answer is a sufficient defense to the petition. The exceptions, therefore, must be sustained, and the petition for the writ of certiorari dismissed in accordance with the stipulation of the parties.

Exceptions sustained.
Petition dismissed.

HIRAM C. LORD et als., Petitioners for Certiorari,

vs.

COUNTY COMMISSIONERS FOR CUMBERLAND COUNTY.

Cumberland. Opinion August 26, 1909.

Certiorari. Petition. Interest of Petitioners. Evidence Dehors the Record not Receivable. Ways. County Commissioners. Notice on Petitions for Ways. Practice. Revised Statutes, chapter 23, section 2.

Although it has been the uniform practice in Maine to hear the whole case upon a petition for the writ of certiorari, nevertheless, the judgment upon the petition granting the writ and ordering the record sent up is not a judgment that the record when sent up in response to the writ is to be quashed, but when the record has been certified up as directed in the writ the question whether the petitioners are entitled to have the record quashed is then to be determined upon the record as certified.

When the writ of certiorari issues and in response thereto the record is sent up, the court can only act upon such record. No evidence outside of the record is receivable to show any error therein. If the record is incorrect and amendable it should be amended before being sent up.

When it appears that petitioners for the writ of certiorari, who are not parties to the record, have no direct, legal, statute interest in the proceedings complained of, they have not shown such an interest in the proceedings sought to be quashed as entitles them to maintain the writ.

Where petitioners prayed for the writ of certiorari to quash the proceedings of the county commissioners in Cumberland County in laying out a town

way in the town of Naples in that county, and it appeared that the only ground for their claim of right to petition for the writ was that they were "citizens and tax payers of said town of Naples," *held* that they had no legal right to petition for the writ.

When a petition is duly presented to county commissioners for the laying out of a way, Revised Statutes, chapter 23, section 2, provides that the commissioners "shall cause thirty days' notice to be given of the time and place of their meeting, by posting copies of the petition, with their order thereon, in three public places in each town in which any part of the way is, and serving one on the clerks of such towns, and publishing it in some newspaper, if any, in the county." The same statute also provides that "the fact that notice has been so given, being proved and entered of record, shall be sufficient for all interested, and evidence thereof."

Where on a petition for the writ of certiorari to quash the record of the proceedings of county commissioners in laying out a town way, and the record certified up showed that the commissioners found as a fact, and entered the same in their record, that it was "then and there satisfactorily proved to us that all the notices named in said order had been duly and seasonably published, served and posted, and that all the requirements thereof had been fully complied with," *held* that the record thus certified up showed a full compliance with the statute as to notice.

It has been the uniform practice in Maine in proceedings for the laying out of ways, where the notice ordered to be given is to include a copy of the petition, not to copy the signatures of all the petitioners in the notice, but only the first with a statement of the number of the others. Such practice has continued so long, and been relied upon as sufficient so universally, that for reasons of public policy if for no other, it should now be regarded as a substantial and sufficient compliance with the statute.

On exceptions by plaintiffs. Overruled.

Petition by Hiram C. Lord and twenty-one others, to the Supreme Judicial Court, Cumberland County, for a writ of certiorari to quash the record of the proceedings of the county commissioners of said county in laying out a certain town way in the town of Naples. The writ was ordered and the county commissioners certified up the full record of their proceedings as commanded. After hearing in the Supreme Judicial Court, the presiding Justice denied the motion of the plaintiffs that the record of the county commissioners be quashed, but ordered the writ of certiorari to be quashed, and the plaintiffs excepted.

The case is stated in the opinion.

Frank H. Haskell, for plaintiffs.

M. P. Frank, for defendants.

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

KING, J. Hiram C. Lord and twenty-one others petitioned the Supreme Judicial Court for Cumberland county, Maine, for a writ of certiorari to quash the record of the proceedings of the County Commissioners of said county in laying out a town way in the town of Naples. At the October term, 1908, of said court the writ was ordered and in obedience thereto the Commissioners certified up the full record of their proceedings. At the January term, 1909, of said court the presiding Justice, after hearing, denied a motion that the record of the Commissioners be quashed, and directed the writ of certiorari to be quashed. The case is before the Law Court on exceptions to that ruling.

In the recent case of *Stevens* v. *Co. Com.*, 97 Maine, 121, this court, reviewing the authorities, restated the well settled doctrine that although it has been the uniform practice to hear the whole case upon the petition for the writ of certiorari, nevertheless, the judgment upon the petition granting the writ and ordering the record sent up is not a judgment that the record when sent up in response to the writ is to be quashed. When the record has been certified up as directed in the writ the question whether the petitioners are entitled to have the record quashed is then to be determined upon the record as certified. That is the question to be determined here.

Numerous alleged errors in the proceedings are set out in the petition but they may all be condensed into two, and in fact they are so considered in the brief of the learned counsel for the petitioners: (1) That notice of the time and place of the Commissioners' meeting was not given in compliance with the statute; (2) That the Commissioners did not adjudicate that the municipal officers had unreasonably neglected and refused to lay out the way.

There is, however, at the threshold of the case another question to be determined the decision of which is, we think, decisive of the matter before us. Are the petitioners for the writ of certiorari shown to have such an interest in the proceeding sought to be quashed as entitles them to maintain the writ? We think not. They are not parties to the record sought to be quashed. None of

them appear to have been petitioners to the municipal officers for the way, or to the Commissioners. The way is not laid out over their land. The only ground for their claim of right to petition for this writ is that they "are citizens and taxpayers of said town of Naples." If for this reason they have the right to petition for certiorari to quash the laying out of this town way, then for a like reason has each citizen and tax payer of the town a like right. But to permit that would be both unreasonable and contrary to precedent.

In the early case of *Bath Bridge & Turnp. Co., Pet'rs*, v. *Magoun & als.*, 8 Maine, 292, Mellen, C. J., speaking of the writs of error and certiorari, said: "They are alike in this, that no one but a party to the record, or one who has a direct and immediate interest in it or is privy thereto, can maintain either of those writs. . . . Numerous cases have occurred, and many are reported, in respect to the location of roads, &c. but they have always been prosecuted by those having a direct, legal, statute interest in the proceedings complained of. As our laws on this subject now stand, the individuals whose land is appropriated for the road have a direct interest of a pecuniary character. So has the county, because liable by law to pay the owner the estimated value of the land so appropriated. So has the town, because by law bound to make the road and keep the same in repair." In *Levant* v. *Co. Com.*, 67 Maine, page 434, it is said: "The petitioner should have a direct interest in the proceedings sought to be quashed." In Vol. 4, page 172, Encyc. Pl. and Prac. the author says: "Proceedings to establish, alter, maintain or repair roads and highways will not be reviewed on the application of private citizens who apply for the writ in their own behalf when such applicants have no special property rights or interests involved."

In *Vanderstolph* v. *Highway Com'r*, 50 Mich. 330, the petitoner was interested only as a tax payer in the town, and Graves, C. J., there said: "We think this interest is too remote and too indirect and indefinite to warrant this remedy, and that any sanction of the proceeding would be an improper exercise of discretion."

Conklin v. *Fillmore County*, 13 Minn. 454, is another case where the question was whether a mere tax payer could prosecute a writ of certiorari to quash the laying out of a road in his town. Wilson, C. J., there said: "I think the plaintiff has not a right to prosecute this action. He does not show or pretend that he is damnified more or otherwise than any other resident of the town. . . The injury—if any—is to the community, not to him in his individual capacity, and it is for them, not for him, to redress it. . . . If one member of the community in his individual capacity has a remedy for such an injury, so has every other member. To permit this would be intolerable and contrary to all precedent and reason. This objection cannot properly be passed over in silence." In the case before us the petitioners for the writ of certiorari have no "direct, legal, statute interest in the proceedings complained of." They are injured, if at all, only as other tax-payers are injured, and that may be to pay some small amount for building and maintaining this way, if they are and continue to be property owners in the town. Such an injury is too remote and too small for the law to notice and redress.

But if the petitioners were entitled to prosecute the writ an examination of the record as certified up shows that the alleged errors complained of are not such in fact.

I. As so the notice. Sec. 2, chap. 23, R. S., provides that the Commissioners "shall cause thirty days notice to be given of the time and place of their meeting by posting copies of the petition with their order thereon, in three public places in each town in which any part of the way is, and serving one on the clerks of such towns, and publishing it in some newspaper, if any, in the county."

The Commissioners ordered such notice to be given in this case. The same section of the statute provides that "The fact that notice has been so given being proved and entered of record, shall be sufficient for all interested, and evidence thereof."

The record shows that the Commissioners found as a fact, and entered the same in their record, that it was "then and there satisfactorily proved to us that all the notices named in said order had been duly and seasonably published, served and posted, and that

all the requirements thereof had been fully complied with." Thus the record certified up shows a full compliance with the requirements of the statute as to notice. But the petitioners attempt to show dehors the record that it is not true; that the notice actually published, served and posted did not contain a copy of the petition because the names of all the petitioners were not copied, but only that of the first, "M. S. Brackett," with the addition "and thirty-six others." If there were merit in such objection to the notice it could not avail the petitioners.

"When the writ issues the court can act only on the record as produced. No evidence aliunde is receivable" *White* v. *Co. Com.*, 70 Maine, page 326. See also to same effect *Cushing* v. *Gay*, 23 Maine, 16; *Pike* v. *Herriman*, 39 Maine, 52; *McPheters* v. *Morrill*, 66 Maine, 125; *Emery* v. *Brann*, 67 Maine, 44; *Stevens* v. *Co. Com.*, 97 Maine, 123. The paper printed with the case purporting to be a "Copy of petition and order as posted" forms no part of the record certified under the hands and seal of the Commissioners, and could not be introduced to change or alter the record. In *Emery* v. *Brann*, supra, it was held that an original paper on file was "not admissible to show error in the record."

But we are of opinion that there is no merit in this objection. We do not readily perceive in what respect any interested party could be materially disadvantaged by the omission to copy the names of all the petitioners in the notice given. The object of the notice is to give information of the time, place and purposes of the Commissioners' meeting. A notice containing a copy of the petition, but with only the name of one petitioner copied, must be as effective for this purpose as a similar notice containing all the names. The orginal petition is on file with the Commissioners and the names of all may be ascertained at any time from an inspection of it. Moreover, it has been the uniform practice in this State, we think, in proceedings for the laying out of ways, where the notice ordered to be given is to include a copy of the petition, not to copy the signatures of all the petitioners in the notice, but only the first with a statement of the number of the others, as was done in this case. Such practice has continued so long, and been relied upon as suffi-

cient so universally, that for reasons of public policy if for no other, it should now be regarded as a substantial and sufficient compliance with the statute.

II. In the amended record it is expressly stated that the Commissioners did adjudge that the municipal officers had unreasonably neglected and refused to lay out the way.

The petitioners now claim, however, that the amendment was not justified, and should not have been made. We see no reason to so conclude, but if so the record as sent up is conclusive in this proceeding. The court can act on nothing else. See cases cited supra.

The entry will therefore be,

Exceptions overruled.

LUELLA E. DREW *vs.* JOHN M. SHANNON.

Penobscot. Opinion August 26, 1909.

Bastardy. Constancy of Accusation. Newly-discovered Evidence.

It is not necessary that newly-discovered evidence should be such as to *require* a different verdict, but there must be a *probability* that the verdict would be different upon a new trial.

In a bastardy complaint proof of the constancy of the plaintiff in her accusation against the defendant, after it is made, is a condition precedent to the maintenance of her suit against him.

The plaintiff in a bastardy complaint, recovered a verdict against the defendant. After the trial and verdict, the defendant filed a motion for a new trial on the ground of newly-discovered evidence, setting out in the motion that after the trial he had discovered a witness who would testify that after the plaintiff recovered from her confinement she was at the house of the witness to get some baby clothes and told her that another man, John Byers, was the father of her child, and that "I was going to lay it on John Byers, but my father wouldn't let me." *Held:* That this was newly-discovered evidence within the established rule in Maine, and that a new trial should be granted in order that the defendant may have an opportunity to present the same in defense of the plaintiff's suit.

On exceptions and motions by defendant. Motion on ground of newly-discovered evidence sustained.

Bastardy complaint. Tried in the Supreme Judicial Court, Penobscot County. Verdict for plaintiff. Defendant excepted to certain rulings, and also filed a general motion for a new trial, also a motion for a new trial on the ground of newly-discovered evidence. The latter motion was sustained. Exceptions and general motion not considered.

The case is stated in the opinion.

R. P. Plaisted, and Martin & Cook, for plaintiff.

Thompson & Blanchard, for defendant.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

KING, J. This is a complaint for bastardy. The verdict was for the plaintiff, and the defendant brings the case here on exceptions to the exclusion of testimony, and two motions for a new trial, one, because the verdict is against the weight of the evidence, the other based on the ground of newly-discovered evidence.

We find it necessary only to consider the latter motion.

The plaintiff's child was born Nov. 1, 1908. Her accusation against the defendant was made on oath before the magistrate Nov. 5, 1908. Proof of the constancy of her accusation against the defendant, after it was made, is a condition precedent to the maintenance of her suit against him. *Palmer* v. *McDonald*, 92 Maine, 125.

She testified that she had never said that this child belonged to anybody else, and there was no evidence at the trial tending to contradict her on this point. But the defendant sets out in this motion, which is sufficient in form and allegation, that since the trial he has discovered a witness, Mrs. Lillian Gould, who will testify that after the plaintiff had recovered from her confinement she was at the house of the witness to get some baby clothes and told her that another man, John Byers, was the father of her child, and that "I was going to lay it on to John Byers, but my father would'nt let me."

We think this testimony is newly-discovered within the established rule in this State. It could not be expected that the defendant or his counsel would discover by reasonable diligence a witness to whom the plaintiff had made such a personal and confidential statement.

Ought the court, then, in the exercise of its discretion, to grant a new trial in this case that the defendant may have an opportunity to present this newly-discovered evidence?

"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. But it is not necessary that the additional testimony should be such as to *require* a different verdict." *Parsons* v. *Railway*, 96 Maine, page 507.

An examination of the testimony of Mrs. Gould which accompanies the motion discloses no inherent improbability in her statement. If it be a fact that the plaintiff intended to accuse John Byers as the father of her child, but made the accusation against the defendant because required so to do by her father, it is not unreasonable that she should disclose the truth to her friend Mrs. Gould, who was at that time giving her clothes for this illegitimate child. The testimony if believed by a jury will necessarily defeat this action. To deprive the defendant of the right to present it may do, and it appears to the court is likely to do, injustice to him. In the exercise of its discretion, and applying the doctrine as above stated, it is the opinion of the court that a new trial should be granted in order that the defendant may have an opportunity to present this newly-discovered evidence in defense of the plaintiff's suit.

New trial granted.

MELISSA HATHAWAY et als. *vs.* GILMAN N. WILLIAMS.

SAME *vs.* SAME.

Washington. Opinion September 1, 1909.

Evidence. "Rebuttal Evidence." Exceptions. Supreme Judicial Court Rule XXXIX.

Where evidence offered for a particular purpose, is excluded and exceptions taken and allowed, the exceptions will not be sustained although the evidence offered might be admissible upon another ground not brought to the attention of the trial Judge.

In an action on contract wherein defendant denied liability, the plaintiff, after the close of defendant's evidence, offered evidence tending to prove an admission of liability by defendant, *held* that the evidence offered was not in rebuttal and that exceptions do not lie to its exclusion.

On exceptions by defendant. Overruled.

Two actions of assumpsit brought by the plaintiffs to recover for the transportation of salt, dories and merchandise from Gloucester, Mass., to Cutler, Maine. Plea, the general issue in each case. Presumably the two cases were tried together although the record is silent on that point. Verdict for the defendant in each case. During the trial the plaintiffs offered certain evidence as "rebuttal evidence" and the same was excluded and the plaintiffs excepted.

The case is stated in the opinion.

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

William R. Pattangall, for defendant.

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

BIRD, J. Actions of assumpsit brought for the recovery of freight, presumably tried together. In each case, the plea was the general issue and the verdict was for defendant. From the bill of exceptions it appears that one of the plaintiffs was called as a witness

in rebuttal and asked by his counsel certain questions preliminary to showing an admission of liability by defendant made some months before the trial. Objection being made, the court intimated its belief that the inquiry was one calling for new matter. Whereupon counsel for plaintiff, differing with the court, stated that defendant had denied all liability and that it was now proposed to show that he had admitted liability. The court offering to admit the testimony, if omitted by inadvertence, counsel for plaintiff disclaimed inadvertence and declared a preference entertained from the beginning of the trial, to introduce the testimony in rebuttal rather than in chief. The court ruled that the testimony proposed to be offered should have been put in as part of plaintiff's case in chief and was not rebuttal. To this ruling, plaintiff excepted.

The bill of exceptions gives none of the evidence except that of one of the plaintiffs when called in rebuttal. It is, therefore, not certain upon the record whether the denial of liability by defendant mentioned by plaintiff's counsel was that made by his plea or by evidence given by him at the trial, especially in view of the fact that it does not appear that defendant was called as a witness in defense.

It is doubtful if any question is properly before us. *Jones* v. *Jones*, 101 Maine, 447, 450; *Hix* v. *Giles*, 103 Maine, 439; *Allen* v. *Lawrence*, 64 Maine, 175; *Gilman* v. *N. A. Ry. Co.*, 60 Maine, 235.

But waiving the irregularity and assuming that defendant testified at the trial denying liability, we think the exceptions must be overruled. The evidence was avowedly offered for the purpose of showing an admission of liability by defendant. No other purpose was mentioned or suggested. Whether it was admissible for other purposes is not open to plaintiff: *Lenfest* v. *Robbins*, 101 Maine, 176, 179; *Lee* v. *Oppenheimer*, 34 Maine, 181, 185; *Emery* v. *Vinall*, 26 Maine, 295, 303. As evidence for the purpose mentioned, it was correctly held by the presiding Justice not to be in rebuttal but part of plaintiff's case in chief. "The orderly course of proceeding requires, that the party, whose business it is to go forward, should bring out the strength of his proof, in the first instance; but it is competent for the judge, according to the nature

of the case, to allow a party who has closed his case to introduce further evidence. This depends on the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not as he thinks proper." *Cushing* v. *Billings*, Shaw, C. J., 2 Cush. 158, 160: Rule XXXIX Sup. Jud. Court.

Exceptions overruled.

EMERY H. MAYNARD *vs.* LAURETTA MAYNARD and Trustees.

Washington. Opinion September 4, 1909.

Bills and Notes. Order Payable out of Particular Fund. Consideration.

The drawer of an order payable in chattels or out of a particular fund does not undertake that he will pay the order in case the drawee refuses or fails to comply therewith.

No suit can be maintained by the payee against the drawer of an order payable in chattels or out of a particular fund. In such case the payee is the mere assignee of the property and if he fails to receive it his remedy is in an action on the original consideration or cause of action against the drawer.

A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry.

A consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a negotiable instrument when the consideration is open to inquiry.

A promise founded upon considerations of affection or gratitude is deemed in law a mere beneficence and cannot be the foundation of a legal action when the consideration is open to inquiry.

Where a mother gave to her son an order on her trustees directing them to pay to the order of the son from her "interest and income account" the sum named in the order, and the trustees refused to accept the order and the son then brought an action on the order against the mother to recover the sum named therein, *held* that the giving of the order was an unsuccessful attempt on the part of the mother to make the son a present of the sum named therein and the only consideration for the order was beneficence and that the action could not be maintained.

On report. Judgment for defendant.

Assumpsit. The declaration is as follows: "In a plea of the case, for that the said defendant, at said Machias, on the 28th day of December, A. D. 1907, for value received of the plaintiff, drew her order in writing under her hand of that date, directed to George F. Cary and Deola C. Getchell Trustees, therein and thereby requesting the said Trustees to pay to the plaintiff, or his order, the sum of eight hundred and eight dollars, and thirty-four cents, and charge the same to her account; and the plaintiff on the date of this writ, presented the said order to the said Trustees for their acceptance and payment, which the said Trustees then and there refused to do, of which the said defendant then and there had due notice, and was requested to pay the same, whereby she became liable and in consideration thereof promised the plaintiff to pay him that sum on demand."

Plea, the general issue as follows: "And now the defendant, by her guardian, Phineas H. Longfellow comes and defends, &c., when, &c., and for plea says she never promised the plaintiff in manner and form as the plaintiff in his writ and declaration has declared against her and of this puts herself on the country." Also brief statement as follows: And for brief statement defendant further says: That at the time at which the alleged promise was made she was insane, and mentally incapable of making the contract set out in plaintiff's writ.

"That at the time of the alleged contract, she was suffering from mental weakness and infirmity to such a degree that she did not understand the nature and effect of such alleged contract, and that her signature to the order declared on, was obtained by fraud." The plaintiff is the son of the defendant.

The order given by the defendant to the plaintiff, is as follows:

"Machias, Dec. 28, 1907.

"Geo. F. Cary, Deola C. Getchell, Trustees.

"Please pay from my interest and income account to the order of Emery H. Maynard the sum of Eight hundred and eight dollars and thirty-four cents, and charge same to my account.

"Lauretta Maynard

"Legatee Under Will John F. Harmon."

After the evidence had been taken out at the trial of the action and a certain agreed statement of facts had been filed, the case was reported to the Law Court for determination.

The case in stated in the opinion.

E. N. Benson, and A. D. McFaul, for plaintiff.

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

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

WHITEHOUSE, J. This is an action against the drawer of an order for the sum of $808.34. The plaintiff is the son of the principal defendant, and the alleged trustees Carey and Getchell were constituted trustees by virtue of a trust deed from one John F. Harmon by the terms of which personal property of the face value of $42,000 was assigned to the said Carey and Getchell, upon the condition and stipulation among others that they should pay to the defendant "so much of said annual income as they in their judgment deemed to be necessary for the comfortable support of the said Lauretta, but in no event are they to pay her any part of the principal trust fund." The trustees refused to accept the order. It appears from a copy of the order (made a part of the case by agreement of the parties) that the defendant directed her trustees to pay the amount named from her "interest and income account." It will be seen from the terms of this order that the sum to be paid was not payable absolutely and at all events, but was payable out of a particular fund, namely, her interest and income account.

"The drawer of an order payable in chattels or out of a particular fund does not undertake that he will pay the amount of the order in case the drawee refuses or fails to comply therewith. . . . No suit can therefore be maintained by the payee against the drawer upon an instrument of this character; the payee is the mere assignee of the property, and if he fails to receive it, his remedy is in an action on the original consideration or cause of action against the drawer." 21 A. & E. Enc. Law, 940.

The defendant accordingly contends in the first place that the action is not maintainable because the order cannot be treated as a

bill of exchange. But it is further contended that even if the order carried with it the mother's implied promise to pay it if her trustees did not, the action is not maintainable for the reason that the only consideration for the order is shown by the evidence to have been love and affection and not a valuable consideration.

"A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry. Therefore, a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note; as, for instance, when a bill or note is accepted or made by a parent in favor of a child, or vice versa, it could not be enforced between the orignal parties, the engagement being gratuitous upon what is called a good, in contra-distinction to a valuable consideration." 1 Daniel Nego. Inst. (4th Ed.) sec. 179.

"A good or meritorious consideration will not suffice to support a simple contract. A promise founded upon considerations of affection or gratitude is deemed in law a mere beneficence and cannot be the foundation of a legal action." 6 A. & E. Enc. of Law, 679. *Fuller* v. *Lumbert*, 78 Maine, 325.

Inasmuch as it clearly appears from the plaintiff's own testimony that this was an unsuccessful attempt on the part of his mother to make him a present of the amount named in the order and the only consideration for the order was beneficence, the certificate must be,

Judgment for the defendant.

STATE OF MAINE *vs.* CHARLOTTE W. FULLER.

Penobscot. Opinion September 4, 1909.

Eminent Domain. Town Ways. Location. Assessment of Damages. Appeal. Constitutional Law. Constitution of Maine, Article I, section 21. Revised Statutes, chapter 4, sections 89, 90, 91; chapter 23, sections 7, 9, 18, 38, 42, 56, 65.

The duty of establishing and constructing highways is imposed upon municipalities by public law, and in performing this duty a town is acting only as the political agent of the State.

When a town way has been legally located by the municipal officers and legally established by a vote of the town, it is an imperative duty laid upon the road commissioner of the town by public law to see that the way is wrought and opened for public travel.

The constitutional provision that "private property shall not be taken for public uses without just compensation" does not require that the payment of such compensation should precede the temporary occupation of land "as an incipient proceeding to the acquisition of a title to it or to an easement in it." It operates to prevent the permanent appropriation of it without the actual payment or tender of a just compensation for it, and the right to such temporary occupation will become extinct by an unreasonable delay to perfect proceedings including the payment of compensation. Unless such compensation be made within a reasonable time, damages may be recovered for the continued occupation and for the injuries resulting from the prior occupation.

It is evident from the express terms and clear implication of the statutes respecting the location of town ways and the assessment of damages for land taken for those purposes that it was the intention of the legislature that when a way has been duly located and established, the land taken is to be actually occupied and the road built and opened to public travel within two years from the location irrespective of the pendency of any appeals upon the question of damages.

Where a town way had been legally laid out and legally established and damages had been awarded for the land taken for the way and the land owner had appealed from the award of damages, and the appeal was pending and the land owner was alive and competent to prosecute her appeal, *held* that the appeal did not vacate the original award of damages and that the town within the time limited by law had a legal right to enter upon the land for the purpose of constructing the way notwithstanding the pendency of the appeal.

Where a town way had been legally located and legally established and the way was constructed and the land owner obstructed the way by erecting a fence across the same and was indicted therefor, *held* that as between the land owner, who had a guaranty of just compensation, and the public who had a right to use the way thus legally established, it was not material to inquire whether the way was constructed under a valid contract or by the voluntary and gratuitous labor of the inhabitants of the town.

Where the defendant was indicted for obstructing a town way built over her land, by erecting a fence across such way and it appeared that the way had been legally laid out, and was legally established and opened for public travel after the lapse of sixty days and within the two years allowed by statute, and damages had been awarded to the defendant by the municipal officers, and the defendant had appealed from the award of damages, and the appeal was pending undetermined at the time of the alleged obstruction by the defendant, *held* (1) that the defendant's appeal, subject only to the contingency of her death, afforded her a certain and adequate method of having a just compensation for the taking of her land awarded by a disinterested tribunal; (2) that the occupation of the land over which the way was located was legally under the control of the officers of the town acting under public law; (3) that the way was a public way at the time of the erection of the fence and that by the erection of such fence the way was thereby unlawfully obstructed by the defendant.

In *Hayford* v. *Bangor*, 103 Maine, 434, it was observed in the opinion, arguendo, that Mrs. Hayford's "right to have her damages assessed by some constituted tribunal upon notice and hearing was a constitutional right and was fully awarded to her by the provision for an estimate by the municipal officers." If construed to mean that her right was fully accorded to her by the provision for an assessment by the municipal officers in the first instance, subject to the right of appeal to have the question of just compensation determined by an impartial tribunal had been fully satisfied by the estimate of the municipal officers, it must be deemed unwarranted. In any event the statement quoted was obiter dictum and not necessary to the decision of that case.

Where a way had been legally located and legally established, and constructed and opened within the time limited therefor by law, but the land owner had appealed from the assessment of damages and the appeal was still pending and the land owner was alive and competent to prosecute the appeal, *held* that the case *Peirce* v. *Bangor*, 105 Maine, 413, was not an authority for the contention that the construction or opening of the way was premature because the appeal was still pending.

Cyr v. *Dufour*, 62 Maine, 20, *Hayford* v. *Bangor*, 103 Maine, 434, *Peirce* v. *Bangor*, 105 Maine, 413, considered.

On report. Judgment for the State.

The defendant was indicted on the charge of having obstructed an alleged town way in Lincoln, Penobscot County, by erecting

and maintaining a fence across the same. When the case came on for trial, an agreed statement of facts was filed and the case was then reported to the Law Court to render such judgment as the facts and the law required.

The case is stated in the opinion.

H. H. Patten, County Attorney, for the State.

Hugo Clark, for defendant.

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

WHITEHOUSE, J. This is an indictment against the respondent for obstructing a town way in the town of Lincoln by erecting a fence across it. The following facts appear from the agreed statement. On June 10, 1905, the way in question was legally laid out by the municipal officers of Lincoln over two parcels of the defendant's land and also over land of three other residents. June 17, 1905, the municipal officers made a valid return of their proceedings with the town clerk of Lincoln from which it appeared that the sum of $150 was awarded to the respondent for damages on account of her two parcels of land. Damages were also awarded to other owners over whose land the way was located. June 26, 1905, the town voted to establish and allow this town way as laid out by the selectmen.

The respondent took an appeal to the Supreme Judicial Court from the award of damages made to her by the municipal officers which is now pending. At the annual March meeting, 1905, and every year since then the town of Lincoln elected one or more road commissioners who qualified and acted during the terms for which they were chosen. None of the selectmen of the town acted as road commissioner in that year or in any year since. Subsequently in the summer of 1905 the selectmen of the town without any vote of the town therefor made an oral contract whereby it was agreed by Ida M. Fleming over whose land the way was laid out, and her husband John G. Fleming that they would build the road to the satisfaction of the town. No appropriation was ever made and no money ever

raised or voted by the town for the express purpose of building the way although money was voted in 1895 and every year since for the general purpose of repair of highways. During the same season but more than sixty days after June 26, the Flemings above named entered upon the land over which the way was laid out and constructed a road bed over the entire length of the location. During the same season the selectmen of the town informed the road commissioner for that year that John G. Fleming was to do the work of building the road, and that he, the road commissioner, "was to show him how." The boundary lines of the road had been run by a surveyor at the time it was laid out. In constructing the road Fleming used the road machine of the town which was turned over to him for that purpose by the road commissioner. The road commissioner also gave Fleming directions in regard to the manner of constructing the road and afterwards in the fall of 1905 made an inspection of the work and told the selectmen and Fleming that "it would do for the present." On one occasion during the temporary absence of the road commissioner the first selectman of the town also visited the location for the purpose of supervising its construction. Two culverts built on the road in the summer of 1905 were paid for out of the funds of the town and the items duly exhibited in the reports of the selectmen. A barrel of cement used by the mason in the construction of one of the culverts was paid for out of funds appropriated by the town for the repair of highways but it was not ordered nor paid for by the order of the road commissioner. It is not in controversy that the defendant erected and maintained a fence across the location August 15, 1908, as charged by the indictment. The case is reported to the Law Court upon this statement of facts, such judgment to be rendered as the law and facts require.

It is contended in behalf of the defendant that the construction or opening of the road was illegal, first, because the selectmen undertook to have the road constructed by a contract with a private party without the authority of the vote of the town, and secondly, because by reason of the pendency of the defendant's appeal from the award of damages, it is claimed that no right had accrued to the town to enter into actual occupation of the land for the purpose of building

a road, and the defendant therefore was not liable for erecting a fence upon her own land.

With respect to the defendant's first contention that the contract made by the selectmen for the construction of the road was not binding upon the town, it is undoubtedly true that without a vote of the town expressly empowering them so to do, selectmen who are not road commissioners are not authorized by law "to take the duty of building a town road out of the hands of the regular road officers," and cannot bind the town by contracts made by them for the construction of such a way. *Goddard* v. *Harpswell*, 88 Maine, 228, and cases cited; but the conclusion sought to be deduced from this proposition by the defendant is not warranted by the facts and circumstances of this case. It is admitted that the municipal officers "duly and legally laid out" the road in question, and that after the return of their proceedings had been filed with the town clerk in a town meeting duly called by a warrant containing an article for that purpose, the town "voted to accept and allow" the town way as laid out by the selectmen. The way was then duly located and established. R. S., chapter 23, section 18; and it is provided by section fifty-six of the same chapter that all such ways thus "legally established shall be opened and kept in repair."

The duty of establishing and constructing highways is imposed upon municipalities by public law, and in performing this duty the town is acting only as the political agent of the State. For its own convenience it is authorized to confer this power upon certain officers whose duties are expressly and by implication prescribed by statute. As observed by this court in *Small* v. *Danville*, 51 Maine, 359, "The duty of the constituency in these political divisions is to elect their officers; that of the officers is to obey the public statutes." And in *Bryant* v. *Westbrook*, 86 Maine, 450, the court say: "The statute provides for the election or appointment of road commissioners or surveyors of highways whose duty it is to open and keep in repair public ways legally established within their districts." Section 65 of chapter 23 of the present revision authorizes a road commissioner to remove any obstacle which obstructs a way and to "dig for stone, gravel or other material suitable for mak-

ing or repairing ways," &c., and section seventy-two contains the following provision: "The road commissioner under the direction of the selectmen shall have charge of the repairs of all highways and bridges within the towns and shall have authority to employ the necessary men and teams and purchase timber, plank and other materials" for that purpose. Section 75 provides that "towns may authorize their road commissioners or other persons to make contracts for opening or repairing their ways."

In *Cyr* v. *Dufour*, 62 Maine, 20, the plaintiff sought to recover damages against a highway surveyor and others for an alleged trespass upon his land in opening a newly located highway across it. It was contended in behalf of the plaintiff that the location of the road was not valid and that the highway surveyor who had charge of the work of building the road was not legally appointed or sworn. But the court held that the validity of the location could not be collaterally questioned and with respect to the second contention said: "Nor do we think it would be of any avail to the plaintiff if it should appear that the highway surveyor who had charge of the work of opening the road was not legally chosen or sworn. It was competent for the selectmen to appoint any citizen of the town to open the road, whether he was a legally chosen surveyor or not. In fact we know of no rule of law that would prevent any one from working on a legally established highway, with the consent of the town, or its municipal officers, if he was willing to do so." In stating that it was competent for the selectmen to appoint any citizen of the town to open the road, it was obviously not the intention of the court to convey the idea that the selectmen without a vote of the town could make a contract for the construction of the road, which would be binding upon the town. If so, it must be deemed an error which has been corrected in subsequent opinions of the court. *Goddard* v. *Harpswell*, 88 Maine, supra, and cases cited. The purpose doubtless was to emphasize the proposition that if a legally established road was actually built and opened with the knowledge and consent of the town, it was immaterial to the land owner whether the work of construction was actually performed by a private citizen or a duly authorized road

surveyor. So in the early case of *Cragie* v. *Mellen*, 6 Mass. 7, it was held that when a town road had been legally established, a highway surveyor was authorized to enter upon the work of building the road without a special vote of the town for that purpose.

In the case at bar it has been seen that the road was duly located by the municipal officers and legally established by vote of the town. It was an imperative duty laid upon the road commissioner of the town by public law to see that the road was wrought and opened for public travel. The selectmen assumed to make an oral contract with certain citizens of the town for the construction of the road, but the work was done under the direction and supervision of the road commissioner and completed to his satisfaction. The expense of building two of the culverts in the road was paid out of the funds of the town and the items of such payments duly scheduled in the reports of the selectmen, and one barrel of cement used in the construction of the larger culvert was paid for out of the funds of the town appropriated for the repair of highways. The road machine of the town was turned over by the road commissioner to the contractors and used by them in building the road. Whether or not there had been created a legal obligation on the part of the town to pay the price agreed upon with the selectmen for the services of the contractors it is unnecessary to consider. The road had been built under the direction of the road commissioner with the aid of the selectmen and with the knowledge of the town. It was legally established and open for public travel after the lapse of sixty days and within the two years allowed by statute and no further action is shown to have been taken by the town in relation to it. It appears to have been open three years later when the obstruction alleged in the indictment was erected by the defendant.

Under these circumstances, as between the land owner, who has a guaranty of just compensation, and the public who had a right to use the road thus legally established, it is not material to inquire whether the road was constructed under a valid contract or by the voluntary and gratuitous labor of the inhabitants.

But it is further contended that the construction or opening of the road was premature, for the reason as alleged that the defend-

ant's appeal upon the question of damages vacated the award made by the municipal officers and is still pending in the Supreme Judicial Court, and the recent case of *Peirce* v. *City of Bangor*, 105 Maine, 413, is cited to sustain this proposition. It will be readily seen, however, upon an examination of the question determined in that case, that the decision is not an authority in support of the defendant's contention in the case at bar. In *Peirce* v. *Bangor*, the defendant took land owned by Mrs. Hayford as a site for a public library building by virtue of sections 89, 90 and 91 of chapter 4, R. S. The "just compensation" to be paid by the city for the land so taken had been estimated by the municipal officers of the city in the first instance, as provided by section ninety, but the land owner appealed from their award to the Supreme Judicial Court in accordance with section ninety-one and asked to have the damages assessed by a jury in the manner provided respecting town ways as prescribed in that section. But before the case was heard Mrs. Hayford died and her legal representative desired to prosecute the appeal under the original petition. It was held in *Hayford* v. *Bangor*, 103 Maine, 434, that as her right of appeal was purely statutory and there was no provision for the survival and continuance of such a proceeding in the event of her death, the petition could not be further prosecuted by the representative of the appellant, and must be dismissed. This was the only question involved and the only question decided in that case. It was observed in the opinion, arguendo, that Mrs. Hayford's "right to have her damages assessed by some constituted tribunal upon notice and hearing was a constitutional right and was fully awarded to her by the provision for an estimate by the municipal officers." If construed to mean that her right was fully accorded to her by the provision for an assessment by the municipal officers in the first instance, subject to the right of appeal, that statement was correct; but if construed to mean that her right to have the question of just compensation determined by an impartial tribunal had been fully satisfied by the estimate of the municipal officers, it must be deemed unwarranted. In any event the statement quoted was obiter dictum and not necessary to the decision of that case. But in *Peirce* v. *Bangor*, 105

Maine, 413, the legal effect of the abatement of the appeal by the death of Mrs. Hayford, upon the validity of the city's claim to the land taken and the rights of the plaintiff as the successor in title to Mrs. Hayford, was for the first time brought directly in question and distinctly determined. It was there held that as the city of Bangor was directly interested in the land taken, the municipal officers of the city could not be deemed a disinterested tribunal competent to make a final award of damages without the assent of the land owner; that inasmuch as the legislature had omitted to provide for the survival and continuance of the pending proceedings for an appeal after the death of the original petitioner, and it was not possible for either the plaintiff or the defendant by means of any subsisting statutory provisions therefor, to have the question of just compensation determined by a disinterested tribunal, the constitutional guaranty of just compensation had not been and could not be fulfilled, that the city's title to the land must fail under this proceeding for its condemnation, and that there must be a new taking by the city to obtain a valid title.

It should be unnecessary to add that there is no warrant for extending the scope of the decision beyond the facts of that particular case. It determines the effect of the abatement of proceedings for an appeal caused by the death of the appellant. Whether the award of damages made by the municipal officers in any or every case is vacated by the appeal of a land owner from their estimate is a question which was not necessarily involved in that case, and the opinion does not assume to decide it. The case is manifestly not an authority for the contention that such original assessment or award is vacated by the appeal while the appellant is living and competent to prosecute his complaint.

The constitutional provision that "private property shall not be taken for public uses without just compensation" does not require that the payment of such compensation should precede the temporary occupation of land "as an incipient proceeding to the acquisition of a title to it or to an easement in it." It operates to prevent the permanent appropriation of it without the actual payment or tender of a just compensation for it, and the right to such temporary

occupation will become extinct by an unreasonable delay to perfect proceedings including the payment of compensation. Unless such compensation be made within a reasonable time, damages may be recovered for the continued occupation and for the injuries resulting from the prior occupation. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91; *Davis* v. *Russell*, 47 Maine, 443; *Nichols* v. *S. & K. R. R. Co.*, 43 Maine, 356; *Cushman* v. *Smith*, 34 Maine, 247. See also Lewis on Em. domain, section 456.

The provisions of our statute respecting the location of town ways and the assessment of damages for the land taken for that purpose are in harmony with this doctrine. Section seven of chapter 23, R. S., provides that municipal officers shall not "order such damages to be paid nor shall any right thereto accrue to the claimant" until the land over which the way is located "has been entered upon and possession taken, for the purpose of construction or use." Section 9 allows the owner of land not exceeding one year after the location to take off timber wood or any erection thereon. Section 22 provides that "no such way shall be opened or used until after sixty days from its acceptance by the town," and section 38 declares that when town ways "are finally located by municipal officers, unless the land is entered upon and possession taken for said purpose within two years after the laying out, the proceedings are void." Finally section 42 gives the land owner an action of debt to recover the damages awarded him after thirty days from demand on the town treasurer.

It is evident from these express terms and clear implication of the statute, that it was the intention of the legislature that when a way has been duly located and established, the land taken is to be actually occupied and the road built and opened to public travel within two years from the location irrespective of the pendency of any appeals upon the question of damages. Otherwise it would be in the power of the land owner not only to delay the construction of the road, but to defeat the location of it altogether by taking an appeal upon the question of damages and delaying the final determination of it until the expiration of two years from the location of the road. It would not be reasonable to impute to the legislature

such contradictory purposes. It intended to prescribe the method of taking land in the exercise of eminent domain for the promotion of the public welfare and it did not intend at the same time to interpose obstacles which would have the effect of nullifying that legislation by defeating and delaying the contemplated improvements.

The defendant was not satisfied with the estimate of damages made by the municipal officers and exercised her statutory right of appeal. Her appeal is still pending undetermined; but subject only to the contingency of her death it affords her a certain and adequate method of having a just compensation for the taking of her land awarded by a disinterested tribunal. In the meantime the occupation of the land over which the road is located has legally been under the exclusive control of the officers of the town acting under public law. The road was built and opened to public travel within the two years allowed by the statute. It was a public way at the time of the erection of the fence described in the indictment and it was thereby unlawfully obstructed by the defendant.

Judgment for the State.

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"My index furnished me much consolation on my voyage to Ararat."

Noah.

ANCILLIARY ADMINISTRATION.

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ANIMALS.

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APPEAL.

See COURTS. EMINENT DOMAIN. TRUSTS.

Where an appeal in equity was taken from a decree requiring the defendant to make a conveyance on the theory of a resulting trust, *held* that the burden was on the defendant to show that the decree was clearly erroneous.

Staples v. *Bowden*, 177.

In relation to appeals in civil actions in inferior courts, Revised Statutes, chapter 85, sections 17 and 18, provide as follows:

"Sec. 17. Any party aggrieved by the judgment of the justice, may appeal to the next supreme judicial or superior court in the same county, and may enter such appeal at any time within twenty-four hours after the judgment, Sunday not included; and in that case no execution shall issue, and the case shall be entered and determined in the appellate court.

"Sec. 18. Before such appeal is allowed, the appellant shall recognize with sufficient surety or sureties to the adverse party, if required by him, in a reasonable sum, with condition to prosecute his appeal with effect, and pay all costs arising after the appeal."

Held: 1. That the appeal must be entered within twenty-four hours after judgment.

2. That to enter the appeal means to claim it or notify the clerk, if there be a clerk, that an appeal is desired, and is the only appellate act which must be done within the twenty-four hours.

3. That it is not necessary for the appellant to "recognize with sufficient surety or sureties" unless required by the adverse party and if he does not request it the appeal is perfected without.

4. That the allowance of the appeal is a judicial act which may be done, after the acts required to be taken by the appellant are completed, at any time prior to the return term of the appellate court.

5. That if the adverse party requires the appellant to recognize "with sufficient surety or sureties" he may request the trial court to fix a day on or before which the recognizance shall be filed. *Wyman* v. *Newland*, 260.

Where an amendment of a record of judgment was authorized and allowed after a writ of error, attacking the service of the writ in the action in which the judgment was recovered, had been entered in court, and no amendment of the writ of error, setting forth the amended record, was presented or granted,

(2) That the compensation which the jury must have given the plaintiff for his mental pain and suffering, his wounded pride and self respect, considering his record and standing in the community was exorbitant. (3) That there was no justification for large punitive damages. (4) That the verdict be set aside unless the plaintiff remit all of the same above $300.

Matson v. *Matson*, 152.

ASSIGNMENTS.

The drawer of an order payable in chattels or out of a particular fund does not undertake that he will pay the order in case the drawee refuses or fails to comply therewith. *Maynard* v. *Maynard*, 567.

No suit can be maintained by the payee against the drawer of an order payable in chattels or out of a particular fund. In such case the payee is the mere assignee of the property and if he fails to receive it his remedy is in an action on the original consideration or cause of action against the drawer.

Maynard v. *Maynard*, 567.

A consideration founded on mere love and affection, or gratitude is not sufficient to sustain a suit on a negotiable instrument when the consideration is open to inquiry. *Maynard* v. *Maynard*, 567.

Where a mother gave to her son an order on her trustees directing them to pay to the order of the son from her "interest and income account" the sum named in the order, and the trustees refused to accept the order and the son then brought an action on the order against the mother to recover the sum named therein, *held* that the giving of the order was an unsuccessful attempt on the part of the mother to make the son a present of the sum named therein and the only consideration for the order was beneficence and that the action could not be maintained. *Maynard* v. *Maynard*, 567.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See BANKRUPTCY.

ASSOCIATIONS.

See INSURANCE (BENEFIT.)

ASSUMPTION OF RISK.

See MASTER AND SERVANT. WAYS.

ATTORNEY AND CLIENT.

When an attorney has an execution legally in his hands for collection, it is prima facie evidence of his authority to act for the judgment creditor, and he may as attorney of the judgment creditor, although he is not the attorney of record, apply for a subpœna commanding the debtor to appear before a disclosure commissioner and make disclosure, and the burden of showing that he is not authorized is upon the debtor. The statute does not restrict the attorney who may apply for the subpœna to the creditor's attorney of record or an attorney authorized by power of attorney.

Grain Co. v. *Bartley*, 293.

The relation between attorney and client rests upon essentially the same basis of trust and confidence as the relation between tenants in common.

Hill v. *Coburn*, 437.

ATTORNEY AND COUNSELLOR.

See TRIAL.

AUTOMOBILES.

See WAYS.

BAIL.

The defendant was formally accused of an offense but another person was arrested upon the complaint and recognized under the defendant's name and defaulted the recognizance.

Held: 1. That scire facias upon such recognizance could not be maintained against the defendant.

2. Nor against the sureties because of the non-joinder of the real principal.

State v. *Messier*, 210.

Revised Statutes, chapter 134, section 27, provides as follows:

"Sec. 27. No action on any recognizance shall be defeated, nor judgment thereon arrested, for an omission to record a default of the principal or surety at the proper term, nor for any defect in the form of the recognizance, if it can be sufficiently understood, from its tenor, at what court the party or witness was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same." The purpose of this statute is to modify the strictness of the common law and to prevent the thwarting or delaying of justice by mere technicalities and in carrying out its spirit a liberal construction has been adopted by the court of Maine.

State v. *Edminster*, 485.

BANKRUPTCY.

BASTARDY PROCESS.

BENEFICIAL ASSOCIATIONS.

See INSURANCE (BENEFIT.)

BILLS AND NOTES.

See ASSIGNMENTS.

BIVALVE MOLLUSK.

See FISH AND FISHERIES.

BONDS.

See APPEAL. BAIL. TAXATION. TOWNS.

BOUNDARIES.

See EASEMENTS.

When recorded muniments of title are assaulted by parol evidence the proof must be full, clear and convincing in order to be effective.
Wilbur v. *Toothaker*, 490.

BRIDGES.

See STREET RAILWAYS.

BROKERS.

See CONTRACTS.

Where a real estate broker contracted to "list" real estate for sale, *held* that the contract was not satisfied by merely taking a description of the real estate. *E. A. Strout Co.* v. *Gay*, 108.

BURDEN OF PROOF.

See EVIDENCE. TOWNS.

BY-LAWS.

See INSURANCE (BENEFIT.)

CARRIERS.

See COMMON CARRIERS.

CASES CITED, EXAMINED, ETC.

CERTIORARI.

See WAYS.

The writ of certiorari lies only to correct errors in law, and not to review and revise the decision of a subordinate tribunal of a question of fact submitted to its judgment. *Nelson* v. *Portland Fire Department*, 551.

COLLECTOR OF TAXES.

See TAXATION.

COLLEGES AND UNIVERSITIES.

See TAXATION.

Although the University of Maine is chartered by the State and fostered by the State, yet it is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State.

Orono v. *Alpha Sigma Epsilon Society*, 214.

By virtue of the provisions of chapter 551 of the Private and Special Laws of 1897, the name of the corporation then known as the "Trustees of the State College of Agriculture and the Mechanic Arts" was changed to the "University of Maine" but it was also expressly provided that "the said University of Maine shall have all the rights, powers, privileges, property, duties and responsibilities, which belong or have belonged to the said trustees." This change of name did not change the status of the Institution or work its adoption as a part of the State or make its property the property of the State, but it remained the same distinct corporation as before.

Orono v. *Alpha Sigma Epsilon Society*, 214.

COMMERCE.

See INTOXICATING LIQUORS.

There is nothing in the interstate commerce law that renders intoxicating liquors immune from seizure, but after seizure of such liquors and upon libel and hearing if it is shown that they were articles of interstate commerce, then the carrier is entitled to a return of such liquors.

Kallock v. *Newbert*, 23.

COMMERCIAL PAPER.

See BILLS AND NOTES.

COMMON CARRIERS.

When goods are delivered to and accepted by a common carrier for transportation, no bill of lading or prepayment of freight is necessary in the absence of law or notice to the shipper that such is required by the rules of the common carrier.

Lord v. *Railroad Co.*, 255.

COMMON LAW BOND.

See TAXATION.

COMPLAINT AND WARRANT.

See INTOXICATING LIQUORS.

COMPOSITIONS WITH CREDITORS.

See BANKRUPTCY.

CONCLUSIONS.

"Where men of judgment creep and feel their way,
The positive pronounce without dismay,
Fling at your head conviction in a lump,
And gain remote conclusion at a jump."

CONDEMNATION.

See EMINENT DOMAIN.

CONSIDERATION.

See BILLS AND NOTES. LANDLORD AND TENANT.

CONSTITUTIONAL LAW.

See CRIMINAL LAW. EMINENT DOMAIN. OFFICE. STATUTES. TOWNS.

Chapter 317 of the Private and Special Laws of 1903, which forbids the taking or digging of clams in any of the shores or flats of Scarboro, from the first day of April until the first day of October, in each year, by any person, except inhabitants or residents of the town, or hotel keepers within the town taking clams for the use of their hotels, is not obnoxious to that portion of the Fourteenth Amendment of the Constitution of the United States which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and is a constitutional exercise of legislative power. *State* v. *Leavitt*, 76.

The entire legislative power of the State is by the constitution vested exclusively in the legislature, and no part of that power can be transferred or delegated by the legislature to either of the other departments of the government. *State* v. *Butler*, 91.

CONSTRUCTION.

See DISCLOSURE COMMISSIONERS. LANDLORD AND TENANT. LOGS AND LUMBER. STATUTES. STREET RAILWAYS. TRUSTS. WILLS.

CONTRACTS.

See ASSIGNMENTS. BILLS AND NOTES. COMMON CARRIERS. GUARANTY. INSURANCE (BENEFIT). LANDLORD AND TENANT. LOGS AND LUMBER. PAUPERS. SALES. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. VENDOR AND PURCHASER.

COUNTIES.

See WAYS.

COUNTY ATTORNEYS.

See CRIMINAL LAW.

COUNTY COMMISSIONERS.

See WAYS.

COURTS.

See APPEAL. APPEARANCE. DISCLOSURE COMMISSIONERS. JUDGMENT. JURISDICTION.

Where the Municipal Court of Portland, Cumberland County, rendered judgment for the plaintiff October 1, 1907, and the defendant within twenty-four hours after judgment appealed to the Superior Court in said county at its next term to be held in November, 1907, and sureties were required by the plaintiff and which sureties were furnished October 3, 1907, and copies of the records and all the papers filed in the cause were entered of record in said Superior Court at said November term, and at said term the plaintiff filed a motion to dismiss on the ground that the appeal was not entered and allowed in the Municipal Court within twenty-four hours after judgment, it was *held* that the appeal was properly taken and allowed in the Municipal Court and that the Superior Court had jurisdiction of the case.

Wyman v. *Newland*, 260.

COVENANTS.

See LOGS AND LUMBER.

CRIMINAL LAW.

See BAIL. INTOXICATING LIQUORS.

Revised Statutes, chapter 135, section 26, as amended by chapter 106, Public Laws, 1905, provides that "sentence shall be imposed upon conviction, either by verdict or upon demurrer, of a crime which is not punishable by imprisonment for life, although exceptions are alleged."

Held: 1. That the verdict of guilty, or the decision overruling the demurrer, is the conviction meant by the statute.

2. That the statute so construed is constitutional, and if the exceptions are overruled the sentence is to be executed. *State* v. *Morrill*, 207.

DAMAGES.

See ASSAULT AND BATTERY. COMMON CARRIERS. NEW TRIAL. SALES. STREET RAILWAYS. WAYS.

DAMS.

See LOGS AND LUMBER.

DEEDS.

See EASEMENTS. EXECUTORS AND ADMINISTRATORS. SPECIFIC PERFORMANCE.

A conveyance of all the right, title and interest which the grantor has in the land described in his deed, conveys only the right, title and interest which he actually has at the time of his conveyance. It is not a grant of the land itself or of any particular estate in the land. It passes no estate which is not then possessed by the grantor, and the covenants of warranty in the deed are limited by the terms of the grant, so that an after-acquired title does not enure to the benefit of the grantee by way of estoppel.

Hill v. *Coburn*, 437.

DE FACTO AND DE JURE OFFICER.

See MUNICIPAL CORPORATIONS. PUBLIC OFFICER. STATUTES.

DELEGATION OF LEGISLATIVE POWER.

See CONSTITUTIONAL LAW. OFFICE.

DELIVERY.

See SALES.

DEPOSITS IN COURT.

See PRINCIPAL AND SURETY.

DEPUTY ENFORCEMENT COMMISSIONERS.

See INTOXICATING LIQUORS.

DESCENT AND DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS. WILLS.

When a widow has seasonably waived the provisions of her husband's will in her behalf, and has claimed her share of the personal estate, under Revised Statutes, chapter 77, section 13, she is entitled to one-third of the personal estate if there are issue, and one-half, if no issue, after deducting the widow's allowance and the debts, funeral charges and expenses of administration.

Fogg, Appellant, 480.

DISCHARGE IN BANKRUPTCY.

See BANKRUPTCY.

DISCLOSURE COMMISSIONERS.

See APPEARANCE. ATTORNEY AND CLIENT. JURISDICTION.

When a disclosure commissioner having jurisdiction of the subject matter, has issued a summons to a debtor to appear before him and make disclosure and such disclosure commissioner is unable to attend, the Judge of Probate acting ex-officio as disclosure commissioner, may attend at the time and place named in the subpœna and take the disclosure of the debtor.

Grain Co. v. *Bartley*, 293.

Revised Statutes, chapter 114, section 23 as amended by chapters 131 and 134 of the Public Laws of 1905 and by chapter 2 of the Public Laws of 1907, relating to poor debtors, provides 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 not such magistrate in the town where the debtor, the petitioner or his attorney resides, then in the 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."

Held: That when "there is no such magistrate in the town where the debtor, the petitioner or his attorney resides," and application for a subpœna is made to a magistrate "nearest to the place of residence of the debtor the petitioner or his attorney," the subpœna should be made returnable before such magistrate in the town where he resides and not in another town, although in the same county, where his office is located. *Grain Co.* v. *Bartley*, 293.

Where a judgment debtor was cited to appear and make disclosure before a disclosure commissioner in a town not the residence of the disclosure commissioner but in the same county in which the disclosure commissioner resided, *held* that the debtor waived all irregularity of the summons by appearing and submitting to an examination. *Grain Co.* v. *Bartley*, 293.

DISMISSAL AND NONSUIT.

See NEW TRIAL.

DOMICIL.

See EXECUTORS AND ADMINISTRATORS.

That a poll tax was assessed against a person in a given town is not competent evidence that he had his home in that town at the time.

Rockland v. *Deer Isle*, 155.

EMINENT DOMAIN.

See EASEMENTS.

Revised Statutes, 1883, chapter 51, section 14, empowered a railroad to take, without regard to width, all land for its location which excavations made necessary, though the width of a location was in general limited to four rods. *Erskine* v. *Railroad Co.*, 113.

Payment of just compensation is a condition precedent to an appropriation of land for public uses. *Peirce* v. *Bangor*, 413.

The legislature has in the first instance the right to prescribe the method of fixing the compensation for land taken for public uses, but the State Constitution requires that the compensation be just, i. e., fixed by a disinterested tribunal. *Peirce* v. *Bangor*, 413.

Compensation fixed by an interested tribunal is not just, unless agreed to. *Peirce* v. *Bangor*, 413.

The municipal officers of a city are not, where their city is interested, a disinterested tribunal. *Peirce* v. *Bangor*, 413.

Compensation fixed by municipal officers if not appealed from by the land owner, is just compensation. *Peirce* v. *Bangor*, 413.

Compensation fixed by municipal officers if appealed from by the land owner, is not just compensation. *Peirce* v. *Bangor*, 413.

In case of an appeal just compensation cannot be ascertained until the appeal is heard and determined. *Peirce* v. *Bangor*, 413.

If because of the death of the appellant, the land owner's appeal cannot be heard, then condition precedent has not been complied with and the land cannot be appropriated. *Peirce* v. *Bangor*, 413.

The Constitution of Maine, Article I, section 21, provides that "private property shall not be taken for public uses without just compensation." This provision for "just compensation" assumes the existence of a tribunal to determine the "just compensation." *Peirce* v. *Bangor*, 413.

Public rights acquired by the exercise of eminent domain are paramount to private rights. *Currie* v. *Railroad Company*, 529.

Under the law of Maine the time of the taking of land for a railroad location as between the owner of the land and the railroad company, is the time of the filing of the location as required by statute, and that upon the payment within three years of the damages which constitute the "just compensation"

EQUITY.

See ARBITRATION AND AWARD. CORPORATIONS. HUSBAND AND WIFE. SPECIFIC PERFORMANCE. TRUSTS. WILLS.

The verdict of a jury upon an issue framed in equity, is merely advisory and must be such as to satisfy the conscience of the court; and in determining whether or not such verdict be set aside, the vital question presented is whether there be sufficient legal evidence to sustain a decree.
Rolfe v. *Fire Insurance Co.*, 58.

Where the promoters of a corporation had received secret profits for which they should account, *held* that a master should be appointed to hear and determine the claims of the promoters for services and expenses in promoting the corporation and also to determine the value of certain shares of stock at the time it was issued to them. *Mason* v. *Carrothers*, 392.

The maxim of clean hands applies solely to some wilful misconduct with reference to the matter in litigation and not to some other illegal transaction, although it may be directly connected with the subject matter of the suit.
Mason v. *Carrothers*, 392.

ERROR.

See APPEAL.

ESTATES.

See DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. TENANCY IN COMMON. WILLS.

ESTOPPEL.

See EASEMENTS. LOGS AND LUMBER.

Where a bill in equity was brought to compel a railroad company to construct a bridge over and across its track and over and across an excavation made by it across the highway, *held* that under the facts and circumstances of the case the railroad company was estopped to deny that it had a legal location, as wide as it had a lawful right to acquire, and which it actually did take, although in fact the "location" filed was ineffective, because it failed to give the boundaries of the land taken. *Erskine* v. *Railroad Co.*, 113.

Where a railroad company succeeded to the title and duties of a railroad company which in a proceeding to compel it to construct a bridge over an excavation across a highway was estopped to deny that it had a legal location, *held* that such successor in title and duties was in like manner estopped.
Erskine v. *Railroad Co.*, 113.

EVIDENCE.

See APPEAL. ARBITRATION AND AWARD. BASTARDY PROCESS. BOUNDARIES. CERTIORARI. CONTRACTS. CRIMINAL LAW. DOMICIL. EXCEPTIONS. EXECUTORS AND ADMINISTRATORS. GUARANTY. INSURANCE. INTOXICATING LIQUORS. LOGS AND LUMBER. MASTER AND SERVANT. MUNICIPAL CORPORATIONS. NAVIGABLE WATERS. PRINCIPAL AND SURETY. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. TOWNS. TRIAL. WAIVER. WAYS. WITNESSES.

Since one's conduct necessarily varies according to the circumstances and the motives which influence him, his agreement with one person can never afford a safe criterion for his agreement with another person under other circumstances. *Provencher* v. *Moore*, 87.

The reason for the rule excluding all evidence of collateral facts which are incapable of affording any reasonable presumption or inference as to the facts in dispute, is that such evidence tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them. *Provencher* v. *Moore*, 87.

Where the plaintiff brought an action of assumpsit on an account annexed containing an item for boarding the defendant's horse and the defendant contended that the plaintiff agreed to keep the horse for its use, and on cross examination the plaintiff was asked if, prior to the time of taking the defendant's horse, he did not offer to keep the horse of one Buker for its use and the plaintiff answered that he did not, and Buker was called by the defendant and permitted against objection to testify that the plaintiff did offer to take his horse for its keeping, *Held:* (1) That the evidence relating to the Buker horse was collateral to the issue and should have been excluded. (2) That the defendant having inquired of the plaintiff on cross-examination concerning a collateral matter should have been held to abide the answer, and not have been permitted to present testimony tending to disprove it. *Provencher* v. *Moore*, 87.

While the burden of evidence may be said to have shifted from a plaintiff to the defendant when the plaintiff has made out a prima facie case, and from the defendant to the plaintiff again when the defendant's evidence has overcome the prima facie case of the plaintiff, yet the burden of proof has not changed at all, but it is incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which he seeks to recover. *Foss* v. *McRae*, 140.

"Burden of proof" and "burden of evidence" are often confused The phrase "burden of proof," is in fact more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must upon the whole, persuade the jury, by legal evidence, that his contention is

EXCEPTIONS.

See DOMICIL. REVIEW. TAXATION. TRIAL.

EXECUTION.

See DISCLOSURE COMMISSIONERS.

EXECUTORS AND ADMINISTRATORS.

See DESCENT AND DISTRIBUTION. DOMICIL. HUSBAND AND WIFE. WILLS.

Where, in a marriage settlement, it was provided that the intended husband should assign to the intended wife a certain paid up policy of life insurance held by him for the sole use and benefit of the intended wife, in case she survived him, "to be paid in full satisfaction of any and all claims by descent or otherwise" which the intended wife might have as widow in her intended husband's estate in event of his decease and which said policy was assigned to the intended wife, and the intended wife covenanted and agreed that the marriage settlement should be a "bar both in law and equity to any claim she may make to any part of the real or personal estate" of the intended husband, and after the execution of the settlement the parties thereto were joined in marriage and the wife having survived her husband, filed a petition as his widow for an allowance out of his personal estate, *held* that the expressions "any and all claims by descent or otherwise," and "any claim she may make to any part of the real or personal estate of the husband," were amply broad to cover the claim of the widow for an allowance, and that she should be enjoined from prosecuting her claim for an allowance.

Bright v. *Chapman*, 62.

When real estate is not in the custody or control of an administrator de bonis non but in that of third parties who hold under recorded deeds, the administrator de bonis non has no power or authority to sell the same for the purpose of paying a legacy, but if the title is to be attacked it should be by the party in interest, by bill in equity. *Walker* v. *Estate of Follett*, 201.

The probate of a will does not determine the person to whom, or the time when, letters testamentary shall issue. *Chadwick* v. *Stilphen*, 242.

The power of an executor to act in the settlement of the estate of a testator, is not derived wholly from his nomination in the will. His authority is not complete until there has been a compliance with all of the prerequisites named in Revised Statutes, chapter 66, section 8, namely: The will must be proved and allowed; the executor named therein must be legally competent in the opinion of the judge of probate; the executor must accept the trust and give bond to discharge the same when required, and must receive letters of administration. *Chadwick* v. *Stilphen*, 242.

The provisions of the statutes of Maine authorizing the granting of ancillary administration on the estate of non-residents who die leaving property to be administered in Maine, were obviously enacted in recognition of the familiar principle of the common law that the authority of an executor over the estate of a deceased person is "confined to the sovereignty by virtue of whose laws he is appointed." *Chadwick* v. *Stilphen*, 242.

Where two executors were named in the will of a testator whose residence was in New York State and the will was executed in that State according to the laws thereof and was duly proved and allowed in that State, and letters testamentary were issued in that State to the two executors and at the same time one of the executors filed a petition, signed by himself alone, in the Probate Court, in Kennebec County, Maine, representing that the testator left estate in that county on which the will might operate and asking that the will be allowed in Maine and that letters testamentary be issued to him, and the will was allowed by the Probate Court in said county and letters testamentary issued to the petitioning executor alone, and not jointly with the co-executor named in the will, and no appeal was taken, *Held:* That the petitioning executor to whom the letters of administration were issued was the legal executor of the will in Maine and had authority over the estate to be administered in Maine and that the co-executor named in the will was not qualified to act in Maine. *Chadwick* v. *Stilphen*, 242.

Where a will executed in New York State was proved and allowed in that State and letters testamentary in that State were issued to the two executors named in the will, and ancillary administration on the estate was granted in Maine on petition therefor by one of the executors without the joinder of his co-executor and letters testamentary were issued to the petitioning executor alone, and such executor afterwards in his capacity as executor brought an action to foreclose a mortgage of land in Maine, given to the testator by the defendant, a resident of Maine, and the defendant filed a plea in abatement to the writ because the co-executor named in the will appointed in New York State as co-executor with the plaintiff, was not joined in the writ nor in the probate proceedings whereby ancillary administration was granted in Maine, *Held:* That the plea in abatement must be adjudged bad.
Chadwick v. *Stilphen*, 242.

From reason and necessity it has been declared that all estates must be referred to some locality. For the purpose of making the place definite and certain, it has been established as a rule of law that it shall be the soil where, at the time of decease, a person has a permanent abode, without any intention of removing therefrom. *Mather* v. *Cunningham*, 326.

Although a person may have abandoned his domicil of origin so far as his acts or intentions were concerned, yet if he was prevented by law from acquiring a domicil of choice then his domicil of testacy or intestacy would continue from necessity to be his domicil of origin. *Mather* v. *Cunningham*, 326.

A Chinese domicil gives a decedent's estate a fixed place of abode and subjects it to the law governing the locality. Whether American Law or Chinese law it is, nevertheless, the law of the place, as to American citizens.
Mather v. *Cunningham*, 326.

Held: That the evidence showed that a decedent, at the time of his death, had abandoned his domicil of origin in Waldo County, Maine, and had acquired a domicil of choice in Shanghai, China, and that consequently the Probate Court in Maine had no jurisdiction of his estate.

Mather v. *Cunningham*, 326.

The special statute of limitations of actions against executors and administrators applies to claims against estates after representation of insolvency as well as before. It is an absolute bar, unless the suit is brought before the representation, or the claim is presented to the commissioners afterwards within the period limited for bringing a suit. The insolvency statute changes the mode, but does not extend the time of commencing process for enforcing claims against estates. *Jellison* v. *Swan*, 356.

A judge of probate has no jurisdiction to allow an account of distribution to heirs or legatees, unless it is presented within one year after the decree of distribution is made. The allowance of such an account presented more than one year after the decree of distribution, is void and of no effect.

Mudgett's Appeal, 387.

Revised Statutes, chapter 67, section 20, among other things, provides as follows: "When an executor, administrator, guardian or trustee has paid or delivered over to the person entitled thereto the money or other property in his hands, as required by a decree of a probate court, he may perpetuate the evidence thereof by presenting to said court, without further notice, within one year after the decree is made, an account of such payments or of the deliverery over of such property; which account being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered to be recorded." This statute is merely permissive. It creates a privilege, but it imposes no obligation. The accountant may avail himself of the privilege, but is not required to do so. But if the accountant would avail himself of the privilege, he must do so within one year after the decree of distribution is made.

Mudgett's Appeal, 387.

It is not unlawful for an executor to transfer at par, in settlement of a legacy, stock that is worth less than par, and at the same time to agree to repurchase the stock later, at an advance price on his personal account. In such a transaction the estate can lose nothing. *Weymouth* v. *Goodwin*, 510.

FACTORS.

See BROKERS. CONTRACTS.

FISH AND FISHERIES.

See CONSTITUTIONAL LAW.

The State holds the rights of common fishery in trust for the public, and as to them, it exercises not only the rights of sovereignty, but also the rights of property. *State* v. *Leavitt*, 76.

The legislature has full power to regulate and control common fisheries, and may grant exclusive rights therein, when the interest of the public will thereby be promoted. *State* v. *Leavitt*, 76.

FOREIGN WILLS.

See WILLS.

FRAUD.

See BANKRUPTCY.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GUARANTY.

See EVIDENCE.

The plaintiff brought an action on a certain written instrument purporting to be a guaranty by the defendants' testator of the payment of certain promissory notes transferred by him to the plaintiff. The defendants gave written notice to the plaintiff of their denial of the execution of the instrument. At the trial, a subscribing witness to the instrument testified that at the time of the execution and delivery of the instrument it did not contain the last four words "and will guaranty them." There was also evidence upon both sides of this issue. The plaintiff contended that upon this issue the burden of proof was on the defendants but the presiding Justice instructed the jury otherwise. *Held:* That the instructions were correct.

Foss v. *McRae*, 140.

HIGHWAYS.

See WAYS.

HUSBAND AND WIFE.

See DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. WILLS.

Section 6 of chapter 63, Revised Statutes, which, among other things, provides that "a husband and wife by a marriage settlement executed in presence of two witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them," is restricted to the rights which either party to the marriage settlement may have in the estate of the other. *Bright* v. *Chapman*, 62.

After dissolution of the marriage by death the marriage settlement provided for by the statute is cognizable in the courts of common law.
Bright v. *Chapman*, 62.

Equity will enforce ante-nuptial settlements, and especially is this true in the case of a widow's claim for allowance inasmuch as an ante-nuptial agreement is no defense in a court of probate to her petition for an allowance.
Bright v. *Chapman*, 62.

Marriage settlements may be made which contain agreements as to matters growing out of marriage relation other than "rights" in the estate of one or the other. *Bright* v. *Chapman*, 62.

IMMISCIBILITY.

See DOMICIL.

In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove animus. In American jurisprudence, at least, it should be allowed to slumber with Quaker persecutions, Salem witchcraft and other kindred dogmas. Since the dictum of immiscibility was first declared, the world has experienced a revolution touching the national, commercial and trade relations between the nations of the East and those of the West.
Mather v. *Cunningham*, 326.

IMPROVEMENTS.

See LOGS AND LUMBER. NAVIGABLE WATERS.

INDICTMENT.

See BAIL. INTOXICATING LIQUORS.

An indictment does not require the signature of the attorney for the State.
State v. *Pooler*, 224.

INITIAL CARRIER.

See COMMON CARRIERS.

INSOLVENCY.

See BANKRUPTCY.

INSURANCE.

Where a bill in equity was brought to set aside the award made by referees in a fire insurance matter, *held* that the evidence adduced by the plaintiff was not of such clear and convincing character as to overcome the presumption in favor of the validity of the award. *Rolfe* v. *Fire Insurance Co.*, 58.

INSURANCE (BENEFIT).

Fraternal beneficiary associations can impose such terms and conditions upon membership not contrary to law as they may choose and members must comply with those terms and conditions in order to be entitled to the benefits of membership. *Gifford* v. *Benefit Association*, 17.

A rule of a fraternal beneficiary association that a member failing to pay an assessment on or before the last day of the month in which the call is dated "shall stand suspended from all rights, benefits and privileges of this association without further notice," is a valid rule and self-executing. *Gifford* v. *Benefit Association*, 17.

When the rules of a fraternal beneficiary association provide that a suspended member to be reinstated shall within thirty days from his suspension pay all arrears of assessments, such payment must be made during the life of the applicant for reinstatement. *Gifford* v. *Benefit Association*, 17.

Payment of the arrears of a suspended member of a fraternal beneficiary association after his death by some other person will not effect the reinstatement of such member, unless such payment be accepted by the association with knowledge of the death. *Gifford* v. *Benefit Association*, 17.

INTEREST.

See STATES. TOWNS.

INTOXICATING LIQUORS.

See CRIMINAL LAW.

Whether intoxicating liquors are commodities within the protection of the interstate commerce law, is a judicial question to be settled by the court and

not one to be determined by the officer as a condition precedent to the execution of his warrant. The officer is not required to adjudicate whether the liquors described in his warrant are seizable or not.

Kallock v. *Newbert*, 23.

A deputy enforcement commissioner duly appointed and qualified under the provisions of chapter 92, Public Laws, 1905, has authority to serve warrants duly issued for the violation of the provisions of Revised Statutes, chapter 29, section 47, which provides that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale." *Kallock* v. *Newbert*, 23.

Where the defendant officer acting under a search and seizure warrant duly issued, searched the plaintiff's vessel and seized about 500 gallons of intoxicating liquors, and while making the search found in the cabin of the vessel, and separate and apart from the other liquors, a small package containing about two quarts of intoxicating liquor but upon the plaintiff's statement that these two quarts had been purchased by him for a friend, omitted to seize the same, *Held* that the omission of the defendant to seize the liquor in this package should be regarded as a mere incident, when considered in connection with the actual seizure of nearly 500 gallons of intoxicating liquors, and that the duty of the defendant officer to seize the liquor contained in the package must be held to have been intended to be waived by the plaintiff by virtue of his own statement that he has purchased the same for a friend.

Kallock v. *Newbert*, 23.

Section 1 of chapter 22 of the Revised Statutes, provides that "all places used . . . . for the illegal sale or keeping of intoxicating liquors, and all houses, shops, or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided for by law, are common nuisances." *Held:* That it was the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drank or dispensed in any manner not provided for by law." *State* v. *Kapicsky*, 127.

Under the provisions of Revised Statutes, chapter 22, section 1, any place that is resorted to, that is, a place of resort for the mere purpose of drinking intoxicating liquors, is a nuisance; any place of resort where intoxicating liquors are illegally kept, is a nuisance; any place of resort where intoxicating liquors are given away, is a nuisance. And any person keeping or maintaining such a place may be punished therefor as provided by statute.

State v. *Kapicsky*, 127.

INTERSTATE COMMERCE.

See COMMERCE.

JOINT TENANCY.

See TENANCY IN COMMON.

JUDGMENT.

See APPEAL. DISCLOSURE COMMISSIONERS.

When its proceedings have all been regular with respect to any matter within the authority conferred upon it by law, the decrees of the probate court when not appealed from, are conclusive upon all persons and cannot be collaterally impeached. *Chadwick* v. *Stilphen*, 242.

If the record of a judgment is erroneous, it may be corrected by an amendment authorized by the court, but until such amendment is made the record must be regarded as true. *Ames* v. *Young*, 543.

When it is alleged that the record of a judgment is erroneous the only evidence admissible to show error is the record itself. *Ames* v. *Young*, 543.

JURISDICTION.

See APPEARANCE. COURTS. DISCLOSURE COMMISSIONERS. STREET RAILWAYS.

There are three essentials to legal jurisdiction, viz: 1. Jurisdiction of the subject matter. 2. Jurisdiction of the parties. 3. Authority to decide. *Grain Co.* v. *Bartley*, 293.

Jurisdiction of the subject matter is conferred by the law which organizes the tribunal, and jurisdiction of the person is the power ordinarily obtained by the service of a summons or other proper notice or by an appearance. *Grain Co.* v. *Bartley*, 293.

Jurisdiction of the subject matter cannot be waived and proceedings without such jurisdiction are void. *Grain Co.* v. *Bartley*, 293.

LACHES.

See SPECIFIC PERFORMANCE.

LANDLORD AND TENANT.

A lease like any other contract is to be construed with reference to the intent of the parties, as gathered from all parts of the instrument, and the object and purpose of the transaction. *Briggs* v. *Chase*, 317.

The form of the instrument is not decisive of its character as a lease, and the mere use of technical words and phrases which have a definite legal signification cannot be allowed to defeat a contrary intention of the parties, if that intention be manifest from the whole contract. *Briggs* v. *Chase*, 317.

LIMITATION OF ACTIONS.

See EXECUTORS AND ADMINISTRATORS. TAXATION.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LOANS.

See TOWNS.

LOGS AND LUMBER.

See WAIVER.

When a written permit to cut timber is under seal and exclusive, title passes to the permittee as soon as the timber is severed either by himself or a trespasser. Title in such cases passes by reason of the executory contract and not because the permittee himself does the cutting.

Martin v. *Johnson*, 156.

In May, 1904, the owners of a township of wild land by written contract not under seal granted the plaintiff permission, during the ensuing logging season only, to enter with four horses or more teams upon mile squares numbered 9-10-11-15-16-17 and 18 . . . . and to cut and remove therefrom, spruce, cedar, fir, and pine timber suitable for logs." Also in May, 1904, the same owners gave to one Worster a written permit not under seal, "during the ensuing logging and bark peeling season only" to enter upon mile squares numbered 1-2-7-8-13 and 14 in the same township and cut and remove bark and timber therefrom. In the course of his operation upon lot 8 Worster got over the line and cut certain spruce logs and railroad ties from lot No. 9 which was embraced in plaintiff's permit. The defendant received the logs and ties cut on lot 9, and thereupon the plaintiff's brought an action of trover against the defendant for the value of the same.

Held: (1) That the plaintiff's permit did not convey any interest in the land or in the standing timber, but was an executory contract for the sale of timber when severed from the soil and converted into personal property, coupled with a revocable license to enter upon the land for the purpose of cutting and removing it.

2. That the permit was not exclusive but applied only to such timber as might be cut by the plaintiff himself or those acting under him.

3. That the cutting by a mere trespasser upon one of the lots permitted to the plaintiff did not give the plaintiff any property in the logs, when severed. They still belonged to the landowner to whom the trespasser and not the plaintiff was liable for the stumpage. *Martin* v. *Johnson*, 156.

Where the plaintiff brought an action to recover damages for the alleged breach of a written contract in the form of a logging permit, *held* that if the plaintiff had any right of action the evidence so closely showed a waiver on his part that a recovery was precluded. *Burnham* v. *Austin*, 196.

The plaintiff brought an action against the defendant to recover toll on logs driven in 1906 down Wilson Stream, which flows into Sebec Lake, based on a provision in its charter which authorized the plaintiff to "demand and receive a toll for the passage of logs driven over their dams and improvements." In 1900, the plaintiff built a dam in Wilson Stream eighteen or twenty miles from the outlet of the stream into Sebec Lake. The logs upon which the plaintiff claimed a toll were driven out of Davis Stream, a tributary which flows into Wilson Stream about two miles above Sebec Lake. Two years later the plaintiff built another dam at Rum Pond. No dam was built by the plaintiff on Wilson Stream below Davis Stream where the logs were landed.

Held: 1. That the word "and" in the clause in plaintiff's charter reading "driven over their said dams and improvements" may be construed as a convertible term used in the sense of "or" so as to authorize the collection of toll not only on logs that pass over the dams but also on those that actually pass over that part of Wilson Stream on which improvements to facilitate driving have actually been made.

2. That in order for the plaintiff to maintain its action, however, it was not sufficient to show that the defendant was enabled to take advantage of a greater flow of water afforded from time to time by the plaintiff's control of the dams eighteen miles above.

3. That the evidence did not satisfactorily show that the plaintiff had made any improvements in that part of Wilson Stream below Davis Stream except such as are ordinarily and incidently made in clearing out the stream each year to facilitate the annual drive.

Dam Company v. *Excelsior Company*, 249.

It is well settled that growing timber constitutes a part of the realty, but may be separated from the rest by appropriate reservation or grant, and when thus separated from the general ownership of the soil, so long as it remains uncut, it has all the incidents of real estate, and the same rules which govern the title and transfer of such property must apply to it.

Brown v. *Bishop*, 272.

It is the settled law of Maine that no present legal title to standing and growing timber passes by virtue of oral, or unsealed written contracts for its sale, to be cut and removed by the purchaser. Such oral or unsealed written contracts are held to be executory, for the sale of timber as personal property as and when it shall thereafter be severed from the soil, together with a license to enter upon the land for the purpose of cutting and removing it.

Brown v. *Bishop*, 272.

When a written contract for the sale of standing and growing timber is under seal, the test to be used, in ascertaining whether it is a mere revocable license, or a license coupled with such an interest as renders it irrevocable, is the intention of the parties. *Brown* v. *Bishop*, 272.

When a contract for the sale of standing and growing timber is in writing and under seal it is to be interpreted and effectuated according to the intention of the parties, as disclosed in the language of the instrument, and the mode in which it was made, considered with reference to the situation of the parties and the purpose to be accomplished, unless some established rule of law will be thereby violated. *Brown* v. *Bishop*, 272.

October 22, 1906, the plaintiff and the defendant entered into a written contract, under seal, the material parts of which are as follows: "Know all men by these presents, that I Elmer E. Brown of Orneville in the County of Piscataquis, Maine, in consideration of the sum of three hundred and fifty dollars to me paid by J. C. Bishop on or before the first day of February 1907 do hereby agree, covenant and permit J. C. Bishop of Orneville said county and state to cut all hemlock fir spruce pine and cedar on my lot located in said Orneville known as the Whitney lot it being the same lots deeded to me by Dana H. Danforth of Foxcroft, and to enter on said lots with teams and men for the purpose of cutting said timber. It is hereby agreed that the lumber shall be cut this winter if possible and what remains uncut shall be cut the following winter. That the lumber shall be cut so as to avoid destroying other lumber so far as possible." The specified consideration of $350 was paid within the time provided therefor. The defendant operated upon the land during the winter of 1906-7, but did not cut and remove all the lumber authorized to be cut under the agreement. September 9, 1907, the plaintiff forbade the defendant in writing "entering with teams and men for the purpose of cutting any lumber or doing any work of whatever nature on my lots of land known as the Whitney land." Notwithstanding this notice, however, the defendant thereafter entered upon the land, in the fall of 1907, and yarded 150 M of the lumber specified in the agreement, and thereupon the plaintiff brought an action of trespass quare clausum against the defendant.

Held: 1. That the manifest intention of the parties, as gathered from the language of their contract, interpreted in the light of their situation and the object they had in view, was not the sale and purchase of a mere revocable license to cut the timber, but the sale and purchase of the timber itself as it then stood, to be taken off within the time provided therefor.

2. That although the instrument in which the contract is expressed does not contain in all its parts the technical words customarily used in conveyances of real estate, yet, it being in writing and under seal, it is sufficient to effectuate the original honest intention of the parties, without infringing any established rule of law applicable in this State to the transfer of an interest in real estate between the original parties.

3. That by virtue of that instrument the defendant acquired a present legal title to the growing timber mentioned therein, defeasible, however, as to so much thereof as he should not cut during the period provided therefor, and that the express license to enter upon the land for the purpose of cutting and removing it, could not, as between the parties, be revoked by the plaintiff while the contract was in force.

4. That the words "if possible" as used in the contract are to have a reasonable interpretation, having reference to the cutting and removing of the lumber as a business undertaking.

5. That the lumber left uncut on the lot at the end of the winter 1906-7 was so left because it was not reasonably possibly, within the meaning of the contract, to cut it that winter. *Brown* v. *Bishop*, 272.

MAGISTRATES.

See DISCLOSURE COMMISSIONERS.

MARRIAGE SETTLEMENT.

See EXECUTORS AND ADMINISTRATORS. HUSBAND AND WIFE.

MASTER AND SERVANT.

See DAMAGES.

A general knowledge of a danger, without an appreciation of it is not conclusive upon the question of the assumption of the risk.
Bowen v. *Mfg. Company*, 31.

Where the plaintiff, an operative in the defendant's mill, slipped on an icy stairway connected with the mill and was thereby injured, *held*, (1) that the evidence was sufficient to warrant the jury in finding that the stairway was not kept in a reasonably safe condition; (2) that the jury was warranted in finding that the plaintiff was not guilty of contributory negligence; (3) that the damages awarded were not excessive. *Bowen* v. *Mfg. Company*, 31.

Where, in an action to recover damages for injuries caused by slipping on an outside stairway, it could not be said as a matter of law that the plaintiff understood and appreciated the dangerous condition of the stairway and assumed the risk, *held* that the question whether or not the plaintiff voluntarily assumed the risk of using the stairway was properly submitted to the jury as a question of fact. *Bowen* v. *Mfg. Company*, 31.

Where the defendant was constructing a line of poles and wires for the transmission of electric current from a generating station and the plaintiff, a servant in the employ of the defendant, was engaged in working on the wires and a current of electricity unexpectedly passed over the wires and the plaintiff

MONEY PAID.

See PRINCIPAL AND SURETY.

MORTGAGES.

See EXECUTORS AND ADMINISTRATORS.

MOTIONS.

See NEW TRIAL. TRIAL.

MUNICIPAL CORPORATIONS.

See PAUPERS. STREET RAILWAYS. TOWNS. WAYS.

Under a statute requiring a municipality to pay all the expenses of its police department "upon the requisition of the Board of Police constituted by the statute, the municipality is not obliged to pay the naked negotiable order or warrant of the Board which does not upon its face or by accompanying papers show what expenses the order or warrant is drawn for.

Board of Police v. *Biddeford*, 46.

The liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the legislature and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute, R. S., chapter 23, section 76.

Huntington v. *Calais*, 144.

The duty imposed upon the person injured to "notify one of the municipal officers" within fourteen days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. Such notice is a condition precedent to a plaintiff's right of action. *Huntington* v. *Calais*, 144.

When a person seeks to recover of a city or town for damages sustained by reason of a defect in a highway, it must affirmatively appear that such person or some one in his behalf notified "one of the municipal officers" of his injury within fourteen days thereafter in the manner specified in the statute.

Huntington v. *Calais*, 144.

Under the provisions of Revised Statutes, chapter 1, section 6, rule XXV, the mayor and aldermen constitute the municipal officers of cities.

Huntington v. *Calais*, 144.

While by its charter, Private and Special Laws, 1883, chapter 325, section 11, the city clerk of the city of Calais is made clerk of the board of mayor and aldermen, yet the city clerk does not thereby become one of the municipal officers of Calais. *Huntington* v. *Calais*, 144.

proceed to organize and to perform their respective duties as such, under color of title and claim of right, with the acquiescence of the citizens, they are officers de facto. *Stuart* v. *Ellsworth*, 523.

Chapter 350, Private and Special Laws of 1907, provides among other things, that the members of the fire department of the city of Portland, are subject "after hearing to removal at any time by the board of engineers, subject to the approval of the committee on fire department, for inefficiency or other cause." Under the provisions of this statute, the plaintiff was removed as a permanent member of the fire department by the unanimous vote of the board of engineers. Previous to the hearing which resulted in his removal, written notice was given to the plaintiff stating the charges against him.

Held: 1. That the plaintiff was expressly charged in the notice with inefficiency, the statutory cause for removal, consisting not only of disobedience of orders, but also a lack of capacity, skill and ability to perform the duties required of him in his position.

2. That whether or not the plaintiff was inefficient to perform the duties of the position from which he was removed was a question of fact, and that the board of engineers had jurisdiction under the statute to decide that question, and that their decision of that question was final and could not be reviewed under a writ of certiorari.

Nelson v. *Portland Fire Department*, 551.

MUNICIPAL OFFICERS.

See EMINENT DOMAIN. MUNICIPAL CORPORATIONS. TOWNS.

NAVIGABLE WATERS.

In an action against a defendant improvement company incorporated to improve a river for navigation, to recover damages sustained by the alleged failure of the defendant improvement company to sufficiently improve the navigation the defendant improvement company offered to show the following things: 1. The amount of its authorized capital of $20,000 consumed in the economical making of improvements which were made. 2. The amount of this capital paid for flowage rights required for these improvements. 3. The amount of this capital necessarily expended for these improvements, real estate and navigation rights. 4. The cost of the new lock economically constructed. 5. The cost of lowering the lock and dredging the river to the same level economically done. 6. That the running expense for maintaining and operating the lock from the beginning had about equalled the gross receipts. This evidence was excluded. *Held* That the evidence should have been admitted, as bearing upon the question whether the defendant, in what it had already done and expended, and in view of what it might cost to make the improvements, suggested by the plaintiff as necessary, had reasonably complied with the terms of its charter.

Steamboat Co. v. *Improvement Co.*, 264.

NEGLIGENCE.

NEGOTIABLE INSTRUMENTS.

NEW TRIAL.

NOTES.

See BILLS AND NOTES.

NOTICE.

See MUNICIPAL CORPORATIONS. WAYS.

NUDUM PACTUM.

See VENDOR AND PURCHASER.

NUISANCE.

See INTOXICATING LIQUORS.

OFFICE.

See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS. PUBLIC OFFICER. STATUTES.

OFFICERS.

See INTOXICATING LIQUORS. OFFICE. PUBLIC OFFICER. WAYS.

OVERSEERS OF THE POOR.

See PAUPERS.

PARTIES.

See CORPORATIONS. EMINENT DOMAIN. LANDLORD AND TENANT.

PAUPERS.

It is made the duty of the overseers of the poor of the town where a person may be found in distress to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself, but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer while the officers were deliberating as to the extent of their official duty and the nature of their remedy. *Hutchinson* v. *Carthage*, 134.

If the overseers of the poor act in good faith and with reasonable judgment touching the necessity of relief of persons found in need, their conclusions will be respected in law. *Hutchinson* v. *Carthage*, 134.

The doctrine that the overseers of the poor may make a contract for the relief and support of those found in need of relief in their town, is well established. *Hutchinson* v. *Carthage*, 134.

It is immaterial whether a person in need is brought into that condition by quarantine, neglect of the board of health or otherwise, inasmuch as it is the fact of the situation not the method of producing it, that requires the action of the officers of a town. *Hutchinson* v. *Carthage*, 134.

The plaintiff brought an action to recover $25 for services alleged to have been rendered by him for the defendant town through a contract with the overseers of the poor. The evidence showed that Samuel Kittridge, his wife and several children were taken ill with the measles, quarrantined by order of the board of health and left in this helpless situation without nurse or attendant. So serious was the condition of the father and mother that they both died from the results of the disease. Under the stress of these circumstances, the attending physician called upon one of the selectmen and overseers of the poor who when informed of the situation, with one of his associates made a personal investigation and then, with the approval of both of his associates, employed the plaintiff to take charge of the afflicted family. After the death of Mr. Kittridge, while he had no real estate, nor money in a bank, it was discovered that he had a small amount of personal property all in chattel form, estimated to be about $200, after payment of debts. The defendant town admitted that the services charged for were rendered for the Kittridge family and that the amount claimed was reasonable. The presiding Justice ordered a verdict for the plaintiff and the defendant town excepted.

Held: (1) That the verdict was rightly ordered upon the question of fact.

(2) That Revised Statutes, chapter 27, sections 2, 11, providing that "towns shall relieve persons having a settlement therein, when, on account of poverty, they need relief," is absolute in its terms and was not repealed expressly or by necessary implication by the act, R. S., chapter 18, creating the board of health.

(3) That R. S., chapter 27, section 2, only applies to cases where the settlement of the pauper is in question, and that that question did not arise in the case at bar. *Hutchinson* v. *Carthage*, 134.

PERMITS.

See LOGS AND LUMBER.

"PERSONAL PROPERTY EMPLOYED IN TRADE."

See TAXATION.

PETITIONS.

See QUIETING TITLE.

PLEADING.

See CONTRACTS. CRIMINAL LAW. QUIETING TITLE.

POLL TAX.

See DOMICIL.

POOR DEBTORS.

See ATTORNEY AND CLIENT. DISCLOSURE COMMISSIONERS.

POWER OF SALE.

See TRUSTS.

PRACTICE.

See WAYS.

PRESUMPTIONS.

See COMMON CARRIERS. CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS. WILLS.

PRINCIPAL AND AGENT.

See ATTORNEY AND CLIENT. BROKERS. COMMON CARRIERS. CORPORATIONS. VENDOR AND PURCHASER.

PRINCIPAL AND SURETY.

See BAIL.

PROBATE COURTS.

See JUDGMENT.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROMOTERS.

See CORPORATIONS. EQUITY.

PROSECUTING ATTORNEYS.

See CRIMINAL LAW. STATUTES.

PUBLIC OFFICER.

See OFFICE. OFFICERS. STATUTES.

An office created or authorized by the legislature should be treated as de jure until otherwise declared by a competent tribunal. *State* v. *Pooler*, 224.

It is an axiom of practical wisdom, coeval with the development of the common law founded upon necessity, that de facto acts of binding force may be performed under presumption of law. *State* v. *Pooler*, 224.

The de facto doctrine is exotic and was engrafted upon law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law. *State* v. *Pooler*, 224.

To protect those who deal with officers, apparently holding office under color of law, in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to them, although not officers de jure they are officers in fact, whose acts public policy requires to be construed as valid. *State* v. *Pooler*, 224.

In controversies to which he is not a party, the title to his office of an officer de facto and his acts therein cannot be questioned. *Stuart* v. *Ellsworth*, 523.

PUBLIC SERVICE CORPORATIONS.

See COMMON CARRIERS. RAILROADS. STREET RAILWAYS.

PUNITIVE DAMAGES.

See ASSAULT AND BATTERY.

QUIETING TITLE.

In a petition under Revised Statutes, chapter 106, sections 47 and 48 as amended by Public Laws, 1907, chapter 150, brought to require the defendant to bring an action to try his title to the premises described in the petition, the description need not be so particular and definite as in a writ of entry or other action to try the title. *Ginn* v. *Ulmer*, 286.

When, in a petition under Revised Statutes, chapter 106, sections 47 and 48 as amended by Public Laws, 1907, chapter 150, brought to require the defendant to bring an action to try his title to the premises described in the petition, if the description is such as to give the defendant notice of at least some part of the land to which the petition refers it is sufficient.
Ginn v. *Ulmer*, 286.

When a petition under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907 is filed for the purpose of requiring the defendant named in such petition to appear and show cause why he should not be required to bring an action to try his title to the premises described in the petition, and the petition sets out all the requirements of the statute; an uninterrupted possession of the premises by the petitioner for ten years, a claim of freehold therein, a sufficient description, and an apprehension of an adverse claim by the defendant which creates a cloud upon the title, and concludes with a prayer that the defendant may be summoned to show cause why he should not bring an action to try title to the premises described in the petition, and these propositions are passed upon by the single Justice his findings are conclusive so far as they involve questions of fact. *Ginn* v. *Ulmer*, 286.

Where a petition under the provision of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, was filed for the purpose of requiring the defendant to appear and show cause why he should not bring an action to try his title to the premises described in the petition, and the petitioner used the language of the statute in alleging the adverse claim of the defendant, *held* that it was sufficient. *Ginn* v. *Ulmer*, 286.

Where in proceedings under the provisions of Revised Statutes, chapter 106, sections 47 and 48 as amended by chapter 150, Public Laws of 1907, the defendant in his answer did not make an unqualified disclaimer such as the statute contemplates, of all right and title adverse to the petitioner, but denied that he had made a claim adverse to the title of the petitioner, *held* that an adverse claim was impliedly asserted by the defendant's statement that "the only difficulty there is between him and the petitioner is the establishment of a line on the northern boundary." *Ginn* v. *Ulmer*, 286.

RAILROADS.

See COMMON CARRIERS. EMINENT DOMAIN. STREET RAILWAYS.

The obligation of a railroad company, when it builds its road across a public way, to bear, or share in, the expenses of putting the way into a condition for travel is, in Maine, a statutory one, of which the railroad commissioners have jurisdiction; and they may lawfully require the company to erect at its own expense a bridge over an excavation made by it, so far as the same is within the railroad location. *Erskine* v. *Railroad Co.*, 113.

Where the right of a town to compel a railroad company to construct a bridge over an excavation across a highway, had become fixed prior to a new location, *held* that the railroad company could not, so far as the town was concerned, limit the town's rights by a new location narrower than the land actually taken. *Erskine* v. *Railroad Co.*, 113.

Where an excavation for a railroad was cut across a highway and the action of the natural elements caused the banks of the excavation to cave in and thereby widened the excavation, *held* that the railroad location was not thereby widened and that the railroad company was obliged to construct a bridge only for the width of the original excavation.

Erskine v. *Railroad Co.*, 113.

A railroad company is bound to take reasonable and proper precautions for the safety of travelers upon the highways having reference to all the circumstances and probabilities to be anticipated and when a railroad crossing is especially dangerous the railroad company must employ such means as are reasonably necessary considering its character, to warn travelers of the approach of a train. *Huntington* v. *Railroad Co.*, 363.

It is difficult if not impossible to lay down an abstract rule of law as to the exact time when or the exact distance at which travelers should be warned of an approaching train. It must be governed largely by the circumstances and surroundings of each particular case. In a general way it may be said that it is a flagman's duty to give such seasonable warning as will enable a traveler to stop his team at a point where an ordinarily well broken and gentle horse would not become dangerously frightened. Circumstances and conditions might modify this and impose a greater obligation upon him but this would seem to be a workable principle.

Huntington v. *Railroad Co.*, 363.

A flagman whose duty it is to guard a railroad crossing over a public street and who remains at his post of duty until an approaching train has reached the crossing and is passing the same, is not negligent in then leaving his post as the train itself then becomes a warning.

Huntington v. *Railroad Co.*, 363.

was "ready for trial." On the day following, both parties went out in her for a trial trip. On the trip several trivial and easily remediable defects in the engine were disclosed. On the same day, June 22, the defendant notified the plaintiff that he would not take the launch, assigning no reasons other than the imperfections in the engine. Afterwards the plaintiff let the launch and then sold her for less than the defendant had agreed to pay.

Held: (1) If the time named for the delivery of the launch was of the essence of the contract, the evidence was plenary that strict performance of this stipulation was waived by the defendant.

(2) In such case, it was the duty of the plaintiff to be prepared to deliver the launch within a reasonable time.

(3) It must be assumed that it was, or ought to have been, fairly within the contemplation of the parties that if trivial and easily remediable faults such as existed in the case, were disclosed on the trial trip, the proffer of which the defendant had accepted, a reasonable opportunity was to be had to cure them. Such would be an obvious purpose of a trial trip.

(4) The refusal of the defendant to take the launch without giving the plaintiff a reasonable further time to remedy the troubles which were found, was, under the circumstances, unwarrantable, and was a breach of his contract.

(5) The evidence did not support the defendant's claim that the plaintiff assented to a recission of the contract.

(6) The plaintiff was entitled to recover the difference between the contract price and the fair market value of the launch at the time of the breach of the contract. *Bonney* v. *Blaisdell*, 121.

SCIRE FACIAS.

See BAIL.

SEALED INSTRUMENTS.

See LOGS AND LUMBER.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

SENTENCE.

See CRIMINAL LAW.

SHELL-FISH.

See FISH AND FISHERIES.

SHERIFFS AND CONSTABLES.

See OFFICERS.

SIGNATURES.

See INDICTMENT.

SOCIAL CLUBS.

See INTOXICATING LIQUORS.

"SPECIAL ATTORNEY FOR THE STATE."

See CONSTITUTIONAL LAW. OFFICE. STATUTES.

SPECIFIC PERFORMANCE.

See BOUNDARIES. EVIDENCE.

The plaintiff, in 1908, brought a bill in equity asking the specific performance of an oral contract, alleged to have been made in 1884 by one Toothaker for the conveyance to the plaintiff of a certain lot of wild land.

Held: 1. That the evidence fell far short of proving the contract alleged by the plaintiff.

2. That even if the original contract could have been proved and all other obstacles overcome, yet the plaintiff had been guilty of such laches as to preclude any just claim for equitable interference.

Wilbur v. *Toothaker*, 490.

STANDING TIMBER.

See LOGS AND LUMBER.

STATES.

See OFFICE.

When the State, by resolve, permits itself to be sued on a claim, interest will not be allowed on the amount found to be due, unless the resolve permitting the suit so provides. *Marshall* v. *State*, 103.

STATE ASSESSORS.

See OFFICE. STATES.

STATUTES.

See APPEAL. BAIL. BANKRUPTCY. CONSTITUTIONAL LAW. CORPORATIONS. CRIMINAL LAW. DESCENT AND DISTRIBUTION. DISCLOSURE COMMISSIONERS. EXECUTORS AND ADMINISTRATORS. INTOXICATING LIQUORS. LOGS AND LUMBER. MUNICIPAL CORPORATIONS. NAVIGABLE WATERS. PAUPERS. STATUTE OF FRAUDS. STREET RAILWAYS. TAXATION. WAYS. WILLS.

Declaring a statute unconstitutional does not necessarily render it void ab initio. *State* v. *Pooler*, 224.

Every Act of the Legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the chair of private judgment and if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes at law, until questioned in and set aside by the court.
State v. *Pooler*, 224.

Although section 8 of chapter 92 of Public Laws, 1905, authorizing the Governor to appoint a "special attorney for the State" to have charge of liquor prosecutions, was held to be unconstitutional, yet the office of "special attorney for the state" was not rendered void ab initio but should be regarded as de jure until said section 8 was declared unconstitutional. *State* v. *Pooler*, 224.

The language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the act deals with a genus and the thing which afterwards come into existence is a species of it.
Hurley v. *So. Thomaston*, 301.

Statutes relating to the same subject matter though enacted at different times, are to be deemed in pari materia, and construed with reference to each other.
Hurley v. *So. Thomaston*, 301.

When a statute may be interpreted in two ways, one of which works manifest inequitable results, and the other just and reasonable results, the latter must prevail. *Peirce* v. *Bangor*, 413.

The real meaning of a statute is to be ascertained and declared even though it seems to be in conflict with the words of the statute.
Orono v. *Electric Company*, 428.

The literal import of language used in statutes is often seemingly at variance with what was obviously intended. In such case the intention and not the literal import is to govern. *Orono* v. *Electric Company*, 428.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

See APPENDIX.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

See EXECUTORS AND ADMINISTRATORS. TAXATION.

STREET RAILWAYS.

3. That damages assessed by the municipal officers under said section 68, if paid by the town, becomes a part of the "expense" of the alterations by virtue of said section 19, and are legally recoverable by the town against the railroad corporation. *Hurley* v. *So. Thomaston*, 301.

Where, under the provisions of Revised Statutes, chapter 53, section 19, the grade of a street railroad located on the side of a town way was established and fixed by the municipal officers of the town and also, by authority of the municipal officers, the grade of the traveled side of the way was raised so as to conform to the grade of the street railroad and an abutting owner was damaged thereby, *held* that under the provisions of Revised Statutes, chapter 23, section 68, the town was liable for the damages sustained by the abutting owner. *Hurley* v. *So. Thomaston*, 301.

Revised Statutes, chapter 51, section 75, provides that "bridges erected by any municipality, over which any street railroad passes, shall be constructed and maintained in such manner and condition as to safety, as the board of railroad commissioners may determine," etc., *Held:* That this statute is not necessarily limited to bridges actually "erected" by the municipality, but includes all highway bridges which municipalities are bound to maintain and keep in repair, and over which any street railroad passes.
Orono v. *Electric Company*, 428.

The legislature having left to the board of railroad commissioners the whole question of how bridges over which street railroads pass shall be constructed and maintained, as to safety, and given them authority to apportion the expense between the railroad and the town, "in such manner as shall be deemed by the board just and fair," their decision of apportionment must stand unless manifestly illegal or unjust.
Orono v. *Electric Company*, 428.

Where the railroad commissioners examined a bridge over which a street railroad passes, determined what repairs were necessary, approved plans and specifications for those repairs, required the work to be done to their satisfaction, gave hearings to all parties in interest, and made their decision that the town should pay a little less than one-half part of the amount the railroad claimed to have paid for the repairs under a written contract, *held*, that the decision of the railroad commissioners was not manifestly illegal or unjust.
Orono v. *Electric Company*, 428.

Where it was provided in the charter of a street railroad company that "said corporation shall keep and maintain in repair such portions of the streets, town or county roads, as shall be occupied by the tracks of its railroad, and shall make all other repairs of said street or roads which shall be rendered necessary by the occupation of the same by such railroad," *held*, that the street railroad company was not necessarily required by this provision in its

charter to maintain and keep in repair the entire structure of a bridge over which its railroad passes, but to what extent certain repairs made on the bridge were rendered necessary by the occupation of it by the railroad company was a question for the determination of the railroad commissioners.
Orono v. *Electric Company*, 428.

Where a bridge over which a street railroad passes, was for sixty years a toll bridge and formed a part of a highway in a town, and more than twenty years ago the town, by voluntary municipal action, took over the bridge, making it free forever after, and thereby assumed the duty to keep and maintain it as a part of its highway, and has performed that duty ever since, *held*, that the bridge comes within the purview of Revised Statutes, chapter 51, section 75, irrespective of the fact that it was not originally erected by the town or that the town may not have acquired a good and sufficient title thereto when it purchased the bridge. *Orono* v. *Electric Company*, 428.

SURETIES.

See BAIL.

SURETYSHIP.

See PRINCIPAL AND SURETY.

TAXATION.

See COLLEGES AND UNIVERSITIES. DOMICIL.

Under Revised Statutes, chapter 9, section 13, paragraph I, which enacts that "all personal property employed in trade, in the erection of buildings or vessels, or the mechanic arts, shall be taxed in the town where so employed on the first day of each April; *provided* that the owner, his servant, subcontractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment," the personal property which may or may not be taxable is property wholly distinct from the store, shop, mill, etc., which by virtue of the proviso, must be occupied for the purpose of such employment. *Norway* v. *Willis*, 54.

The personal property which may or may not be subject of taxation under Revised Statutes, chapter 9, section 13, paragraph I, is movable property wholly distinct from the "store, shop, mill, wharf, landing place or shipyard," which, by virtue of the proviso, must be occupied "for the purpose of such employment" by the owner or other person under him, so employing it, in order to render it legally taxable in the town where it is employed. One and the same thing cannot at the same time serve as personal property employed and as the building or place in which it is employed.
Norway v. *Willis*, 54.

The general rule is that all real property within the State is subject to taxation, and an exemption which is an exception to the general rule must always be construed strictly. *Orono* v. *Alpha Sigma Epsilon Society*, 214.

Not all the real estate of literary and scientific institutions is exempt from taxation under the provisions of Revised Statutes, chapter 9, section 6, paragraph II, but only such real estate as is "occupied by them for their own purposes or by any officer thereof as a residence."
Orono v. *Alpha Sigma Epsilon Society*, 214.

Where the plaintiff town taxed as real estate the chapter house of the defendant corporation, a Greek letter fraternity, and which said corporation was organized under the general laws of the State for the purpose of "erecting and maintaining a chapter house on the campus of the University of Maine, and to hold and dispose of all such real estate and personal property by purchase, lease, sale or otherwise as may be necessary for all such purposes and any and all other acts and things incident thereto and necessary, proper and convenient to the transaction of any such business of said corporation," and which said tax the defendant corporation refused to pay on the ground that the property was exempt from taxation,

Held: 1. That the corporate purposes of the defendant are neither literary nor scientific, but rather they are domestic in the nature of a private boarding house and such is the business it carries on.

2. That the defendant is entitled neither to exemption from taxation as an educational or scientific institution, nor immunity as an agency or instrumentality of the State, but that its property was subject to taxation in the plaintiff town.

3. That the tax assessed against the defendant was not a tax against the University of Maine but against a separate and independent corporation.
Orono v. *Alpha Sigma Epsilon Society*, 214.

Revised Statutes, chapter 9, section 65, contemplates an actual possession of some kind. It need not be as continuous as the possession of a farm would be expected to be, but there should be some kind of continuity.
Hill v. *Coburn*, 437.

Where a person in 1867 purchased wild lands from the State at a tax sale in that year, and continuously paid the taxes thereon for more than twenty years, and from 1867 to 1901 no former owner or person claiming under him, paid any tax on the land, or any assessment by the county commissioners, or did any other act indicative of ownership, and the purchaser operated on the land from 1867 to and including 1872, under such circumstances as indicated exclusive, peaceable, continuous and adverse possession of wild lands as intended by Public Laws, 1895, chapter 162, section 1, now Revised Statutes, chapter 9, section 65, but from 1872 to 1901 there was no evidence of any

kind tending to show that any one was in possession of the land for any purpose, *Held:* That the statutory condition of possession had not been proved, and hence the statute did not apply. *Hill* v. *Coburn*, 437.

At its annual town meeting in 1906, the plaintiff town voted that the collector of taxes should settle in full with the town on February 1, 1907, thereupon the defendant tax collector and his sureties on May 7, 1906, gave to the plaintiff town a bond containing the following condition: "That whereas the said Waldo H. Bennett has been chosen collector of taxes for said town for the year 1906; now if the said Waldo H. Bennett shall well and faithfully perform all the duties of his said office, and shall collect the taxes committed to him within the said year, and shall settle in full with said town on or before February first, A. D. 1907, then this obligation shall be void; otherwise shall remain in full force and virtue."

Held: 1. That the bond was a voluntary contract on the part of the defendants with the town, founded upon a sufficient consideration, and intended to serve a lawful purpose.

2. That the bond was good at common law. *Newport* v. *Bennett*, 547.

TENANCY IN COMMON.

See ATTORNEY AND CLIENT. PRINCIPAL AND AGENT.

It is undoubtedly a well settled rule that one co-tenant cannot purchase an outstanding title or incumbrance effecting the common estate for his own exclusive benefit, and assert such right against the other co-tenants. Such a purchase will enure to the benefit of him and his co-tenants, providing the latter elect within a reasonable time to avail themselves of such adverse title and contribute their ratable share of the expenses of acquiring it.
Hill v. *Coburn*, 437.

There may be cases when it would not be a breach of trust for a tenant in common to purchase an outstanding title, and retain so much thereof as may be necessary to protect his own interest. *Hill* v. *Coburn*, 437.

There is no principle of law or equity which makes it the absolute duty of tenants in common to purchase any adverse title which might be asserted either for their own benefit or the benefit of their co-tenants.
Hill v. *Coburn*, 437.

Tenants in common stand in such confidential relation to one another in respect to their interests in the common property, and the common title under which they hold it that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title and thereby injure and prejudice the interests of his own co-tenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the

TOWNS.

See MUNICIPAL CORPORATIONS. PAUPERS. STREET RAILWAYS. TAXATION. WAYS.

An action will not lie against a town for money loaned to it, through its officers, without antecedent authority, unless their action has been ratified by the town, even if the money has been used to pay legitimate obligations of the town. *Baldwin* v. *Prentiss*, 469.

If a town treasurer pays a town order with his own money, it is essentially a loan to the town, and he cannot recover the money from the town without proof that the town previously authorized or subsequently ratified his action. *Baldwin* v. *Prentiss*, 469.

A town treasurer is not the financial agent of the town. His duty is simply to receive and safely keep the public money and disburse it upon lawful warrant. *Baldwin* v. *Prentiss*, 469.

A town has the right to hire money to refund the debt which it owed in 1878, when the amendment to the constitution limiting municipal indebtedness took effect, even if its debt was then in excess of the five per cent limit. *Leavitt* v. *Somerville*, 517.

In such case a town cannot constitutionally create a new or additional debt while the former debt remains unpaid to the extent of the debt limit, nor can it hire money to pay a debt thus unlawfully created. *Leavitt* v. *Somerville*, 517.

If a town, however, does create such an additional, but unconstitutional, debt, and hires money to pay both classes of debt, indiscriminately, the taint of the unlawful part permeates the whole loan, and is uncollectible. *Leavitt* v. *Somerville*, 517.

When a town's debt is in part lawful, and in part unlawful by reason of its being in excess of the constitutional debt limit, a vote to issue bonds "to fund the town debt" applies to the unlawful part of the debt, as well as to the lawful part. And bonds issued in pursuance to such a vote are wholly invalid and uncollectible. *Leavitt* v. *Somerville*, 517.

The increase of town debt, due to the accretions of unpaid interest on existing lawful indebtedness, is not the creation of a new debt, within the meaning of the constitution. *Leavitt* v. *Somerville*, 517.

The burden is on one, who would recover a loan made to a town for the purpose of paying its debt, to show that the debt to be paid was within the constitutional limit. *Leavitt* v. *Somerville*, 517.

TROVER.

See LOGS AND LUMBER.

In order for a plaintiff to maintain trover, he must have such a general or special property in the goods in question as entitles him to immediate possession. *Martin* v. *Johnson*, 156.

TRUSTS.

See TENANCY IN COMMON. WILLS.

While under the original theory of a trust the powers and duties of the trustee were confined substantially to holding and caring for the property, yet it is equally true that the purposes of the modern trust are of a much broader character requiring ordinarily much greater powers on the part of the trustee including a power of sale, which is generally expressly given. *Robinson* v. *Robinson*, 68.

When a trustee under a will is charged with a duty which cannot be performed without a power of sale, and no power of sale is expressly given by the will, a power of sale will be implied. *Robinson* v. *Robinson*, 68.

The words "invest and manage" in the will of a testator, import and imply a power of sale unless a contrary intention can be found in the will taken as a whole. *Robinson* v. *Robinson*, 68.

Where a testator directed that one-fourth of the principal of her residuary estate, "shall be paid to the children or direct descendants of my said deceased child," *held* that the term "be paid" was applicable exclusively to personalty. *Robinson* v. *Robinson*, 68.

Where a testatrix by her will left the residuum of her estate to her executors in trust, to invest and manage and pay over the income to her children during their lives with directions, upon death of any one of the children, that a proportionate part of the principal of the residuary estate should be paid to the children or other direct descendants of such deceased child,

Held: (1) That the trustees could not ascertain the true amount of the estate or pay over the fractional part directed to be paid to the children of a deceased child until the whole estate had been converted into money.

(2) That upon the whole will it was the intention of the testatrix that the trustees should have power to sell the real estate devised by the residuary clause and give to the purchaser or purchasers good title in fee simple and that her will so directed. *Robinson* v. *Robinson*, 68.

It is a principle in equity that the beneficial estate attaches to the party from whom the consideration comes. Hence when property is purchased and the conveyance of the legal title is taken in the name of one person and the pur-

VENUE.

See BASTARDY PROCESS.

VERDICT.

See ASSAULT AND BATTERY. EQUITY. NEW TRIAL. WAYS.

WAIVER.

See APPEARANCE. DISCLOSURE COMMISSIONERS. LOGS AND LUMBER. SALES.

Waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declaration; it may be inferred from the acts of the party and most often is shown by his action or non-action.

Burnham v. *Austin*, 196.

Waiver may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was the intention and purpose to waive.

Burnham v. *Austin*, 196.

WATERS AND WATERCOURSES.

See NAVIGABLE WATERS.

WAYS.

See EASEMENTS. MUNICIPAL CORPORATIONS. RAILROADS. STREET RAILWAYS.

The doctrine of assumption of risk applies to actions against towns for injuries received through defects in ways. *Philbrick* v. *West Gardiner*, 164.

If a traveler sees horses standing crosswise the road while feeding, and undertakes to pass behind them, he assumes the risk of injury from such horses.

Philbrick v. *West Gardiner*, 164.

While the plaintiff was undertaking to pass behind some horses feeding on the road, one of then by backing or kicking frightened the plaintiff's horse to his injury. *Held:* That the risk of fright from such backing or kicking was assumed by the plaintiff, and he could not recover of the town.

Philbrick v. *West Gardiner*, 164.

When a highway has been laid out by county commissioners they must state in their return when the work of building the same shall be done. The language of the statute, R. S., chapter 23, section 4, "shall state in their return when it is to be done" is mandatory, not simply directory.

Kingman v. *County Commissioners*, 184.

When a highway has been laid out by county commissioners but their return contains no statement when the work of building the same shall be done, such record would form no legal basis for proceedings under Revised Statutes, chapter 23, section 39, to cause the work to be done by an agent when it was not done by the town within the time prescribed therefor.

Kingman v. *County Commissioners*, 184.

Where a highway located partly in a town and partly in a plantation, was laid out by county commissioners but there was an entire absence of any statement or provision in the return of the commissioners showing that any decision was made respecting the time within which that portion of the road in the plantation should be completed, *Held:* That this omission was a failure to comply with a mandatory requirement of the statute, and an error which materially concerned the town.

Kingman v. *County Commissioners*, 184.

A petition for a writ of certiorari was filed in behalf of the plaintiff town against the county commissioners of Penobscot County to quash their records for errors alleged to have been committed in laying out a highway located partly in the plaintiff town and partly in Drew Plantation in that county, *Held:* That the writ should issue.

Kingman v. *County Commissioners*, 184.

The plaintiff brought an action against the defendant town to recover damages for personal injuries sustained by him while riding horseback along a town way in the defendant town, by reason of his horse stepping into a hole in the traveled part of the way, and recovered a verdict for $441.67. The defendant town contended (1) that the plaintiff's proof located the alleged defect at another and different place in the way than that described as its location in his written notice to the defendant town after the accident; (2) that there was not sufficient proof of the twenty-four hours' actual notice of the defect prior to the accident, as required by statute; (3) that the plaintiff was not in the exercise of due care at the time of the accident; (4) that the damages awarded were excessive.

Held: (1) That it was an issue of fact for the jury whether the plaintiff's injuries were caused by the defect described in the notice and the jury having found for the plaintiff on that issue, no sufficient reason was shown for disturbing that finding.

(2) That the verdict showed the jury must have found that the defect existed and that the person acting as substitute for the road commissioner had the necessary twenty-four hours' actual notice of the defect, and that such finding was justified by the evidence.

(3) That the jury were authorized by the evidence to find that the plaintiff was in the exercise of due care at the time of the accident.

(4) That the damages awarded were not excessive.

Hignett v. *Norridgewock*, 189.

The law requires automobilists like all other citizens to have regard for the rights of others. It may be convenient and even fascinating to reach one's destination at the earliest possible moment, but the safety of travellers must not be sacrificed to speed. *Gurney* v. *Piel*, 501.

While it is true that both a person with an automobile and a person with a team has the right to use the highway with his respective vehicle, yet it is also true that each is obliged to exercise his rights with due regard to the corresponding rights of the other, and neither has a monoply of the highway. *Gurney* v. *Piel*, 501.

Where the plaintiff recovered a verdict for $237.00 for personal injuries sustained by her in a collision between her team and the defendant's automobile, *held* that the evidence supported the verdict. *Gurney* v. *Piel*, 501.

Where the use of a road has been permissive and by the indulgence and license of the owner of the land over which the road passes, such permissive use, no matter how long continued, does not create a prescriptive right to use such road. *Currie* v. *Railroad Co.*, 529.

When a petition is duly presented to county commissioners for the laying out of a way, Revised Statutes, chapter 23, section 2, provides that the commissioners "shall cause thirty days' notice to be given of the time and place of their meeting, by posting copies of the petition, with their order thereon, in three public places in each town in which any part of the way is, and serving one on the clerks of such towns, and publishing it in some newspaper, if any, in the county." The same statute also provides that "the fact that notice has been so given, being proved and entered of record, shall be sufficient for all interested, and evidence thereof."
Lord v. *County Commissioners*, 556.

It has been the uniform practice in Maine in proceedings for the laying out of ways, where the notice ordered to be given is to include a copy of the petition, not to copy the signatures of all the petitioners in the notice, but only the first with a statement of the number of the others. Such practice has continued so long, and been relied upon as sufficient so universally, that for reasons of public policy if for no other, it should now be regarded as a substantial and sufficient compliance with the statute.
Lord v. *County Commissioners*, 556.

The duty of establishing and constructing highways is imposed upon municipalities by public law, and in performing this duty a town is acting only as the political agent of the State. *State* v. *Fuller*, 571.

When a town way has been legally located by the municipal officers and legally established by a vote of the town, it is an imperative duty laid upon the road commissioner of the town by public law to see that the way is wrought and opened for public travel. *State* v. *Fuller*, 571.

WILLS.

See DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. TRUSTS.

In considering a will, the general rule is that the intent of the testator is to govern but it is the intention expressed in the will and not otherwise.
Doherty v. *Grady*, 36.

The words of a will must receive their usual, ordinary and popular signification, technical words excepted, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed. *Doherty* v. *Grady*, 36.

The distinction made in cases in regard to the right of beneficiaries named in a will to take per stirpes or per capita, depends upon determining whether the phraseology of the will divides them into classes, in which the individuals of each class take equally, or establishes but one class all the members of which take equally. *Doherty* v. *Grady*, 36.

According to the established rule of law, a devise to "heirs" whether it be one own's 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. Such presumption, however, will be easily controlled, by any words in the will, indicating a different intention of the testator; as if, after a devise to "heirs," it be added, "in equal shares," or "share and share alike," or "to them and each of them," or "equally to be divided" or any equivalent words, intimating an equal division then they will take per capita, each in his own right. But when there are no such words, the presumption is that the testator referred to the familiar law of descents and distributions, to regulate the distributions of his bequest. *Doherty* v. *Grady*, 36.

Where a testator in his will used phrases, "to my legal heirs then living in equal shares," "to my legal heirs, in equal shares" and "in equal shares to my legal heirs," *held* that these phrases were undoubtedly calculated to convey precisely the same meaning and that the language used in the will designates but one class, his legal heirs, who take in equal shares according to his express directions. *Doherty* v. *Grady*, 36.

The will of a testator contained the following clauses:

"7th. I hereby direct and authorize my executors or their successors to form a trust fund of the amount or amounts received from the sale of the said real estate, together with all the rest, residue and remainder of my personal estate after the above mentioned bequests shall have been made and deposit the same with the Morton Trust Company of New York City.

"8th, I bequeath to my wife Mary R. Grady, and hereby direct and authorize my executors to pay to her during her lifetime the interest on the sum of forty thousand dollars, and no more.

"9th, The interest on the balance of the fund I give and bequeath to my legal heirs, in equal shares, payable annually.

"10, It is my will and request and I hereby authorize my executors and trustees, after the death of my wife, Mary R. Grady, to distribute the balance of the fund then in the hands and possession of the said Morton Trust Company, in equal shares to my legal heirs.

"11th, Should my wife Mary R. Grady, die within twenty years from the date of my decease the fund is to remain on deposit with the said Morton Trust Company until after the expiration of that time when it is to be disposed of as provided in clause ten the interest to be divided amongst my legal heirs."

Held: 1. That the testator intended to make a specific bequest to his widow of the income on the sum of $40,000 which became vested immediately upon his death, but not payable until the expiration of a year from that date.

2. That it was the intention of the testator that his widow should receive from the date of his death until the trust fund was actually established a rate of interest upon $40,000 equivalent to that allowed by the Morton Trust Company.

3. That whenever the Morton Trust Company declares a dividend of interest on the trust fund, whether quarterly, semi-annually or annually, the widow will be entitled to receive her interest on the $40,000.

4. That in default of the payment of any installment of interest, the widow will be entitled to simple interest on the amount of such default from the time it becomes due and payable until it is paid.

5. That, according to clause ten of the will, the balance of the trust fund is to be divided per capita among the legal heirs of the testator.

6. That upon the happening of the contingency named in the 11th clause of the will, the interest on the trust fund until the expiration of twenty years should be divided equally among the legal heirs living at the time of the decease of the widow and payable to them in the same manner as it was paid to the widow in her lifetime.

7. That under clause 9 of the will, the interest is payable annually and is to be divided per capita among the legal heirs of the testator.

Doherty v. *Grady*, 36.

It is a well established rule in Maine that when a testator gives to the first taker an estate for life only by certain and express words, the question whether a power to dispose of the remainder is annexed to the conventional life estate, depends upon the construction of the instrument under which the power is claimed. *Bodfish* v. *Bodfish*, 166.

In construing a will the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase especially involved in the inquiry, provided no settled rule of law or principle of sound public policy is thereby violated. *Bodfish* v. *Bodfish*, 166.

In construing a will the intention of the testator must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning. *Bodfish* v. *Bodfish*, 166.

In case of ambiguity, it is well settled that all the surrounding circumstances of the testator, his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of his will. *Bodfish* v. *Bodfish*, 166.

A testator's will contained the following provisions:

"First. I give, bequeath and devise unto my wife Lydia A. Bodfish, of said Elliottsville all the property, real, personal and mixed which I shall own or be possessed of at the time of my decease, for and during the term of her natural life.

"Second. After the decease of said Lydia A. Bodfish, I give, bequeath and devise unto my son, John I. Bodfish lot number 1 in the third range of lots in the Vaughan Tract in said Elliottsville, and called the Major Sawyer lot, and containing one hundred acres more or less.

"Third. After the decease of said Lydia A. Bodfish I give, bequeath and devise unto my son Samuel G. Bodfish, lot number six (6) in said third range of lots, in said Vaughan Tract and called the Wilbur lot.

"Fourth. I give and bequeath unto my daughter Marion A. White, widow of Flavius E. White the sum of two hundred dollars, to be paid to her within one year after the decease of my said wife, Lydia A. Bodfish.

"Fifth. I give, bequeath and devise to my son Rodney R. Bodfish and my daughter Sarah E. Bodfish in equal shares in common and undivided all the rest, residue and remainder of the property which shall be left after the decease of my said wife. And should either my said daughter, Sarah E. Bodfish or my son Rodney R. Bodfish die before the decease of my said wife, Lydia A. Bodfish, then his or her part of the property described in this fifth clause of my will shall go to the husband or wife of the said Sarah E. Bodfish or Rodney R. Bodfish if the said Sarah E. Bodfish or the said Rodney R. Bodfish shall have a husband or wife living at the time of their decease, if not then the whole property described in this fifth clause of my will shall go to the survivors of the said Sarah E. Bodfish or Rodney R. Bodfish upon the death of either.

"This bequest and devise to said Sarah E. Bodfish and Rodney R. Bodfish is made on the condition that they remain at home and care for said Lydia A. Bodfish while she shall live and that they pay to said White the two hundred dollars bequeathed to her by the fourth clause of this will."

Held: That the testator intended to give to his wife Lydia A. Bodfish, a simple life estate in all his property with the further provisions for her care and comfort contained in the fifth paragraph of the will, and that it was not his purpose to annex to this life estate the power to dispose of any part of the property. *Bodfish* v. *Bodfish*, 166.

The equity court under a bill in equity has power to determine whether or not a legacy creates a charge on real estate in the hands of parties holding the same under recorded deeds, and also if such a right once existed whether or not it has been lost through laches, and also to designate the particular real estate which in the first instance shall be reached.

Walker v. *Estate of Follett*, 201.

Revised Statutes, chapter 66, section 13, provides as follows: "Any will executed in another state or country, according to the laws thereof, may be presented for probate in this state, in the county where the testator resided at the time of his death, and may be proved and allowed, and the estate of the testator settled, as in case of wills executed in this state." Section 16 of the same chapter provides as follows: "After allowing and recording any will as aforesaid, the judge of probate may grant letters testamentary, or of administration with the will annexed thereon, and proceed in the settlement of the estate found in this state, in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country. . . . The provisions of section 10 of this chapter apply to such proceedings." Said section 10 provides as follows: "Letters testamentary may issue, and all acts required by law or otherwise under the provisions of the will may be done and performed by the executor without giving bond, or by his giving one in a specified sum, when the will so provides; but when it appears necessary or proper, the judge may require him to give bond as in other cases." *Held*: That when section 16 is construed in connection with sections 10 and 13, it becomes obvious that a foreign will may be proved and allowed and the estate of the testator settled as in case of a will executed in the State of Maine. *Chadwick* v. *Stilphen*, 242.

When a widow has seasonably waived the provisions of her husband's will in her behalf, and has claimed her share of the personal estate under Revised Statutes, chapter 77, section 13, legacies are not to be deducted before distribution to the widow. They are to be borne by the remainder of the personal estate, after her share is taken out. *Fogg, Appellant*, 480.

A legacy given to the executor in lieu of commission is to be regarded as an expense of administration, and not a legacy proper.

Fogg, Appellant, 480.

Whether a widow who has waived the provision of her husband's will is entitled in any event to one-third of the personal estate, free of debts, under Revised Statutes, chapter 77, section 1, quaere. *Fogg, Appellant*, 480.

WITNESSES.

It is the uniform rule that answers to collateral inquiries on cross-examination cannot be contradicted by the party inquiring. *Provencher* v. *Moore*, 87.

The defendant having inquired of the plaintiff on cross-examination concerning a collateral matter, *held* that he should have been held to abide the answer, and not have been permitted to present testimony to disprove it.
Provencher v. *Moore*, 87.

WORDS AND PHRASES.

APPENDIX

"I tried to make the whole world an appendix to Rome."
Caesar.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

COLONIAL ORDINANCES OF MASSACHUSETTS.

STATUTES OF MASSACHUSETTS.

REVISED LAWS OF MASSACHUSETTS.

GENERAL STATUTES OF MASSACHUSETTS.

RESOLVES OF MAINE.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Page 485, second head note, last word in last line should read "fact" instead of "effect."

Page 510, second head note, first line, between "is" and "sufficient" insert "a," and between the words "statute" and "frauds" read "of" for "or."