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MAINE REPORTS

106

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

SEPTEMBER 8, 1909—JUNE 29, 1910

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1911

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ABRAHAM LINCOLN.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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ALBERT R. SAVAGE
HENRY C. PEABODY
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Justices of the Superior Courts

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OLIVER G. HALL, KENNEBEC COUNTY

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Term expired January 17, 1911

CYRUS R. TUPPER
Term commenced January 18, 1911

ASSISTANT ATTORNEY GENERAL

CHARLES P. BARNES

REPORTER OF DECISIONS

GEO. H. SMITH

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

GEORGE W. HOLCOMB

vs.

CLINTON C. PALMER et als., Executors, Trustees.

Cumberland. Opinion September 8, 1909.

Wills. Construction. Trusts. Exemption from Trustee Process, When.

The controlling rule in the construction of wills, to which all others must yield, is that the intention of the testator is to be ascertained, if possible, and that such intention when so ascertained will prevail, provided it is consistent with legal rules.

If a legatee under a will has the absolute title to personal property bequeathed by the will, it can be reached by trustee process; but if he has simply a beneficial interest in such property it cannot be reached by trustee process.

The residuary clause of the will of a testatrix was as follows: "I give, bequeath and devise all the rest and remainder of my estate to such of my children who may outlive me share and share alike, but I will that the portion which would fall to my son Clinton shall be held in trust for him by my son Francis to be used for his comfort and necessities according to the discretion of said son." Certain personal property passed under this clause of the will. The testatrix left five children, four sons and one daughter.

Held: 1. That the shares of four of the children passed to them absolutely or in fee simple, but that Clinton received his share in equitable fee simple or a fee simple in trust, the legal estate passing to the trustee Francis, the beneficial interest to the cestui que trust Clinton, and the trust terminating at the death of Clinton, when any portion of the trust estate left would pass by his will if he die testate or descend to his heirs if he die intestate.

2. That the legal title to Clinton's share being in Francis as trustee and Clinton holding only the beneficial interest therein, the executors of the will could not be held on trustee process for Clinton's debts.

On exceptions by trustees. Sustained.

Trustee process in an action of assumpsit against the principal defendant, who was one of the residuary legatees under the will of his mother, and the three executors of said will alleged trustees of the principal defendant.

The principal defendant did not appear, but the alleged trustees appeared and filed their disclosure and after hearing thereon were charged for certain personal property in their hands as executors aforesaid, as belonging to the principal defendant. To the ruling charging them as aforesaid the alleged trustees excepted.

The case is stated in the opinion.

Geo. F. & Leroy Haley, for plaintiff.

James O. Bradbury, for trustees.

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

CORNISH, J. The contention in this case arises over a trustee disclosure and depends upon the construction of the residuary clause in the will of Elizabeth Chase Palmer who died testate on September 30, 1907.

No defense is made by the principal defendant, Clinton C. Palmer, to the suit, which is an action of assumpsit on two promissory notes given by him, and at the hearing before the presiding Justice, the alleged trustees, who are the executors of said will, were charged for certain personal property in their hands as belonging to said Clinton C. Palmer, one of the residuary legatees thereunder. The case is before this court on the trustees' exceptions to this ruling and the decision must rest upon the determination whether under said will said Clinton C. Palmer has the absolute title to said property so that it can be reached by trustee process, or whether he has simply a beneficial interest that cannot be so reached. If the former is the true construction the ruling was correct, if the latter, the exceptions should be sustained.

This brings us to the consideration and interpretation of the will, which is somewhat lengthy and was drawn with apparent care. It disposed of an estate valued at more than $40,000 with unusual

detail. The testatrix left five children, four sons and one daughter, and she made many specific bequests to them, of furniture, articles of personal property and heirlooms, beside certain pecuniary bequests to Francis, Chase and Lillian, as an equivalent in the words of the will to various sums of money received from her in her lifetime by her other sons Bartlett and Clinton, her evident intention being to make an equal division among all her children.

Then follows the residuary clause which is under consideration here:

"I give, bequeath and devise all the rest and remainder of my estate to such of my children who may outlive me share and share alike, but I will that the portion which would fall to my son Clinton shall be held in trust for him by my son Francis to be used for his comfort and necessities according to the discretion of said son." The position of the plaintiff is that the first part of this clause gave an absolute estate in fee to the five children, all of whom survived the mother, and that the last clause attempting to put the share of Clinton in the hands of Francis in trust, was an attempt to cut down this absolute fee and therefore was repugnant and void. In other words, the plaintiff invokes the rule, well established in this State and elsewhere that where by the terms of a devise or bequest an estate in fee simple of real estate or an absolute gift of personal property is made, a devise or gift over is void, as held in *Joslin* v. *Rhoades*, 150 Mass. 301; *Jones* v. *Bacon*, 68 Maine, 34; *Mitchell* v. *Morse*, 77 Maine, 423; and in the very recent case of *Bradley* v. *Warren*, 104 Maine, 423, where the rule and its reasons are carefully considered. "The title to property once given away cannot be regained by the hand that gave it." *Taylor* v. *Brown*, 88 Maine, 56. Notwithstanding this rule sometimes appears to operate harshly in defeating the probable intention of the testator, which is presumed to be the goal of judicial construction, its observance has been deemed safer "than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty."

Its application, however, inasmuch as it may override the intention of the testator, is not to be forced, and in the case at bar

it is not required. It is hardly necessary to say that the controlling rule in the construction of wills, to which all others must yield, is that the intention of the testator is to be ascertained if possible and that such intention when so ascertained will prevail, provided it is consistent with legal rules. Here the intention of the testatrix is perfectly plain, is expressed in apt language and violates no rule of legal interpretation. After making numerous specific bequests she gathers together all her remaining property and gives it equally to her five children share and share alike, but at the same time and in the same sentence that she gives four their share outright, she gives the fifth his share in trust, making his brother the trustee. There is no attempt on her part to make any gift or devise over, but the whole estate passes out of her, absolutely as to the four-fifths, in trust as to the one-fifth. In every instance it passes from the mother completely, and vests in the devisees or legatees completely. Her heirs can have no more interest in the one than in the other. She did not die intestate as to the one-fifth any more than as to the four-fifths. The cases cited as applying the rule are clearly distinguishable from the case at bar. In *Jones* v. *Bacon*, 68 Maine, 34, the language of the will was "As to the residue of my estate after payment of my just debts I 'give and bequeath the same to my beloved wife . . . . and lastly I further direct if there be any of my estate left after the decease of my said wife, then the said property left be equally divided between G & T." In *Mitchell* v. *Morse*, 77 Maine, 423, the words were: "I give and devise to my wife all the rest and residue of my real estate. But, on her decease the remainder thereof I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them." In *Taylor* v. *Brown*, 88 Maine, 56, the testator gave to his widow all his real and personal estate and in the same clause added "And at her decease what remains I wish to be equally divided between . . . . children of my wife's sister." In *Bradley* v. *Warren*, 104 Maine, 423, the residue was disposed of as follows: "One moiety thereof to my daughter Alice Buck, ... and if at her decease this will shall have taken

effect, and she shall have entered into possession of said estate so much thereof as may remain at her decease shall so descend and be distributed to and among my heirs at law."

In all of these and similar cases the hand that gave attempted to take away what had once been given and the law will not permit it. That is not the situation here. There is no attempt to retake or to divert the property into other channels. This residuary clause expresses in a concise form what could be more fully stated as follows: "I give, bequeath and devise all the rest and remainder of my estate, share and share alike, to such of my children as may survive me, one fifth to Chase, one fifth to Bartlett, one fifth to Lillian, one fifth to Francis, and one fifth to Francis in trust for Clinton, to be used for his comfort and necessities according to the discretion of said son Francis." No one could doubt the meaning of this bequest and yet it is simply another form of expressing the same intention, and perhaps not a plainer one. The fair and true construction of this residuary clause therefore is that four of the children received their shares absolutely or in fee simple and Clinton received his share in equitable fee simple or a fee simple in trust, the legal estate passing to the trustee Francis, the beneficial interest to the cestui que trust Clinton, and the trust terminating at the farthest at the death of Clinton, when any portion of the trust estate left would pass by his will if he die testate or descend to his heirs if he die intestate. This was the evident purpose of the testatrix. Her intention to dispose of her whole estate is manifest. With a mother's fairness she wished Clinton to receive the same share as the others but with a mother's prudence she wished it to be properly used and she therefore placed it in trust not that the income merely be used for his comfort but any portion or all of the principal according to the discretion of the trustee.

But the plaintiff contends that because the sentence, if it stopped with the words "share and share alike," would convey a title free from trust, therefore the last three lines creating and defining the trust must be rejected as repugnant and void. Such a strained construction cannot be adopted, for if adopted it would thwart rather than effect the intention of the testatrix. The whole sentence must

be read together, the later part can no more be rejected than the earlier. Neither alone expresses the intention of the testatrix. Both together do express it and are harmonious. In *Buck* v. *Paine*, 75 Maine, 582, the will was construed to convey an equitable fee simple conditional, and the point was there raised that the condition subsequent was repugnant to the prior gift of an equitable fee. The court answered this point as follows: "In one sense it may be regarded as repugnant. Not in a legal sense, however. It is not an illegal repugnancy. The objection of repugnancy in its proper sense does not apply. It is repugnant in the sense that a condition in a mortgage is repugnant to the prior granting of a fee. It is different from what is understood as repugnancy; it is more than that; it cuts deeper, it controls and overrules."

The distinction between this case and that of an absolute devise with an attempted gift over, and the construction placed upon this clause as conveying an equitable fee simple, are in line with the decided cases. In *Fay* v. *Phipps*, 10 Met. 341, the bequest was in these terms: "I give and bequeath to T in trust forty shares in B. H. bank and I hereby appoint my executors, trustees of this bequest. Held, that the trust terminated on the death of T. and that his administrator was entitled to the trust property which remained in the hands of the trustees at his death. Chief Justice Shaw in the course of the opinion said: "In terms the property is given to the grandson to be held in trust. . . . The testator does not restrict the benefit intended for his grandson to the income, but the whole was to him, though to be held in trust. . . . It appears to the court that the equitable title to the legacy vested in the grandson; that the trust was not intended to be perpetual and would not extend beyond the life of the cestui que trust, and that at his decease, in the absence of any gift over, or other disposition, it goes to the personal representatives of such equitable legatee."

In *Chauncey* v. *Francis*, 181 Mass. 513, the bequest reads as follows: "I give and bequeath to my brother Stephen Salisbury the sum of $1000 in trust for my nephew Samuel Salisbury, to invest the same and pay the interest of the same to the said Samuel or expend the same for his benefit as said trustee may deem best

and with full power to expend any part or the whole of the principal sum for the benefit of said Samuel." The court held that the $1000 was set apart to be held upon a general trust for Samuel; that he was the sole equitable owner of the fund, and that the directions to the trustees were for the management of the trust during the lifetime of the beneficiary and at the death of the beneficiary the fund went to the representative of his estate.

Chauncey v. *Salisbury*, 181 Mass. 516, is strikingly like the case at bar in that, in the will, the testatrix fully provided for the final disposition of one-half of the residue and gave the remaining half in general terms to six nephews and nieces and then added a clause placing the bequests to two in trust, viz: "The remaining half I wish divided among my nephews and nieces, the children of my brothers Stephen and my eldest brother Sam. They consist of Annie Woolsey, William Salisbury, Elizabeth Fitzgerald, Sally Walker, Agnes Chauncey Salisbury, children of my brother Stephen, also Sam Salisbury at the West, son of my brother Sam, to be divided equally among them. The sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey and they should have the income only." It will be observed that the clause relating to the trust is embodied in a later and separate sentence and is introduced by the verb "wish" while in the case at bar the trust is a part of the very sentence creating the bequest and is introduced by the stronger word "will." The court held that an equitable estate in fee was created in William and Sam, and at the death of the beneficiaries the property became a part of their estates. See also *O'Rourke* v. *Beard*, 151 Mass. 9; *Powers* v. *Rafferty*, 184 Mass. 85; *Sawyer* v. *Banfield*, 55 N. H. 149; *Taylor* v. *Taylor*, 9 R. I. 119; *Greene* v. *Wilbur*, 15 R. I. 251; *Hamilton* v. *Downs*, 33 Conn. 211; *Bransfield* v. *Wigmore*, 80 Conn. 11. In the very recent case of *Plaut* v. *Plaut*, 80 Conn. 673, the testator devised and bequeathed all his property both real and personal to his eight children, four sons and four daughters and to their heirs forever, and then added "but I desire and direct that my said children shall keep my real estate intact and entire if they can do so and that the income of all my property

both real and personal shall be paid to my said daughters above mentioned, excepting those who may be married at and after my death, until they are all married, or in the event of their not marrying until such time as they shall find it convenient without loss to themselves, my said daughters, to divide the income of all said property equally among all my children named herein, sons as well as daughters." The point was sharply raised that the testator in the first part of the paragraph used language which standing alone would have been effective to give his eight children all the property, the real estate in fee simple and the personal estate absolutely. But the court held that the sentences introduced by the word "but" must be also considered in ascertaining the intent, and construed the will to convey a fee simple charged with a trust which would end with the marriage of the last single daughter or sooner by the consent of all the single daughters, and that on the termination of the trust, the legal and beneficial estate would merge in the owners of the legal estate.

It is unnecessary to quote from other decisions at length, but the following cases may be cited where bequests similar in language to that at bar have been held to grant an absolute title in trust. *Lippincott* v. *Stottsenburg*, 47 N. J. Eq. 21; 20 At. 360; *Thieme* v. *Zumpe*, (Ind.) 51 N. E. 86; *Dulin* v. *Moore*, 96 Tex. 135, 70 S. W. 742; *Mee* v. *Gordon*, 187 N. Y. 400, 80 N. E. 353; *Deans* v. *Gay*, N. C., 43 S. E. 643.

We are not aware that the precise question involved in this case has been decided by this court, but the principle was recognized in *Deering* v. *Adams*, 37 Maine, 264, where a fee simple in trust defeasible at the end of twenty years was recognized, and where it was further held that although a will may not contain any express words of grant to executors or any technical words of limitation to them, yet by implication a fee will vest in them, if upon a view of the whole will, such a fee is indispensable to effectuate the objects of the testator, and that where a will creates trusts which require for their effectual execution an estate in fee, such estate will be implied. See also *Pearce* v. *Savage*, 45 Maine, 90; *Buck* v. *Paine*, 75 Maine, 582; *Hersey* v. *Purington*, 96 Maine, 166.

Our conclusion therefore is that the legal title to the property in question was at the date of the service of the trustee writ, in Francis Palmer as trustee under the will of Elizabeth Chase Palmer, that Clinton C. Palmer held only the beneficial interest therein and that said property could not be held on trustee process.

The entry must therefore be,

Exceptions sustained, trustees discharged.

CLINTON C. PALMER, Appellant from Decree of Judge of Probate,

vs.

ESTATE OF ELIZABETH C. PALMER.

York. Opinion September 15, 1909.

Wills. Construction. Legacies. Specific Legacies. General Legacies. Payment of Legacies. Dividends or Interest Accruing after Death of Testator.

1. A testatrix made a bequest in the following language: —

"Whereas my sons Bartlett and Clinton have at sundry times received from me sums of money not herein accredited, as an equivalent, I give and bequeath to my two children Chase and Lillian twenty shares of Pepperell Manufacturing stock and twelve shares of Penn Steel Prefd stock or the value of five thousand dollars each, should a change be made in these investments."

Held: That under this bequest, the legatees, Chase and Lillian, are each entitled to twenty shares of the Pepperell stock and twelve shares of the Steel Preferred stock.

2. A bequest of a stated number of shares of stock of a designated corporation, without any reference to the particular shares intended to be bequeathed, is not specific, but general.

3. Whether a bequest of a stated number of shares of designated stock, without other words of identification, and without words indicative of present ownership or possession, is made specific by the circumstance that the testator had at the time of making his will that precise number of shares, quaere.

4. Specific legacies carry with them all accessions by way of dividend or interest that may accrue after the death of the testator, unless the will specifies otherwise.
5. An executor is not compellable to pay general legacies within one year after the death of the testator. But he may lawfully pay and discharge them within the year, if the estate be such as to enable him to do so.
6. Dividends on stocks bequeathed as general legacies, paid within a year after the death of the testator, and after they have been transferred to the legatees, belong to the legatees, and not to the estate.
7. When shares of stock bequeathed as a general legacy were transferred to the legatees on the books of the company prior to January 20, 1908, but were not formally delivered to them until February 1, of the same year, the legatees were entitled to a dividend declared to stockholders of record on the books of the company on January 20, 1908, payable February 1.

On report. Appeal from decree of Judge of Probate. Appeal sustained.

Appeal from the decree of the Judge of Probate, York County, allowing the account of the executors of the last will and testament of Elizabeth C. Palmer. When the matter came on for hearing in the Supreme Judicial Court sitting as the Supreme Court of Probate, an agreed statement of facts was filed and the case was then reported to the Law Court "for such judgment, direction and decree as the law and admissible evidence require."

The case is stated in the opinion.

Clinton C. Palmer, Geo. F. and Leroy Haley, for plaintiff.

James O. Bradbury, for defendant.

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

SAVAGE, J. This is an appeal from the decree of the Judge of Probate, allowing the account of the executors of the will of Elizabeth C. Palmer, and involves the construction of that will. The will is holographic. And the particular paragraph which requires consideration is as follows:—

"Third. Whereas my sons Bartlett and Clinton have at sundry times received from me sums of money not herein accredited, as an equivalent, I give and bequeath to my two children Chase and Lillian twenty shares of Pepperell Manufacturing stock, and twelve

shares of Penn Steel Prefd stock or the value of five thousand dollars each, should a change be made in these investments.

To my son Francis I give and bequeath my Kennebunkport property, house, land and furnishings, valued at five thousand dollars.

In addition to the foregoing I give to my daughter Lillian five shares of Amoskeag Manufacturing stock, five shares of Bates Manufacturing stock, twenty shares of Union Pacific R. R. Prefd stock, eight shares of New Jersey R. R. & Canal stock and one Maine Central five hundred dollar bond."

Mrs. Palmer died September 30, 1907, and her will was allowed November 5, 1907. Her sons Chase Palmer and Francis Palmer, and a nephew, Chase Eastman, the executors named in the will, were appointed executors, and qualified as such.

Within a year from the death of the testatrix, the executors, in satisfaction of the legacies in the paragraph above mentioned, delivered to Chase Palmer and Lillian C. Palmer, each, twenty shares of Pepperell stock, and to each twelve shares of Penn. Steel preferred stock, and to Lillian C. Palmer the number of shares of Amoskeag, Bates, and other stocks which were bequeathed to her. During that year dividends were declared and paid on some of those stocks, and the legatees received the dividends paid after the stock had been transferred to them.

The executors in their account credited themselves with the stock thus transferred, and did not charge themselves with dividends paid on these stocks during the year, after the transfers. Their accounts thus stated were allowed by the Judge of Probate.

It is admitted that the executors should have charged themselves with a dividend of $6 a share paid on six shares of Pepperell stock set apart for the benefit of Clinton C. Palmer under the residuary clause of the will, but not then delivered to his trustee, and that in this respect the decree of the Judge of Probate was erroneous.

From the allowance of the account, Clinton C. Palmer, a residuary legatee, appealed, and under the reasons of appeal, upon the facts as stated, two controverted questions arise. First, was the bequest to Chase Palmer and Lillian C. Palmer, in paragraph three of the

will, of twenty shares of Pepperell stock, and twelve shares of Penn. Steel preferred stock, a bequest to them as tenants in common, that is, of twenty shares of the one, and twelve shares of the other, for both, or was it a several bequest, as the Judge of Probate decided, of twenty shares of the one, and twelve shares of the other, to each? Secondly, was the estate entitled to all dividends on stocks bequeathed, which accrued within one year from the death of the testatrix, and should the executors have been charged for the same in their account?

I. The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator. The intention, however, must be gathered from the language which the testator used. It may be sought, as the saying is, within the four corners of the will. If the language of the will is of doubtful meaning, it may be interpreted in the light of conditions existing at the time the will was made, and which may be supposed to have been in the mind of the testator. But the language used must be interpreted in accordance with the settled canons of interpretation, even if it may result in a seeming overthrow of the testator's intent. These rules are so well settled that the citation of authorities in support of them is unnecessary.

The will of Mrs. Palmer presents questions of some difficulty and doubt. Whether she intended to give her children, Chase and Lillian, together, twenty and twelve shares respectively of the stocks named, or to each separately, twenty and twelve shares, is, we think, from any point of view, uncertain. No light is thrown upon the intention of the testatrix in the third paragraph of the will, by any other portion, and the case is almost barren of evidence of any existing conditions which might have helped interpretation. We are compelled to fall back upon the bare language of the paragraph itself.

Had the testatrix said only, "I give and bequeath to my two children Chase and Lillian twenty shares of Pepperell Manufacturing stock and twelve shares of Penn. Steel Prefd. stock," this would have been a bequest to them in common. Together they would have taken the twenty shares and twelve shares. On the contrary, if she

had added to the foregoing the following eight words "or the value of five thousand dollars each," and stopped there, the whole clause would properly be interpreted as a gift to each of them of the stock described, or an alternative gift in cash to each. But she did not stop there. She added the words, "should a change be made in these investments." These words undoubtedly apply to and limit the alternative cash bequest. The legatees are to have money in lieu of stocks, in the contingency that a change is made by the testatrix in the investment, not otherwise.

The precise question is, does the word "each" apply only to the cash bequest, or does it apply to the alternative? It would have been somewhat clearer, we think, that the former was intended, had Mrs. Palmer rearranged the clauses and put the words she used into this form "or, should a change be made in these investments, the value (doubtless meaning "amount") of five thousand dollars each." But this was not the way she expressed herself. She placed the word "each" at the end of a bequest, first of stocks, or, secondly, in case of a specified contingency, of money.

The appellant contends that she meant to give the stocks to the legatees in common, but the money, in case the contingency happened, in severalty. But from the words used, and the order in which they are used, we are unable to discover such a meaning. If a testator intended that two legacies, granted to the same persons, in the same sentence, the one legacy contingent and alternative to the other, should fall to the legatees in different proportions, or in a different manner, in one legacy than in the other, we should expect a change of expression to indicate it, other than appears in this will. We should expect the antithesis to be more apparent. It may be, in this case, that the testatrix intended these shares of stock to go to these legatees in common. But, if so, we think she failed to express her meaning with sufficient clearness. So that, although the construction to be given to this bequest is not free from doubt, we find ourselves inclined to the conclusion, based upon the language alone, that the testatrix intended that Chase and Lillian should each have twenty and twelve shares of the respective stocks. This was the conclusion of the Judge of Probate. And we so decide. And this

conclusion is not affected by any light thrown on the will by conditions existing when it was made.

It has been argued that the value of twenty shares of one stock and twelve of the other at the date of the will was in the neighborhood of $10,000, and therefore that the testatrix intended the money bequest to be an equivalent in value of the stock, whereas it would be only about one-half the value of forty shares of one stock and twenty-four of the other. But the case before us does not show the value of the stocks at the time the will was made. It does show their appraised value months afterwards. We cannot take judicial notice of the rise or fall of particular stocks. So that the argument has no basis of proof upon which we can rest.

II. The second question is whether the dividends on the stocks bequeathed, paid during the year after the death of the testatrix, and after they were transferred, belonged to the estate, or to the legatees. And this depends upon the answer to the question whether the executors might lawfully turn over the stocks as a satisfaction of the legacies, before the year was ended.

The appellant contends that it was the duty of the executors to keep the stocks for a year after the death of the testatrix, and having failed to do so, that they are chargeable for the dividends which they might have received, but did not. It is not claimed that this rule would be true concerning specific legacies. A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind, so as to individualize it, and enable it to be delivered to the legatee as the particular thing or fund bequeathed. *Stilphen, Applt.*, 100 Maine, 146. Specific legacies carry with them all accessions by way of dividend or interest that may accrue after the death of the testator, unless the will specifies otherwise. 2 Redf. on Wills, sect. 468; *Sullivan* v. *Winthrop*, 1 Sumn. 1; Fed. Cas. 13,600. And while an executor may withhold payment of a specific legacy for a time, since it is subject to the payment of debts, it is unquestionably true, if the condition of the estate warrants it, he may at his discretion, and also at his own risk, pay it at any time. *Bonham* v. *Bonham*, 33 N. J. Eq. 476; *Alexander* v. *Stewart*, 8 Gill & J. 226.

But the appellant contends that the legacies of stock to Chase and Lillian, which we have already discussed, as well as the legacies of stock to Lillian alone, in the last clause of the third paragraph of the will, are not specific legacies, but that they fall into the class known as general or pecuniary legacies. Such legacies are payable out of the general assets of the estate. *Stilphen, Applt.*, supra. And in the case of the legacy of stocks, they may be satisfied by the delivery to the legatees of any stock whatsoever answering the description.

We will consider first the shares of Pepperell stock and Steel Preferred stock bequeathed to Chase and Lillian. It nowhere appears in the case, except in the reasons of appeal, which are not evidence, that these shares are only portions of the stock in these companies which the testatrix owned when the will was made. But counsel on both sides in their arguments have assumed such to be the fact. Hence we assume it.

We regard it as a well settled canon of interpretation that a bequest of a stated number of shares of stock of a designated corporation, without any reference to the particular shares intended to be bequeathed, is not specific, but general, *Johnson* v. *Goss*, 128 Mass. 433. See also 10 Am. & Eng. Annotated Cases, 492, and cases cited. The bequests to Chase and Lillian of the Pepperell stock and Steel Preferred stock come within this rule, and must be regarded as general legacies.

As to the bequest to Lillian of Bates, Amoskeag, and New Jersey R. R. & Canal Co. stocks, the case states that the numbers of the shares of these stocks designated were the same as were listed in the inventory. The appellant points out that this does not necessarily mean that the numbers were the same as the testatrix owned at the time the will was made,—in other words that she then might have owned more than she did at the time of her death. But for the purposes of this discussion, we assume that the shares bequeathed to Lillian equalled the exact number which she then owned. In such a case, the weight of authority apparently is to the effect that a bequest of a stated number of shares of designated stock, without other words of identification, and without words

indicative of present ownership or possession, is not made specific by the circumstance that the testator had at the time of making his will, that precise number of shares. See 10 Am. & Eng. Annotated Cases, p. 492, and cases cited. There are, however, persuasive arguments to the contrary, found in *White* v. *Winchester*, 6 Pick. 47; *Martin, Pet'r*, 25 R. I. 1, and other cases.

But in view of the conclusion we have reached on the main matter in controversy, we do not deem it necessary to examine the character of these legacies further. We shall assume, as the appellant claims, that all these legacies are general. The question then arises whether the executors could properly pay them within one year after the death of Mrs. Palmer. We think they could.

In the absence of a statutory provision, or of any direction otherwise in the will, general or pecuniary legacies are generally payable in one year after the death of the testator, and bear interest after that time. 2 Redfield on Wills, sect. 471; *Dawes* v. *Swan*, 4 Mass. 208; *Hamilton* v. *McQuillan*, 82 Maine, 204. This rule, said Judge Story, in *Sullivan* v. *Winthrop*, 1 Sumner 1; Fed. Cases, No. 13,600, is "irrevocably fixed as a general rule" and is based on the "broad principle of public convenience." In this State there is no statute on the subject. And no time of payment has been specified in this will. The expression that such legacies are *payable* in one year after the death of the testator means that an executor is not compellable to pay within the year. It does not mean that he may not pay within that time. In 2 Williams Executors, 855, it is said that the allowance of one year to executors, during which they may retain the entire personal estate, "is merely for convenience, in order that the debts of the testator may be ascertained, and the executor made acquainted with the amount of assets, so as to be able to make a proper distribution. Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so." *Garthshore* v. *Chalie*, 10 Ves. Jr. 13. In 2 Woerner on Administration, sect. 454, it is said that "since the creditors of a testator must all be satisfied before any legacy is payable, the executor must be allowed a reasonable time to inform him-

self of the state of the property and the demands upon the same, before the legatees can compel him to satisfy their legacies. The period fixed by the civil law, and acquiesced in by common law courts, is a year from the testator's death, within which the executor cannot be compelled to pay a legacy, although directed by the testator to pay sooner. But the time is given simply for the convenience and protection of the executor; hence he may discharge the legacies at an earlier period if the estate be such as to enable him to do so." In *Sullivan* v. *Winthrop*, supra, Judge Story said: "It has been already stated that Mrs. Sullivan could not claim interest until after the year, and the executors could not be compelled to pay the legacy until that period. But it by no means follows that as a matter of discretion, the executors were not at liberty to pay the legacy within the year. There would be no breach of duty in so doing. They might, if they had seen fit, have invested the whole $20,000 for Mrs. Sullivan exclusively in stock within the year; and if they had, she would from the time of the investment have been entitled to the income." After citing *Pearson* v. *Pearson*, 1 Sch. & L. 10, in which Lord Redesdale said: "The executor may pay the legacy within the twelve months, but he is not compelled to do so," and *Angerstein* v. *Martin*, 1 Turn. & Russ. 232, in which Lord Eldon said: "I know of no case which prevents executors, if they choose, from paying legacies or handing over the residue within the year, and if it is clear, currente anno, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing," Judge Story added, "It is sufficient for my guidance that it is founded in reason, and has the authority of such extraordinary judges as Lords Eldon and Redesdale to support it." *Evans* v. *Inglehart*, 6 Gill & J. (Md.) 171; *Biays* v. *Roberts*, 68 Md. 510; *Turnage* v. *Turnage*, 7 Ind. 127; *Watts* v. *Watts*, 2 McCord, 77; *Williams* v. *Ely*, 13 Wis. 1; *Hitchcock* v. *Merrick*, 15 Wis. 578; *Curts* v. *Brooks*, 71 Ill. 125; 2 Roper on Legacies, 188; 11 Am. & Eng. Ency. of Law, 1167; 18 Am. & Eng. Ency. of Law, 792.

The probate judge was right in holding, in this case, that the executors might properly pay the legacies of stocks to Chase and

Lillian within the year, and that the dividends in the stocks made payable after the transfer of the stocks belonged to the legatees.

It appears that the Pepperell stock was transferred to the legatees on the books of the company prior to January 20, 1908, but was not formally delivered to them until February 1, 1908. It also appears that prior to January 20, 1908, the Pepperell Company had declared a dividend to stockholders of record on January 20, payable February 1. The legatees received this dividend. They were entitled to it. The fact that the dividend was declared prior to their ownership of the stock is not the test. They were stockholders of record on January 20, and they were actually in possession of the stock on February 1, when the dividend was made payable. The transfer of the stock carried with it the right to the dividend payable that day.

But for the admitted error in not charging the executors with a Pepperell dividend of $36 paid August 1, 1908, on other Pepperell stock, the appeal must be sustained. The case will be remanded to the Supreme Court of Probate for decree in accordance with the opinion.

Appeal sustained. Case remanded for decree in accordance with opinion.

In Equity.

HARRIET B. BEALE *vs.* EVANGELINE PEARSON SWASEY, Executrix.

Cumberland. Opinion September 20, 1909.

Attorney and Client. Executors and Administrators. Claims Against Estates of Decedents Barred by Special Statute of Limitations. "Culpable Neglect" Defined. Revised Statutes, chapter 89, section 21.

An attorney, within the scope of his employment, represents his client. His acts of omission as well as commission are to be regarded as the acts of the party he represents. The neglect of the attorney is equivalent to the neglect of the party himself.

In relation to claims against the estates of decedents, Revised Statutes, chapter 89, section 21, provides as follows:

"Sec. 21. If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

Held: That relief under this statute is grantable only in those cases that are unmistakably shown to be within the express provisions of the statute strictly construed.

Where the plaintiff brought a bill in equity under the provisions of Revised Statutes, chapter 89, section 21, and the defendant demurred, *held* that the allegations in the bill did not sufficiently show that the plaintiff's neglect to enforce her claim against the estate of the decedent within the time limited by statute was not the result of culpable neglect within the meaning of said chapter 89, section 21, and chargeable to her.

The phrase "culpable neglect" as used in Revised Statutes, chapter 89, section 21, has been judicially defined to mean "censurable," "blameworthy," neglect, the neglect which exists when the loss can be fairly ascribed to a plaintiff's own carelessness, improvidence or folly.

In equity. On appeal by plaintiff. Dismissed.

Bill in equity under the provisions of Revised Statutes, chapter 89, section 21, brought by the plaintiff creditor against the execu-

trix of the estate of Maria A. Bent, late of Portland, deceased, to recover judgment on a claim against the estate of said deceased and which said claim had become barred by the special statute of limitations, to wit, section 14 of said chapter.

The defendant both demurred and answered. The Justice of the first instance filed a pro forma decree dismissing the bill and the plaintiff appealed.

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

John Howard Hill, for defendant.

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

KING, J. This suit in equity is brought against the estate of Maria A. Bent under the provisions of R. S., chap. 89, sec. 21, viz:

"If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of the opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

The defendant both demurred and answered the bill, and the case is before the Law Court on appeal from a pro forma decree sustaining the demurrer and dismissing the bill.

In support of the demurrer it is contended, among other grounds, that the facts alleged in the bill show that the plaintiff is chargeable with culpable neglect in not bringing suit on her alleged claim within the time limited by statute.

The phrase "culpable neglect" as used in this statute has been often judicially defined. See *Bennett* v. *Bennett*, 93 Maine, 241; *Holway* v. *Ames*, 100 Maine, 208. It is "censurable," "blameworthy" neglect—"the neglect which exists when the loss can fairly be ascribed to his (plaintiff's) own carelessness, improvidence or folly."

Accordingly it has been held to be "culpable neglect" in the creditor of an estate to delay the enforcement of his claim even at the special request of the estate, and relying upon the distinct promises and assurances of the administrator or executor that the claim should certainly be paid. See *Waltham Bank* v. *Wright*, 8 Allen, 121; *Jenney* v. *Wilcox*, 9 Allen, 245; *Wells* v. *Child*, 12 Allen, 333.

The allegations of this bill, respecting the delay to bring suit, considered in the most favorable light for the plaintiff, are in substance, that she placed her claim with an attorney in good standing with express instructions to enforce it against the estate, that she was assured by him it was being properly attended to, and that she relied upon him and believed his assurances, and supposed her claim was in suit within the time limited, "but in some way to the plaintiff unknown or by some oversight or inadvertence or negligence on the part of the attorney" no action on her claim was seasonably begun, although, as she afterward learned, the executrix had declined and refused to pay the claim.

We think these allegations are not sufficient to relieve the plaintiff of the charge of "culpable neglect" within the meaning of that phrase as used in the statute. An attorney, within the scope of his authority, represents his client. His acts of omission as well as commission are to be regarded as the acts of the party he represents. The neglect of the attorney is equivalent to the neglect of the party himself. *Kean* v. *Strausberger et al.*, 71 Ill. 413, a case very much in point with the case at bar. See also cases collected in note on page 36, Vol. 31, L. R. A. To entitle the plaintiff to the relief provided for by this statute, it is not enough for her to allege and show that she entrusted the enforcement of her claim to an attorney in good standing upon whom she relied, and that he did not prosecute it as directed by her, for his neglect to act in the premises must be considered as her neglect. If his neglect is culpable, then she must be chargeable with culpable neglect, at least, in the absence of any special circumstances making it equitable for her to be relieved therefrom. But no such special circumstances appear in this case. There is no allegation as to how it happened that the attorney did not seasonably bring suit on the plaintiff's claim. On the other

hand she alleges that she does not know why it was not done, suggesting however that it was "oversight or inadvertence or negligence on the part of the attorney."

The statute limitation within which claims may be enforced against the estate of deceased persons is important, serving the worthy purpose of preventing unreasonable delays in the administration and distribution of estates. Since the granting of relief under the provisions of the remedial statute here invoked contravenes this purpose of the special statute of limitations, such relief is grantable only in those cases that are unmistakably shown to be within the express provisions of the remedial statute strictly construed.

It is the opinion of the court that the allegations of the plaintiff's bill, which are admitted by the demurrer, do not sufficiently show that the neglect to enforce her claim against the estate of Mrs. Bent within the time limited by statute was not the result of culpable neglect, within the meaning of this statute, and chargeable to her.

In the language of this court in *Bennett* v. *Bennett*, supra: "To hold otherwise would be to practically nullify the statute of limitations and indefinitely prolong the administration of estates."

It is unnecessary to consider the other grounds urged by the defendant in support of the demurrer.

Appeal dismissed. Decree of single Justice affirmed with additional costs.

CHARLES A. HIGGINS *vs.* PORTLAND RAILROAD COMPANY.

Cumberland. Opinion September 20, 1909.

Street Railroads. Negligence. Proximate Cause. Newly-Discovered Evidence.

Where in an action on the case to recover damages for personal injuries sustained by the plaintiff and for injury to his property caused by a collision between an electric car of the defendant and the plaintiff's truck wagon, and the verdict was for the defendant and the plaintiff filed a general motion for a new trial also a special motion based on the ground of newly-discovered evidence,

Held 1. That the evidence utterly failed to support the only allegation of negligence contained in the writ, namely, that the car was being driven at a "high, rapid and excessive rate of speed."

2. That it was the duty of the plaintiff to use due care in so placing his team as not to obstruct the passage of the defendant's cars, and having placed it he impliedly invited the employees to pass if there was ample space. From the attitude and conduct of the team they had a right to assume that the plaintiff had so placed it that it would not move.

3. That the evidence abundantly proved that the proximate cause of the accident was the moving of the horse and the consequent throwing of the wagon top against the car, and that the wagon ran into the car, and not the car into the wagon.

4. That whether the injury was caused by the want of due care on the part of the plaintiff in not properly placing his team or not trigging the wheels to prevent their moving, or whether it was due to an accident for which neither party was responsible, it was not necessary to determine but it certainly could not be attributed to any negligence on the part of the defendant or its servants.

5. That the newly-discovered evidence was not of such kind or strength as to demand a new trial under the rule well settled in this State.

On motions by plaintiff. Overruled.

Action on the case to recover damages for personal and property injuries received by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for defendant. Plaintiff filed a general motion for a new trial and also a special motion for a new trial on the ground of newly-discovered evidence.

The case is stated in the opinion.

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

Libby, Robinson & Ives, for defendant.

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

CORNISH, J. The plaintiff asks to have a verdict for the defendant, in an action on the case for negligence, set aside as against the evidence and also on the ground of newly-discovered evidence. The case arises out of a collision between the side of one of the defendant's electric cars and the top of the plaintiff's truck wagon, the plaintiff who was standing at the rear of the wagon being struck by the top, in its fall, and injured. The situation as revealed by the evidence was this.

The accident occurred in the forenoon of April 27, 1908 on Middle street in the city of Portland, one of the principal streets of the city, with electric cars passing very frequently. The track at this point, and for about 100 feet above, was straight with a five per cent grade. The plaintiff, a truckman, drove up the left hand side of this street between the sidewalk and the track, with his team heavily loaded with merchandise for delivery at various points, and stopped in front of the Homsted Store for delivery there. The space between the curb stone and the nearest rail at that point was too narrow to allow the team to be placed at right angles with the street, the distance being twelve feet and three inches while the length of the body of the wagon alone was about thirteen feet. The plaintiff therefore placed his wagon so that the rear hind wheel was backed firmly against the curb stone, the body of the wagon standing diagonally towards the track, and the horse was swung around sharply toward the sidewalk on the left and in the direction from which the cars came. The wagon was of the style known as a cut under, the forward wheels turning beneath the body without any interference with the sides, and had a top supported by four stakes one at each corner of the body, and projecting about six inches over the supports.

With the team in this position the plaintiff began to unload the Homsted merchandise and two cars passed without obstruction while this was being done. He finished and was about to step upon the team and drive up the street to another store, when a third car, the one in question, came down the track. About four-fifths of

this car also had passed when the top of the wagon came in contact with the side of the car about eight feet from the ground and seven feet from the rear of the car with the result before described.

The jury have found no liability on the part of the defendant and it is the opinion of the court that the verdict was not erroneous.

The only allegation of negligence in the writ is the "high, rapid and excessive rate of speed" at which the car was being driven, but the evidence entirely fails to support this contention. The car had stopped for a passenger to alight at a point about 115 feet from the wagon and then proceeded slowly a short distance when the motorman, seeing the team, stopped again and looked out the side of the forward vestibule to ascertain if there was ample clearance and saw that there was. The conductor testified that when the car stopped this second time without signal from himself, he looked out of the rear vestibule to ascertain the cause and observed the team. He sighted along the side of the car to the top of the wagon and deciding that there was ample room, he gave the signal to go ahead, which was done, and no difficulty was experienced until almost the entire car had passed.

Certainly the jury were justified if they believed this evidence, and it commends itself to the court as honest and truthful, in finding that the servants of the defendant used that degree of watchfulness and care which the law requires. Both parties had a right to the reasonable use of the street and upon both the law placed certain duties and obligations. It was the duty of the plaintiff to use due care in so placing his team as not to obstruct the passage of the defendant's cars, a duty which he himself apparently recognized, because he testifies that he "swung the horse around so as to clear the cars so they could come down by." "Electric street cars have, in a qualified way at least, the right of way as against persons on foot or travelling with carriages and teams in the same manner as ordinary steam railroads have. And all persons passing on foot or travelling by the common methods on the highway should carefully observe the movements of the street cars and leave them unobstructed passage as well as they reasonably can." *Flewelling* v. *R. R. Co.*, 89 Maine, 585; *Atwood* v. *Railroad Co.*, 91

Maine, 399. On the other hand it was the duty of the motorman and conductor to use due care in the management of their car in order to avoid injury to the plaintiff's team. Vigilance was required of them, and even though the plaintiff had been negligent in placing his team, that would not excuse them in running into it if a collision could have been avoided by the exercise of reasonable care on their part. Whether the plaintiff fulfilled his duty is a matter of some doubt. He had control of the team and could have placed it in such position as he saw fit. He could have located it parallel with the sidewalk, or could perhaps have trigged the forward wheels to prevent the wagon moving. Doubtless he thought he had allowed ample room for passage, and he had if the team remained stationary. Whether he was guilty of contributory negligence in not adopting further precautions it is unnecessary to decide.

But there is certainly no evidence of failure of duty on the part of the defendant's servants that would warrant the reversal of the verdict of a jury whose sympathies would naturally be with the plaintiff rather than with the defendant, a corporation. Both the conductor and the motorman acted with admirable caution. From the attitude and conduct of the team they had a right to assume, if there was ample space to clear it, that the plaintiff had so placed it that it would not move. He impliedly invited them to pass and they had a right to accept the invitation provided the space was ample. Their judgment on that point was confirmed because nearly the whole car moved safely by before the contact. What took place then? One of the vehicles must have changed its position. It could not have been the car because that was moving on a fixed straight course without lateral motion. It must have been the wagon and the evidence of two disinterested witnesses prove that to have been the fact. A passenger saw the top of the wagon settle back into the car just as it was opposite the window at which he was sitting, and a bystander saw the cause of this change, as he noticed the horse step to one side and then settle back producing the movement of the wagon top and the contact with the car.

This is the key to the accident and forces the inevitable conclusion that the wagon ran into the car and not the car into the wagon.

The collision may have been due to the plaintiff's want of care or perhaps to accident, but certainly it cannot be attributed to any negligence on the part of the defendant or its servants.

The general motion cannot be sustained.

The newly-discovered evidence is not of such kind or strength as to demand a new trial under the rule laid down by this court in the recent cases of *Parsons* v. *Railway Co.*, 96 Maine, 503; *Mitchell* v. *Emmons*, 104 Maine, 76.

Motions overruled.

HERBERT ELMER WYMAN, pro ami, *vs.* ALBERT P. BERRY.

Kennebec. Opinion September 21, 1909.

Master and Servant. Vice-Principal. Contributory Negligence.

The plaintiff, who was the servant of a third party, was loaned by his employer to the defendant's servant, Wood, for a day's work on the defendant's farm, under circumstances which warranted the jury in finding that Wood had authority to procure the service. The plaintiff was then sixteen years of age. Wood and the plaintiff undertook to cut up some straw for bedding. For this purpose they used a feed cutter, the power for which was supplied by a gasolene engine. Wood fed the straw into the machine, where it was cut by knives affixed to a shaft revolving at a speed of about 900 revolutions a minute. The plaintiff was directed to remove the chopped straw after it left the machine, and carry it away in a basket, or baskets. The chopped straw, as it came from the spout, so called, of the feed cutter, either fell on the floor or, if the plaintiff was there with his basket, into the basket. Around the spout was a projection,—a rim or flange,—and from the outer rim of this flange, at the top, in to the revolving knives, was a distance of from three and a half to four inches. The spout was eleven inches wide, and about sixteen inches from top to bottom, and the top of it was about thirty inches from the floor. The knives were covered by a hood, and were not visible to the plaintiff, in any position he would naturally assume in removing the bedding. The plaintiff had never worked about a feed cutter before, and was not

acquainted with its mechanism. He did not know the exact position of the knives. But he must have known that knives, or some cutting apparatus, was within the machine. The plaintiff was told in the beginning to take the straw away from the machine, "the straw that piled up." Soon the machine clogged. The plaintiff was then told "to keep it clear." No other specific direction was given at any time. The clogging was in the iron rolls which conducted the straw to the knives, and not in the knives themselves. But it was claimed for the plaintiff that he understood that the straw was clogged in the knives. Sometime afterwards, while he was away emptying his baskets, straw accumulated on the floor, when he returned he put this into one basket, and then took the other basket, and placing it before him, stood in front of the spout, and caught the straw as it came down, to use his own expression, "combed it right down into the basket with both hands, dog paddle style." While he was doing this, the machine clogged again. He noticed that the machine was shaking, and, as he says, "he went to pull the straw away," and got his fingers into the knives. The plaintiff complains of want of proper instructions, and the defendant, among other things says the plaintiff was guilty of contributory negligence.

Held: 1. That though the plaintiff was loaned to the defendant by his own employer, the defendant owed to him the duties which a master owes to a servant.

2. That in giving, or failing to give, warning of hidden dangers, Wood was not a fellow servant of the plaintiff, but was a vice-principal and as such represented the master.

3. That the defendant was not bound to give the plaintiff warning of all possible, concealed, or unknown, dangers incident to the use of the machine, but only of such as might expose him to injury in the course of his employment, that is to say, while doing his work in the way he was told to do it, if told at all, or, if not told, in any way in which he might reasonably be expected to do it, taking into account his age, intelligence and experience.

4. That the plaintiff was guilty of contributory negligence.

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

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant's vice-principal. Plea, the general issue. Verdict for plaintiff for $2166.63. 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.

Guy A. Hildreth, for plaintiff.

O. B. Clason and Geo. W. Heselton, for defendant.

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

SAVAGE, J. Action on the case for personal injuries alleged to have been caused by the negligence of the defendant's vice-principal, for which the defendant is claimed to be responsible. The plaintiff recovered a verdict, and the case comes up on defendant's exceptions and motion for a new trial. We will consider the questions arising under the motion.

It appears that the defendant resides in New York, but owns a farm in Litchfield, which he visits several times a year. In 1906, there was living on the farm one Wood and his wife. Wood was employed by the defendant to take care of the stock and do whatever was necessary about the buildings, and to work on the farm whenever he could. In the defendant's absence, he had charge of the farm, but, as the defendant claims, under his specific directions.

In May, 1906, the plaintiff, then sixteen years old, was employed by one Frank Berry, a neighbor, and a relative of the defendant. Frank Berry, by arrangement with the defendant, was accustomed to work at times on the defendant's farm. Wood and Frank Berry were in the habit of "changing works,"—Wood working for Berry, and at other times Berry working for Wood. But whether the defendant had knowledge of, and consented to, this practice is in dispute. For several days in the early part of May, Frank Berry took the plaintiff with him to work on the defendant's farm, doing work which he had agreed with the defendant to do. May 11, Wood asked Frank Berry to let him have the plaintiff to work for him that day, and Berry consented. According to this arrangement, the plaintiff went to the defendant's farm and worked with Wood. Though working for Wood, the plaintiff remained the servant of Berry. Berry merely loaned him to Wood. After doing other things, Wood and the plaintiff undertook to cut up some straw for bedding. For this purpose, they used a feed cutter, the power for which was supplied by a seven horse power gasolene engine. Wood fed the straw into the machine, where it was cut by knives affixed to a shaft revolving at a speed of about 900 revolutions a minute. The plaintiff was directed to remove the chopped straw

after it left the machine, and carry it in a basket or baskets, about twenty feet, and put it in a pile in the tie-up. The chopped straw, as it came from the spout, so called, of the feed cutter, either fell on the floor, or, if the plaintiff was there with his basket, into the basket. Around the spout was a projection,—a rim or flange,—and from the outer edge of this flange, at the top, in to the revolving knives, was a distance of from three and a half to four inches. The spout was eleven inches wide, and about sixteen inches from top to bottom, and the top of it was about thirty inches from the floor. The knives were covered by a hood, and were not visible to the plaintiff, either standing erect, or in any position he would naturally assume in removing the bedding. The plaintiff had never worked about a feed cutter before, and was not acquainted with its mechanism. The hood was not removed while he was present, and he did not know the exact position of the knives. But he undoubtedly knew that knives, or some cutting apparatus, was within the machine. While engaged in removing the bedding, the plaintiff put his right hand into the spout, under the flange far enough so that four fingers and a part of the thumb were cut off.

The defendant contends, in the first place, that Wood had no authority to hire the plaintiff from Frank Berry, that Wood was an agent with expressly limited powers and duties; that he had no duties to perform which required the assistance of others, and from which a power to hire could be implied, except in the use of the feed cutter; and that for this service, the defendant had already provided other men. In short, the defendant claims that Wood was merely a farm servant, acting at all times under specific directions. The plaintiff, on the other hand, says that Wood was a vice-principal, that he had authority to "change works" with Berry, or at least that he had authority or was held out by the defendant as having authority, to hire a man to do such work as the plaintiff was employed by him to do.

We will not undertake to analyze, or give a synopsis of, the voluminous evidence on this much contested point. It is enough to say that if the defendant's contention rested upon this point alone, we should not disturb the verdict.

We assume, then, that the plaintiff was properly hired by Wood of Frank Berry to do the defendant's work. And though the plaintiff was technically still a servant of Frank Berry, yet having been put by Berry to work for the defendant, by authority of the defendant, he became, as to that work, the servant of the defendant, and the defendant owed to him the duties which a master owes to a servant. This proposition is not denied, nor can it be successfully. *Coughlan* v. *Cambridge*, 166 Mass. 268; *Clapp* v. *Kemp*, 122 Mass. 481.

The plaintiff claims that the defendant failed to perform the duties he owed to him, in two respects. First, that the machine as it was being used was unsafe, in that it was being used without an elevator, and secondly, that the defendant did not instruct him with regard to the machine, and did not warn him of the dangers attendant upon its use. As to the first proposition, only a word need be said. The machine was so constructed that an elevator could be used with it to carry away matter after it was cut. Such an elevator would presumably be useful when ensilage was being cut up. But the defendant was under no obligation to use the elevator. He might adopt any other means he saw fit for taking away the cut up matter. How an elevator could have been of service on the occasion in question is not apparent.

If, however, there were any risks incident to the use of the machine as it was, which were not known by the plaintiff, or which were not obvious to nor appreciable by him, especially considering his youth and inexperience, and which would expose him to danger in the course of his employment, it was the defendant's duty to warn him of them, and give him appropriate instructions so as to secure his safety. *Campbell* v. *Eveleth*, 83 Maine, 50; *Wormell* v. *M. C. R. R. Co.*, 79 Maine, 397; *Welch* v. *Bath Iron Works*, 98 Maine, 361; *Erickson* v. *Monson Consolidated Slate Co.*, 100 Maine, 107. And this duty the defendant could not delegate to another so as to escape responsibility. *Welch* v. *Bath Iron Works*, supra; *Donnelly* v. *Granite Co.*, 90 Maine, 110. In giving, or failing to give, warning of hidden dangers, Wood was not a fellow servant of the plaintiff. In this particular he represented the

master. As to the duty of giving instructions, he was a vice-principal. The test of vice-principalship is not the relative grade of the servants employed, but the nature of the duty to be performed. *Small* v. *Allington, etc., Mfg. Co.*, 94 Maine, 551. Therefore the defendant is to be held responsible for any failure of Wood to give the plaintiff requisite instructions.

But in this connection it should be said that the defendant was not bound to give the plaintiff warning of all possible, concealed, or unknown, dangers incident to the use of the machine, but only of such as might expose him to injury in the course of his employment, that is to say, while doing his work in the way he was told to do it, if told at all, or if not told, in any way in which he might reasonably be expected to do it, taking into account his age, intelligence and experience.

According to the version of the facts as given by the plaintiff, he was told in the beginning to take the straw away from the machine,—"the straw that piled up." Very soon the machine clogged once, as it seems it was apt to do, if a large or untangled "wad" of straw was fed into it. It is conceded that the clogging was in the iron rolls which conducted the straw to the knives, and not in the knives themselves. But it is claimed for the plaintiff that he understood that the straw was clogged in the knives. He says that at the time of this clogging Wood told him "to keep it clear." He testifies to no other or further direction by Wood. Sometime afterwards he emptied his baskets, and when he came back a pile of straw had accumulated on the floor. He put this into one basket, and in so doing he cleaned up nearly all that was on the floor. He then took the other basket, and placing it before him, stood in front of the spout and caught the straw as it came down,—to use his expression,—"combed it right down into the basket with both hands, dog paddle style." While he was doing this, the machine clogged again. He noticed that it was shaking, and he "went to pull the straw away," and got his fingers into the knives.

It may well be doubted whether, in view of the character of the work to which the plaintiff was assigned, there was any duty on

the part of the defendant or Wood, to instruct the plaintiff in regard to the danger of being cut by the knives. As we have seen, the defendant was not bound to give warning of a danger that was not reasonably to be anticipated. There was nothing, it seems to us, in the general directions, "to take the straw away," "to keep it clear," which made it the duty of the plaintiff, or which should have made it seem to him as his duty, to put his hands under the hood to pull the straw away from the knives. If this be so, the defendant was not in fault for not giving warning about the knives. But the plaintiff contends that, under the circumstances, the direction, "keep it clear," given at a time when the machine clogged, would naturally and reasonably give a person of his age and inexperience to understand that he was expected to get the straw away from the point where he supposed the straw clogged, namely, under the hood, where it seems the knives were, though unknown to him as he claims. If this be so, or, if Wood saw that the plaintiff was taking the straw away in an improper and dangerous manner as the jury may have found, then he should have warned the plaintiff of the danger. He should have considered the age of the plaintiff, his lack of experience, and the fact that the knives were concealed from view, and instructed him to keep his hands away from the knives.

It is, however, unnecessary to determine whether the plaintiff's propositions of fact are sustainable, for it is clear that the defendant's last contention, namely, that the contributory negligence of the plaintiff contributed to his injury, must be sustained.

The plaintiff was bound to show not only the defendant's negligence, but affirmatively that no want of due care on his own part contributed to the injury. *Colomb* v. *P. & B. St. Ry.*, 100 Maine, 418. And on this point we state the situation as it is stated by the plaintiff's counsel in argument. It is claimed by him that the cause of the clogging of the machine was irregular feeding by Wood; that the straw choked in the rolls before it got to the knives, and but little then came out of the spout; that the plaintiff, in his ignorance and inexperience, thought the reason more straw did not come out of the spout was because it was choked in the spout, and

remembering the order of Wood, "to keep it clear," put his hands into the spout "to keep it clear," and thus was injured.

Assuming all this to be true, we cannot resist the conclusion that it was gross carelessness,—a piece of foolhardiness,—even for a person of his age, to put his hands out of sight under the hood, into a place where he knew that knives or some other appliances were cutting the straw. His testimony shows that he is a young man of a good degree of intelligence, and he must have known, if he used that intelligence, that he could not remove the straw from the cutting apparatus, whatever it was, without the liability of getting his hands into dangerous proximity to the apparatus itself. The knives were beyond his sight. He did not know where they were. And this made it all the more careless for him to do what he did. Though the age and intelligence of a party are always important factors in determining whether due care has been used, yet the plaintiff was bound to use that degree or extent of care which ordinarily prudent persons of his age and intelligence are accustomed to use under like circumstances. *Colomb* v. *P. & B. St. Ry.*, supra. Measuring the plaintiff's conduct by this standard, we think it must be held to be careless. If the plaintiff himself had been asked, before the accident, if it would be safe to put hands, with the machine in operation, in the place where he afterwards put his, we think it hardly admits of a doubt that he would have answered, "No."

It is unnecessary to consider the exceptions.

Motion sustained.
New trial granted.

ELLIS LORD et als., Appellants from decree of Judge of Probate,

ESTATE OF LEONARD LORD.

Somerset. Opinion September 25, 1909.

Wills. Revocation. Lost Will. Evidence. Presumptions. Revised Statutes, chapter 76, section 3.

1. The existence of a lost will must be proved by clear, strong, satisfactory and convincing evidence.
2. If an instrument propounded as a revocation of a will be in the form of a will, it must be perfect as such and subscribed and attested as required by the statute.
3. Neither water stains upon a will nor pencil marks thereon will be held to indicate the revocation of the will, in absence of declarations of the testator made at the time, when the evidence shows that the presence of the stains and pencilings may have been the result of accident or made for a purpose other than immediate revocation.
4. When a will is once regularly made, the presumption of law is strong in its favor and the intention to revoke must be plain and without doubt.

On report. Appeal from decree of Judge of Probate. Decree affirmed.

Appeal from the decree of the Judge of Probate, Somerset County, allowing a certain instrument dated May 17, 1903, as the last will and testament of Leonard Lord, late of Detroit in said county. The "reasons of appeal" were as follows:

"1st. Because said instrument so purporting to be the last will and testament of said Leonard Lord and so allowed is not the last will and testament of said Leonard Lord.

"2nd. Because at the time of the making and executing of said instrument so allowed as the last will and testament of said Leonard Lord, he, the said Leonard Lord, was not of sound and disposing mind and memory.

"3d. Because said will so as above allowed was made and signed by said Leonard Lord under undue and improper influence and was procured to be made and signed by said improper influence.

"4th. Because said instrument purporting to be the last will and testament of the said Leonard Lord as allowed, was revoked by the said Leonard Lord by his making and signing a subsequent will duly and legally executed as a will is required to be under the laws of the State of Maine.

"5th. Because said instrument purporting to be the last will and testament of the said Leonard Lord as allowed, was revoked by the said Leonard Lord, in his lifetime, by being intentionally cancelled, torn, and obliterated by the said Leonard Lord or by some person by his direction and in his presence."

After the evidence had been taken out in the appellate court, the case was reported to the Law Court for a decision upon the competent and legally admissible evidence.

W. S. Townsend, *Louis C. Stearns*, *Charles F. Johnson*, *and Sewall W. Abbott*, for plaintiffs.

Manson & Coolidge, for Heman Norton, executor, et als.

Herbert M. Heath, for Fred R. Lord, legatee.

The case as stated by Mr. Justice BIRD, who prepared the opinion, is as follows:

Leonard Lord died on the thirteenth day of June, 1906, leaving neither widow nor lawful issue. The will admitted to probate, which purported to be executed on the eleventh day of May, 1903, was found shortly after his death in a secretary with other papers among which were sundry policies of insurance, all of which had expired except one, the draft of a will admitted to be in the handwriting of Abel Davis, Esq., late of Pittsfield, Me., and the draft of, or memorandum for, a will in the handwriting of one Daisy P. Bartlett. The probated will, after giving numerous money legacies, provided for his widow, if any, the care of his cemetery lot, disposed of the residue among five legatees and appointed Heman Norton his executor. This will was typewritten except the provision for the care of the cemetery lot, the residuary clause and some unimportant particulars which were, it is admitted, in the handwriting of said Davis who is one of the witnesses. Three of the items of this will were marked thus X in lead pencil, lead pencil lines were drawn through sundry words and expressions and

sundry interlineations were penciled upon it in the handwriting of said Davis. The signatures of testator and witnesses were not marked. The paper upon which this will was written was water stained as were certain other papers, including the unexpired policy of insurance, which were found in the secretary, and several bank books found in the safe of deceased. Neither the water stains nor the pencil marks rendered the will illegible.

The provision for the widow, if any, contained in this will was as follows: "In case I should marry and leave a widow, I give and bequeath to her the sum of five thousand dollars. This shall be in full for all claims by inheritance or otherwise she may have to my estate, by virtue of said marriage relation between us."

The draft in the handwriting of Mr. Davis followed the probated will and the pencilings thereon with such changes as a careful and intelligent scrivener would make. The clause relating to the widow was as follows, "In case I should marry and leave a widow I give and bequeath to her the sum of five thousand dollars. This to be in full of all claims of inheritance, dower or otherwise that should or might to my estate by virtue of said marriage relations between us; or in lieu of my marrying if I should have a housekeeper, who should stay with me and see me through and use me well, care for me properly in sickness as well as health, then she is to have said sum of five thousand dollars."

One Daisy P. Bartlett was at the home of Leonard Lord from Saturday, July 22, 1905, until Friday, August 25, following. Mr. Lord was evidently desirous of marriage with her, or, failing that, to secure her services as housekeeper for the remainder of his life. She states that she had been at his house possibly two weeks and a half — a little while — when he one day came home from Pittsfield, laid a paper in her lap and said "There I have made my will, and I want you to read it;" that she complied; that it contained a provision for the benefit of a housekeeper; that it was written with a pen by Abel Davis, was signed by Lord and that the names of Abel Davis and two other witnesses were signed to it; that she returned the paper to him and that he placed it in the secretary; that on the following morning, he again produced the paper, asked

her to read it again and decide to stay. She further states that, as she was to have three weeks vacation, she had but a short time to decide; that she read the paper again, perhaps not thoroughly, and decided to stay two weeks longer; and that on the Tuesday night prior to her departure on Friday, she told Mr. Lord of her determination not to remain, when he remarked that he was glad he had made his will and that Ellen Norton was provided for as his wife wished. Miss Bartlett can remember but little of the contents of this August will, save that she has the impression that Mrs. Norton received $2000, Mrs. Head $1000, Mrs. Brown $600, Fred Lord the home place. She states that there were nine residuary legatees, of whom she mentions the names of the five residuary legatees of the probated will and of Mrs. Brown, and that Heman Norton was appointed executor.

Two letters written in the summer of 1906 by Miss Bartlett were in evidence in which she states that the paper above referred to—the alleged August will—was signed by Leonard Lord and witnessed by two people. Two witnesses also testify to her making to them statements like in substance during the same summer and that she stated that by this will Elizabeth Brown was to receive six hundred dollars and that provision was made for the housekeeper in the sum of five thousand dollars and that she could not recollect the other provisions. In both the letters and the statements she disavows recollection of the names of any of the witnesses of the will.

Miss Bartlett testifies that at the dictation of Lord, he having the alleged August will and other papers before him, she wrote the draft of a will which she identifies as the one found after his death with the will offered for probate and the draft in the handwriting of Abel Davis. This she thinks was made before the alleged will was brought to her by Davis although, when confronted on cross examination by a letter written by her in the summer of 1906, in which she states it was some two weeks after the production of the alleged will of August 1905, she does not deny the statement of the letter. Later she fixes the date as "a little while before I came away, August, 1905." This draft follows quite closely the Davis draft, two or three legacies being omitted, one or two being added and amounts changed in

some instances. The clause as to the widow is "In case I should marry and leave a widow, I give and bequeath to her the sum of five thousand dollars: this to be in full for all claims of inheritance, dower or otherwise should or might to my estate by virtue of said marriage relations between us, or in lieu of any marrying, if I should have a housekeeper who should stay with me and see me through and use me well, care for me in sickness as well as in health, then she is to have said sum of five thousand dollars." Miss Bartlett has no recollection of having seen the will of 1903 or the Davis draft prior to the death of Leonard Lord.

One Carr testifies that in the latter part of the summer or early part of the fall of 1905, he thinks in August, he was called into the office of Davis in Pittsfield, that there were also there Leonard Lord, Abel Davis, and one Corey; that Davis said there was a document he wanted me to sign, that Davis read part of it, that he cannot remember all he read "but the last part of it was 'the will and testament of Leonard Lord.'" He is unable to state if Davis and Corey signed it and is not positive if it was a will. He states he signed it and put his name under that of somebody else and remembers of no other signature being made upon the paper after he entered the office. He was never in the office when Mr. Lord was there but once.

One Corey, a constable, also called by contestants, says he was in the office of Davis in the summer of 1905 with Lord and Davis. He is unable to state that he witnessed any paper, has no recollection of being requested to do so; admits he signed some papers but supposed they were writs. Later, he states, Mr. Carr was called into the office by Davis and signed some paper but does not know if it was the same he signed. He heard Davis say something about a will but cannot say what he said. He did not see Lord sign any paper. Neither Carr nor Corey testify that they saw the signature of Leonard Lord upon the paper signed by either of them nor that he made any remark whatever.

One Foster called by proponent testifies that he was a deputy sheriff during the year 1905 and on the 28th day of September of that year was in the office of Davis at Pittsfield, that Lord and

Carr were there but that he has no recollection of Corey being there or any one else; that he fixes the date from the fact that he made service on that day for Davis of a writ which bears date the same day and which he saw Davis make; that he never saw Lord there but once and Lord and Carr there except at that time. Neither Carr nor Corey deny that Foster was present when they were in the office with Lord and Davis.

No will of Leonard Lord other than that admitted to probate has been found. Abel Davis died on the sixth day of October, 1905.

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

BIRD, J. This appeal from the decree of the Judge of Probate of Somerset County approving and allowing the last will and testament of Leonard Lord is reported to this court from the Supreme Court of Probate for decision upon so much of the evidence as is legally admissible.

It is admitted that the will of 1903, which was allowed by the Judge of Probate, was at the time of its execution, a valid will but it is the contention of the contestants that the testator in the summer of 1905 made a second will, lost or destroyed, which, by reason of its inconsistent provisions worked a revocation of the earlier will.

The existence of a lost will must be proved by evidence clear, strong, satisfactory and convincing: *Connor* v. *Pushor*, 86 Maine, 300, 302; The evidence must be strong, positive and free from doubt; *Newell* v. *Homer*, 120 Mass. 277, 280; See also *Liberty* v. *Haines*, 103 Maine, 182, 190-2. If the instrument, propounded as a revocation of a will, be in the form of a will, it must be perfect as such and subscribed and attested as required by the statute; *Doane* v. *Hadlock*, 42 Maine, 72, 74; *Laughton* v. *Atkins*, 1 Pick. 535, 541; See also *Kimball* v. *Morrell*, 4 Maine, 368; *Dunlap* v. *Glidden*, 31 Maine, 510.

Neither of the alleged witnesses to the will alleged to have been made in the office of Mr. Davis saw the signature of Leonard Lord

upon any instrument and it may be doubtful, at least, if Lord's acknowledgment flowing from the request of Davis to Carr to act as a witness, if made, dispenses with proof of his signature: II Greenl. on Ev., § 676. Nor does the testimony of Carr and Corey as to the attestation of the alleged will appear to meet the degree of proof required. Neither is certain that he subscribed a will as a witness, neither is certain that the other signed the same instrument and neither can state that any third witness signed. And we are not aware of any presumption that under the circumstances Abel Davis signed the paper signed by either of the other witnesses. But it is unnecessary to determine these questions, since, as we must find as matter of fact from the testimony of Mr. Foster that the transaction in the office of Mr. Davis took place on the twenty-eighth day of September, 1905, there is no proof whatsoever of the contents of that paper,—that it contained a revocation clause or made dispositions of property inconsistent with the will of 1903. It cannot, therefore, whether duly executed or not, be material evidence tending to prove revocation of the will of 1903.

The testimony of Daisy P. Bartlett as to the attestation of the alleged will shown her by Lord in August, 1905, is also insufficient to prove due attestation of the will. As she is unable to give the names of two of the alleged witnesses, there can be no proof of their signatures. Her testimony as to the alleged signatures of Abel Davis as a subscribing witness, if offered in support of its genuineness was clearly inadmissible as it is not shown that she had ever seen him write or was then familiar with writings acknowledged to be his, or that she was an expert in handwriting who had qualified herself to testify in the case. Moreover, in view of her oral declarations and those contained in her letters made and written in the summer of 1906 to the effect that the alleged will was signed by two people as witnesses and that she had no recollection of the names of any of the witnesses, the evidence that Abel Davis' name was upon the alleged will is neither convincing nor free from doubt. It is not necessary to add that, as we have found that the transaction in Mr. Davis' office occurred in September, the alleged August will can receive no aid therefrom.

It is not believed that the contestants very seriously urge that the water stains and pencilings upon the will of 1903 worked a revocation of that instrument. There is no extraneous evidence of the circumstances attending the water staining or the pencilings nor evidence of declarations of the testator made when they were made. The water stains do not render the will or any part of it illegible and are apparently the result of an accident in which the unexpired policy of insurance and sundry bank books of the testator were equally involved. The pencilings were made by the attorney of testator and, if assumed to have been made by his direction and in his presence (R. S., c. 76, § 3,) of which there is no evidence, we must conclude, in view of the draft made by the same attorney closely following it and its interlineations and containing a revocation of all former wills and in view of the continually manifested desire of the testator not to die intestate, that the pencil changes were but instructions for the making of a later will which should revoke the earlier and do not indicate that they were made with an intention of immediate revocation. Where a will is once regularly made, the presumption of law is strong in its favor, and the intention to revoke must be plain and without doubt. *Throckmorton* v. *Holt*, 180 U. S. 552, 584-585, 587. See *Strong's Appeal*, 79 Conn. 123.

The will of 1903 was found in the secretary and not in the safe of the testator, where his more valuable papers were kept, but this fact taken in connection with either the water stains or the pencilings, or both, does not afford evidence from which an animus revocandi can be found or presumed: *Throckmorton* v. *Holt*, supra: *Williams* v. *Williams*, 142 Mass. 515: *Fellows* v. *Allen*, 60 N. H. 439.

Decree of the probate court affirmed with costs.

J. ARTHUR CLARKE

vs.

EASTERN ADVERTISER COMPANY, and Trustees.

Cumberland. Opinion September 27, 1909.

Contract of Hiring. Same not Ambiguous. Same Construed.

The plaintiff and the defendant entered into a written contract, by which the defendant employed the plaintiff to solicit contracts for advertising for the term of twelve months. In two separate clauses of the contract, it was stated that "the company agrees to pay J. A. Clarke, fifteen per cent commission." In another it was stated that "the fifteen per cent commission shall be credited and paid," only under certain conditions therein named. The eighth and twelfth clauses were as follows: "Eighth. A statement of account is to be rendered by the company to J. A. Clarke every three months, or within fifteen days thereafter, together with a check for any monies due him after deducting monies drawn." "Twelfth. The company agrees to allow J. A. Clarke a weekly drawing account of fifty dollars to be charged against commissions earned by him and due to him by the company. Said J. A. Clarke is to pay his own travelling expenses."

The defendant discharged the plaintiff before the expiration of the contract period. In an action to recover damages for this alleged breach of the contract,

Held: 1. That the contract was not ambiguous, with respect to the compensation agreed to be paid, and that parol evidence was not admissible to explain it, or to show that the words "weekly drawing account," in the twelfth clause, were intended to mean a guaranteed salary.

2. That the plaintiff was not entitled, under the contract, to a salary of fifty dollars a week, but only to a fifteen per cent commission upon the amount actually paid to the company by the advertisers whose contracts for advertising the plaintiff personally secured.

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

Assumpsit to recover damages for breach of contract of hiring, also certain sums alleged to be due for services and expenses. The defendant filed an account in set-off for $1742.96, and pleaded the general issue. Verdict for plaintiff for $1059.60. The defendant filed a general motion for a new trial and also excepted to several rulings during the trial.

The case is stated in the opinion.

Clarke & Gardner, for plaintiff.

Verrill, Hale & Booth, and Clifford E. McGlauflin, for defendant.

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

SAVAGE, J. Assumpsit to recover damages for breach of contract of hiring; also certain sums alleged to be due for services and expenses. The case comes up on exceptions by defendant to certain rulings made at the trial.

It appears that on January 28, 1907, the parties entered into a written contract, by which the defendant employed the plaintiff to solicit contracts for advertising and perform such other services as might be required, for the term of twelve months, beginning February 4, 1907. The other clauses of the contract which are material to the present discussion are these:—

THIRD. The Company agrees to pay J. A. Clarke fifteen per cent commission upon such advertising contracts as the said J. A. Clarke may personally secure and which are accepted by the Company, and upon nothing else.

SIXTH. The Company agrees to pay J. A. Clarke fifteen per cent commission upon the amount actually paid the Company by the advertisers whose contracts J. A. Clarke may secure, ...

SEVENTH. Payment shall be made only upon the amount actually paid to the company by the advertisers and the fifteen per cent commission shall be credited and paid under no other conditions.

EIGHTH. A statement of account is to be rendered by the company to J. A. Clarke every three months, or within fifteen days thereafter, together with a check for any monies due him after first deducting monies drawn.

TWELFTH. The company agrees to allow J. A. Clarke a weekly drawing account of fifty dollars to be charged against commissions earned by him and due to him by the Company. Said J. A. Clarke is to pay his own travelling expenses.

The plaintiff was discharged by the defendant October 18, 1907, and, as he claims, unjustifiably. And in this action he claims damages for this alleged breach of contract, at the rate of fifty dollars a week, for the remainder of the contract year. In the same count in which this cause is declared, he also alleges that the defendant owed him on October 18, 1907, one hundred and fifty dollars, as salary already earned, under the contract, which he claims to recover. He also has two other counts in his declaration, to recover for other services and for money paid out as expenses.

The first controversy arises concerning the construction of the twelfth clause in the contract, which we have quoted above in full. The plaintiff claims that he was entitled to fifty dollars a week in any event,—that although his compensation was in general measured by commissions earned, yet by that clause the defendants guaranteed him fifty dollars a week, whether his commissions amounted to that sum or not. And at the trial the plaintiff claimed that the twelfth clause was ambiguous, and that being so, parol evidence was admissible to interpret its terms, and to show that the words "weekly drawing account" were intended to mean a guaranteed salary. The presiding Justice so ruled. And to this ruling and to the introduction of parol evidence under it, the defendant excepted.

Of this evidence it is only necessary to say in general that it goes much further than to interpret any phrase in the clause in question. It tends to set up a contract differing from the terms of the writing. It utterly violates the parol evidence rule, which declares that a writing cannot be modified, varied, added to or contradicted by parol. Much of this evidence would be inadmissible, even if, as claimed, the phrase "weekly drawing account" is technical, or uncertain in meaning. But we do not need to consider the character of the evidence further in this case, for taking the phrase "weekly drawing account" in connection with the rest of the contract, and so construing it, we are unable to discover any ambiguity in it. Hence there is nothing to be explained by extrinsic evidence.

The contract again and again fixed the compensation of the plaintiff at a fifteen per cent commission. The reiteration is impressive. The plaintiff was to pay his own expenses. Settlements were to be made every three months, but the defendant was to allow the plaintiff to draw fifty dollars a week, in advance, not as salary, but to be charged against commissions earned and due, and to be deducted at the quarterly settlements from what would otherwise be due, if anything. The parties apparently contemplated that the commissions would amount to more than the advances. But the fact that they did not does not alter the construction of the contract. This exception of the defendant must be sustained.

We deem it unnecessary at the present time to consider the other questions raised by the exceptions.

Exceptions sustained.

STATE OF MAINE *vs.* S. H. MAYO.

Hancock. Opinion October 1, 1909.

Ways. Right to Use Same not Absolute. Automobiles May be Restricted in Such Use. Constitutional Law. Class Legislation. Police Power of the State. Ordinance Authorized by Express Legislative Authority. United States Constitution, XIV Amendment. Constitution of Maine, Article I, section 1. Private and Special Laws, 1903, chapter 420.

The right to use the public streets for the purposes of travel as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the State, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the State, called its police power, be used.

By the exercise of the police power of the State, through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even prevented, if mani-

festly necessary to develop the resources of the State, improve its industrial conditions, and secure and advance the safety, comfort and prosperity of its people.

Reasonable regulations for the safety of the people while using the public streets are clearly within the police power of the State, and in the exercise of that power the State may regulate the speed, and enact other reasonable rules and restrictions as to the use of automobiles upon the public streets.

It is fundamental law that no constitutional guaranty is violated by an exercise of the police power of the State when manifestly necessary and tending to secure general and public benefits.

A law is not to be regarded as class legislation simply because it affects one class and not another, provided it affects all members of that same class alike, and the classification involved is founded upon a reasonable basis. Such a law is general and not special.

When the legislature has constitutional authority to enact a law to promote the public safety, and does enact it, the expediency of its enactment is not to be passed upon by the court. In such case the legislature determines by the enactment that the law is reasonable and necessary.

In certain sections of Maine such as Mount Desert Island and the vicinity of Bar Harbor, public highways have been constructed along precipitous mountain sides, through circuitous defiles, over deep ravines and on the very edges of ocean cliffs. The use on such ways of the powerful, swiftly moving, and dangerous automobile must necessarily endanger all who travel thereon, and especially those who ride in carriages drawn by horses. Presumably to safeguard the people against such dangerous conditions the legislature decided that the ordinance in the case at bar might be made. It seems reasonable and expedient; but as to that the judgment of the legislature is conclusive.

Where a municipal ordinance was not made under a general law authorizing municipalities to make reasonable regulations for the safety and welfare of the people, but was made under a special legislative enactment authorizing such ordinance, *held* that the legislature by its enactment had determined the question of the reasonableness of the proposed ordinance and its decision was conclusive.

Where the town of Eden, under express legislative authority, passed an ordinance closing to the use of automobiles certain public streets in that town, *held* that the legislative enactment which authorized the closing to the use of automobiles such streets, was not repugnant to any constitutional provision and that the ordinance was constitutional.

On agreed statement of facts. Judgment for the State.

This case was reported to the Law Court for decision upon an "agreed statement of facts," which states the case as follows:

"This is a criminal prosecution for breach of a town ordinance.

passed by authority of a special act of the Legislature of Maine. A. D. 1903, approved March 28th A. D. 1903, entitled 'An Act in regard to use of the roads in town of Eden.' Said ordinance having been passed at a special town meeting, legally called and held in Bar Harbor, town of Eden, Hancock County, Maine, on the first day of July, A. D. 1903.

"The respondent S. H. Mayo, was arrested on a warrant duly issued by the Bar Harbor Municipal Court on the 5th day of April, A. D. 1909, entered a plea of not guilty, was found guilty by said court, and sentenced to pay a fine of five dollars and costs of prosecution, from which sentence he appealed to the Supreme Judicial Court for Hancock County.

"All the requirements of the special act and the ordinance passed by the town of Eden, have been complied with on the part of the town, by its municipal officers. The warrant was properly drawn, served and returned. The respondent came in over the Eagle Lake road, from Eagle Lake to the head of Mount Desert street, in said Eden, being one of the roads specified in said special act and ordinance, in a motor vehicle propelled by its own power, with full knowledge of the existence of said ordinance prohibiting the use of automobiles and motor vehicles on said road.

"The Ocean Drive, Bay View Drive, from Duck Brook bridge to Hulls Cove bridge, the Eagle Lake roads as far as Eagle Lake and the Green Mountain drive, are the only entrances by land into that part of the town of Eden, known as the village of Bar Harbor. Closing the above roads make the entrance into Bar Harbor by motor vehicles over existing roads impossible. The said Eagle lake road from Eagle lake to head of Mt. Desert street is a crooked and hilly road."

Chapter 420, Private and Special Laws, 1903, provides as follows:

"Sec. 1. The town of Eden in the county of Hancock, at any legal meeting of the voters thereof may close to the use of automobiles the following streets within its limits: Ocean Drive, Bay View Drive, from Duck Brook bridge to Hull's Cove bridge, the Eagle Lake roads as far as Eagle Lake and the Green Mountain

drive. Any street so closed shall be marked at the entrance thereof by sign boards in large letters 'No automobiles allowed on this road.'

"The term 'automobile' as used in this section applies to all motor vehicles propelled by power. For the violation of this act the town of Eden may vote at said meeting what punishment shall be inflicted for the violation thereof, but for the first offense, not over twenty-five dollars and cost of prosecution; for the second offense, not over twenty-five dollars or thirty days' imprisonment, or both and cost of prosecution.

"Sec. 2. This act shall take effect when approved."

At the special town meeting held in the town of Eden, July 1, 1903, the following votes were passed:

"Article 1.—B. E. Whitney was elected moderator and was sworn by the clerk.

"Article 2—Voted—That the following streets be closed to the use of automobiles in the town of Eden: Ocean Drive, Bay View Drive from Duck Brook bridge to Hulls Cove bridge; both Eagle Lake roads, as far as Eagle Lake, and the Green Mountain Drive.

The following amendment was offered and carried: Any street so closed shall be marked at the entrance thereof by sign boards in large letters, 'No automobiles allowed on this road.'

"Article 3—For the violation of the foregoing act the person so offending for the first offense shall be punished by fine not exceeding $20 and costs of prosecution; for the second offense by a fine not exceeding $25 or 30 days imprisonment or both and costs of prosecution."

Wiley C. Conary, County Attorney, for the State.

Herbert L. Graham, for defendant.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

KING, J. The question presented is this: Is the ordinance of the town of Eden, passed under express legislative authority, closing to the use of automobiles certain public streets in said town, constitutional?

The contention of the defendant is that it violates the Fourteenth Amendment of the constitution of the United States which declares, among other things, that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and that it also denies him that equality of right guaranteed under sec. 1, Art. I, of the Constitution of Maine, "of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

It is an equal right of all to use the public streets for purposes of travel, by proper means, and with due regard for the corresponding rights of others; and it is also too well recognized in judicial decisions to be questioned that an automobile is a legitimate means of conveyance on the public highways. But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority—the State, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the State, called its police power, be used. By the exercise of that power, through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even prevented, if manifestly necessary to develop the resources of the State, improve its industrial conditions, and secure and advance the safety, comfort and prosperity of its people. And it is fundamental law that no constitutional guaranty is violated by such an exercise of the police power of the State when manifestly necessary and tending to secure such general and public benefits. *Commonwealth* v. *Alger*, 7 Cush. 53; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Stone* v. *Mississippi*, 101 U. S. 814; *Barbier* v. *Connolly*, 113 U. S. 27; *Thorpe* v. *Rutland R. R. Co.*, 27 Vt. 150; *Wadleigh* v. *Gilman*, 12 Maine, 403; *Boston & Maine R. R. Co.* v. *County Com.*, 79 Maine, 386; *State* v. *Robb*, 100 Maine, 180; *Jacobson* v. *Massachusetts*, 197 U. S. 11.

That reasonable regulations for the safety of the people while using the public streets are clearly within this police power of the

State is too plain to admit of discussion. Such is and has been the law everywhere.

Since the introduction of automobiles as vehicles of conveyance many cases have arisen and been decided by the courts of last resort in different States respecting the validity and construction of statutes and ordinances regulating their use upon the public highways, and it has been uniformly held that the State, in the exercise of its police power, may regulate their speed and provide other reasonable rules and restrictions as to their use. *Commonwealth* v. *Boyd*, 188 Mass. 79; *Commonwealth* v. *Kingsbury*, 199 Mass. 542; *Christy* v. *Elliott*, 216 Ill. 31; *People* v. *Schneider*, 139 Mich. 673; *People* v. *McWilliams*, 86 N. Y. Supp. 357; *Fletcher* v. *Dixon*, (Md.) 68 Atl. Rep. 875; *State* v. *Swagerty*, 203 Mo. 517. See Note and cases collected therein, Vol. 12 Ann. Cas., page 291.

The defendant however objects against the validity of the ordinance in question here that it applies to automobiles only, and not to all other vehicles that use those streets. He contends that it "operates against a class only," and is therefore special legislation which the Constitution inhibits. That contention cannot prevail. This same objection to the constitutionality of statutes and ordinances regulating the use of automobiles, that they apply only to one particular class of vehicles, has been repeatedly raised in recent cases and as repeatedly decided to be without merit. In *Barbier* v. *Connolly*, supra, Mr. Justice FIELD, speaking for the Supreme Court of the United States, said: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in 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 *Christy* v. *Elliott*, supra, wherein this same objection was made to the validity of legislation regulating the speed of automobiles, the Illinois Supreme Court said: "Such laws as the Act here in question have never been regarded as class legislation simply because they effect one class and not another, inasmuch as they effect all members of the same class alike, and the classification involved in the law is

founded upon a reasonable basis. 'If these laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply: and they are then public in character, and of their propriety and policy the legislature must judge.' (Cooley's Const. Lim.—6th ed.—497-481.)" In *State* v. *Swagerty*, 203 Mo. 517, it is said: "The principal objection urged against the act is that it is a special law because it legislates only upon automobiles, and does not attempt to legislate upon all vehicles using the public highways. We are unable to concur with the defendant in this view. The act applies to and affects alike all members of the same class. . . . It does not refer to particular persons or things of a class and is, therefore, a general and not a special law."

The ordinance in question is general and not special, for it applies equally to all automobiles without discrimination, wherever or by whomsoever owned. The streets in question are closed to all automobiles without any distinctions.

The defendant further contends that this ordinance is unreasonable, and unnecessary for the public safety and welfare.

It is to be noted, however, that the ordinance in question was not made under a general law authorizing municipalities to make reasonable regulations for the safety and welfare of the people.

Here the legislature enacted the specific regulation that might be made. It determined the streets that could be closed to automobiles, and it has passed upon the question whether it is reasonable and for the benefit of the people that those streets should be so closed. When the legislature has constitutional authority to enact a law, and does enact it, the expediency of its enactment is not to be passed upon by the court. The legislature determines if the law is reasonable, and will promote the public welfare, and its determination is conclusive. Such is the well settled law.

"In all cases where the legislature have a constitutional authority to pass a law, the reasonableness of it seems to be a subject for their decision." *Lunt's Case*, 6 Maine, page 414.

"When the legislature decides, that an Act is reasonable and for the benefit of the people, as it does by making the enactment under

the sanction of an oath to support the constitution, that decision must be conclusive, if the enactment be not repugnant to any provision of the constitution, and be not made colorably to effect one purpose under the appearance of effecting another." *Moor* v. *Veazie*, 32 Maine, page 360.

In *Jones* v. *Sanford*, 66 Maine, page 589, the late Chief Justice PETERS, speaking of the authority of the court to pass upon the question of the reasonableness of a by-law or local ordinance, said:

"This principle does not apply, where that is done by a municipal corporation which is directly authorized to be done by the legislature. But where the power granted is a general one, the ordinance passed in pursuance of it, must be a reasonable exercise of the power or it is invalid."

Touching the question as to what extent, if at all, the court could review the reasonableness of the legislation to promote the public welfare, Mr. Justice HARLAN, speaking for the Supreme Court of the United States, in *Jacobson* v. *Massachusetts*, 197 U. S. page 11, said: "Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The right of the legislature, acting under its police power, to make reasonable regulations respecting the use of automobiles on the public highways in order to secure the public safety is well settled, as we have seen. This enactment, which authorized the closing to the use of automobiles of the streets in question, we do not find to be repugnant to any constitutional provision. In making it the legislature decided that the regulation was necessary and reasonable in order to secure the public safety and welfare, and it

cannot be affirmed that such will not be its effect. The regulation is clearly within the police power of the legislature to enact, its manifest tendency and effect is to accomplish the purpose for which it was intended, and accordingly its reasonableness and expediency cannot be reviewed by the court. The judgment of the legislature in that respect is conclusive.

If, however, the court were authorized to review that judgment it would be found supported in sound and convincing precedents.

In 1848 the Supreme Court of Massachusetts, in sustaining the validity of an ordinance excluding omnibuses from certain streets in Boston, thus spoke, quite prophetically: "To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam power, passing through Washington Street, at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington Street by vehicles propelled by steam power? We cannot doubt that it would."

Sixty years after, in 1908, the same court has unhesitatingly decided that the legislature has the right, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town. *Commonwealth* v. *Kingsbury*, 199 Mass. 542. We quote with approval from that case.

"Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travellers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. . . . It seems too plain for discussion that, with a view to the safety of the public, the legislature may pass laws regulating the speed of such machines when running upon the highways. The same principle is applicable to a determination by the legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the State, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it

would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travellers with horses and with vehicles of other kinds if automobiles were allowed there."

In certain sections of our State, such for example as Mount Desert Island and the vicinity of Bar Harbor, public highways have been constructed along precipitous mountain sides, through circuitous defiles, over deep ravines, and on the very edges of ocean cliffs. They have been so made to afford access to some of Maine's famous and picturesque scenery. The use on such ways of the powerful, swiftly moving and dangerous automobile must necessarily endanger all who travel thereon, and especially those who ride in carriages drawn by horses. Presumably to safeguard the people against such dangerous conditions the legislature decided that the ordinance in question might be made. It seems reasonable and expedient; but as to that the judgment of the legislature is conclusive.

It is the opinion of the court that the ordinance which the defendant admittedly violated is constitutional, and accordingly the entry must be,

Judgment for the State.

GEORGE M. STANWOOD *vs.* MARY CLANCEY et als.

Cumberland. Opinion October 1, 1909.

Negligence. Licensee. Duty Owed to Licensee. Assumption of Risk.

The defendants were the owners of an office building in Portland, and were operating a passenger elevator therein. The face of the elevator cage formed a part of the side of the hallway of the street entrance to the building. At the time the injuries complained of were received, the elevator had been raised, and the door in the elevator frame left open. The plaintiff, to accommodate a friend, was in search of a man named Hanscomb. He did not know where Hanscomb's office was. He stepped into the hallway through the main entrance of the defendant's building, for the purpose of making inquiries in the building, as to where it was. Hanscomb had no office in the building. After entering the hallway, the plaintiff, thinking, as he says, that the open space in the elevator frame was the entrance to an office, stepped into it, and fell to the bottom of the well and was injured. The day was bright and sunshiny, and the door from the street was wide open, and was only five feet from the elevator.

Held: 1. The plaintiff must be held to have been guilty of contributory negligence.

2. When the owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incident to the business carried on there by himself or by his tenants. If the building is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. To those invited, he owes the duty of exercising care in the management of the premises, so that they may not be injured; but to those merely licensed, he owes no such duty. To a mere licensee, he owes no duty, except that he will not wantonly injure him.

3. When a licensee goes into a building, he enters at his own risk, and must take the building as he finds it.

4. The plaintiff in the case at bar was a mere licensee in the defendants' building.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff caused by the alleged negligence of the defendants in leaving open or unguarded the door to an elevator in the defendants' building in Portland, and into which the plaintiff

stepped and fell. Plea, the general issue. At the conclusion of the evidence for the plaintiff, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

Dennis A. Meaher, and Charles P. Mattocks, for plaintiff.

Libby, Robinson & Ives, for defendants.

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

SAVAGE, J. Case to recover for personal injuries caused by the defendants' alleged negligence in leaving open or unguarded the door to an elevator into which the plaintiff stepped and fell. At the conclusion of the evidence for the plaintiff, a nonsuit was directed, and the plaintiff excepted.

The facts shown, taken most favorably for the plaintiff, are these. The defendants were the owners of an office building on Exchange Street in Portland, which was occupied by their tenants. On the ground floor were two insurance offices, and the second and third floor rooms were mostly lawyers' offices. Between the two insurance offices was the main entrance to the building, leading into a hallway. At the further end of the hallway were the stairs leading to the second and third floors. At the right of the door as one entered, and about five feet distant therefrom, the defendants had placed, and were operating, a passenger elevator. The face of the elevator cage formed a part of the side of the hallway. In the elevator well, below the level of the first floor of the building, was an electric light meter. On the day in question, a servant of the electric light company went to the building for the purpose of reading the meter. To enable him to get into the well where the meter was, the boy in charge of the elevator, who was the servant of the defendants, in operating it, run it up until the floor of the elevator was only a little lower than the top of the doorway in the elevator frame. The electric light man descended into the well, leaving open the door in the elevator frame. While things were in this situation, the plaintiff entered the hallway from the street, and thinking, as he says, that the open space in the elevator frame was

the entrance to an office, stepped into it and fell to the bottom of the well, and received serious injuries.

The plaintiff, that morning, according to his own version, had learned that a Mr. York wished to see him, and he went to the latter's office. He learned there that York wished to obtain some gravel from a pit owned by the city of South Portland, of which city the plaintiff was an alderman. The plaintiff refused York's request, but said that he knew a lawyer, whose name he thought was Hanscomb, who had a gravel pit, and he told York that he thought Hanscomb would be the man to see. Thereupon York said "Let's see him." The plaintiff and York then started to ascertain where Hanscomb's office was. The plaintiff had sometime been told that Hanscomb had an office on Exchange Street, but neither he nor York knew where it was. When they reached the entrance of the defendants' building, York said "Let's go in here. Any of these lawyers will tell us where he is." They went in, and the plaintiff stepped into the elevator well, as has been described. It is admitted that Hanscomb did not then have, and never had had, an office in the defendants' building.

Upon these facts it is contended in support of the order of nonsuit, that the plaintiff was a mere licensee upon the defendants' premises, and that they did not owe to him the duty of using care to prevent his stepping into the open elevator well, and hence that, as to him, at least, they were not negligent. It is also contended that the plaintiff himself was guilty of contributory negligence.

We think the nonsuit was properly ordered. Upon the evidence the jury would not have been warranted in finding for the plaintiff. In such case it is the duty of the court to order a nonsuit, or direct a verdict for the defendant.

In the first place, if the plaintiff was paying the slightest attention to the situation, it is difficult to see how he could have mistaken the opening into the darkness of an elevator well for the entrance to an office, as he testified that he supposed it was. It was a sunshiny day, and the door from the street was wide open, and was only five feet from the elevator. The merest attentive glance would have disclosed that the opening was not the open door of an office, and

should have halted the plaintiff. It is impossible to resist the conclusion that the plaintiff was guilty of that thoughtless inattention which has been said to be the very essence of negligence. See *McCarvell* v. *Sawyer*, 173 Mass. 540; *Humphreys* v. *Portsmouth Co.*, 184 Mass. 422.

But we go further. While it is the duty of the owner of a building, having it in charge, to be careful in keeping it safe for all those who come there by his invitation, express or implied, he owes no such duty to those who come there for their own convenience, or as mere licensees. Toward a licensee, the owner owes no duty, except that he shall not wantonly injure him. *Dixon* v. *Swift*, 98 Maine, 207; *Russell* v. *M. C. R. R. Co.*, 100 Maine, 408; *Parker* v. *Portland Publishing Co.*, 69 Maine, 173. It is well settled that when the owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incident to the business carried on there. And if he leases the building, or parts of it, to tenants, he impliedly invites all persons to come there in connection with the business carried on by the tenants. At the same time, if the building is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. To those invited, he owes the duty of exercising care with reference to the management of an elevator operated by him, but to those merely licensed he owes no such duty. *Plummer* v. *Dill*, 156 Mass. 426.

"To come under an implied invitation as distinguished from mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." Pollock on Torts, 417; *Plummer* v. *Dill*, supra. When the owner lets rooms to tenants for business purposes he has an interest in their being used for such purposes; and a mutuality of interest exists when a visitor goes to the rooms for the purpose of transacting the kinds of business for which the

owner let them. The tenants, doubtless, may transact any kind of lawful business therein that they choose, unless limited by the terms of the tenancy. It is so contemplated by the owner when he lets the rooms, and he thereby impliedly invites all persons who have business to transact with the tenants to go to their rooms for that purpose. But he does not invite persons to go there merely for their own convenience or curiosity.

Now applying these rules to the case at bar, it will readily be seen that the plaintiff was not invited by the defendants to visit their building, but that he was a mere licensee. He went to the building to make an inquiry about a matter which concerned himself, or his friend York, alone. It had nothing to do with any kind of business in which any of the tenants or occupants were engaged, or for which the building was used, or designed to be used. It was not used and it was not held out by the owners as being used, as an information bureau. See the precisely parallel case of *Plummer* v. *Dill*, supra.

It may well be that the plaintiff was not unlawfully upon the premises. Under the circumstances, it may be conceded that he was impliedly permitted to go to this building in pursuit of the information he desired; but he was not invited. That is the distinction. As a mere licensee, he went into the building at his own risk, and was bound to take the premises as he found them. *Reardon* v. *Thompson*, 149 Mass. 267; *Moffatt* v. *Kenny*, 174 Mass. 315; *Beekler* v. *Daniels*, 18 R. I. 563; *Dixon* v. *Swift*, supra.

In argument, the plaintiff's counsel cites and relies upon *Stratton* v. *Staples*, 59 Maine, 94, and *Foren* v. *Rodick*, 90 Maine, 276. But neither of these cases affords him any aid. They are both cases of implied invitation. In the former, the plaintiff, in the evening, went to the defendant's building, in which were four stores, seeking a business interview with him. The defendant's counting room was in one of the stores, but the plaintiff did not know which one it was. In endeavoring to ascertain in which store the counting room was, the plaintiff walked along the platform in front of the stores, and fell into an insufficiently guarded roll-way, and was

injured. The presiding Justice, in his charge, said "But for all persons who had occasion to go upon the platform in order to enter either of the stores of the defendant on legitimate business, he would be liable for all damages occasioned by these erections, provided they were unsafe or dangerous. . . The next question is, was the plaintiff legitimately upon the sidewalk or platform? You have heard her statement as to her business with the defendant. It is unnecessary for me to allude to the testimony. It is all with you." After a verdict for the plaintiff, this court overruled the defendants' exceptions without discussion of the principles involved, only saying that if the charge was not as full as it ought to have been, the objection was waived, because counsel did not ask for other and more appropriate instructions. In *Foren* v. *Rodick*, the plaintiff went to the defendants' building to consult professionally a physician who was a tenant therein, and while seeking an entrance, was injured by reason of certain defects in the construction or maintenance of the building. The court said: "All persons having occasion to visit any of the offices on the second floor on legitimate business with any of the defendants' tenants had an implied invitation from the defendants to use the common entrance and passageway for that purpose."

Upon the whole case, therefore, it is clear that the plaintiff has no cause of action against the defendants. The exceptions to the order of a nonsuit must be overruled.

Exceptions overruled.

WILLIAM FRANKLIN HUME *vs.* FORT HALIFAX POWER COMPANY.

Kennebec. Opinion October 7, 1909.

Master and Servant. Negligence. Duty of Master. Fellow Servant. Vice-Principal. Failure of Master to Warn Servant of Dangerous Conditions.

The duty imposed upon a master to warn his servant of dangers attendant upon the place of the employment, of which the master has knowledge, and which are unknown to the servant, is a personal duty. The servant has the right to look to the master for the discharge of it. If instead of discharging it himself the master employs another to do so then that other stands in the place of the master, becomes a substitute for him, a vice-principal, in respect to the discharge of that duty, and the master then becomes liable for the acts and the negligence of such other person in the premises to the same extent as if he had performed those acts and was guilty of the negligence personally.

In an action on the case to recover damages for personal injuries sustained by the plaintiff, *held* that there was no error in the refusal of the presiding Justice to instruct the jury that the foreman of the crew in which the plaintiff was working was a fellow servant of the plaintiff, for in respect to informing the plaintiff of the dangers attendant upon the place where the foreman directed the plaintiff to work he was not his fellow servant, but a vice-principal of the master.

In an action on the case to recover damages for personal injuries sustained by the plaintiff, *held* (1) that there was no reversible error in the refusal to give the request that, if the place in which the plaintiff was set at work was unsafe and unsuitable, it had become so through the act of a fellow servant. It was unimportant how or by whom the dangerous conditions were created so long as they existed in fact, and the plaintiff did not know of them, but the defendant did, through its foreman, and was required by law to inform the plaintiff of them. (2) That the negligence complained of was not that dangerous conditions were created and existed, but that the plaintiff was not warned of them.

In an action on the case to recover damages for personal injuries, the plaintiff recovered a verdict for $3750, *held* that the verdict must be sustained.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant and caused by the alleged negligence of the defendant. Plea, the

general issue. Verdict for plaintiff for $3750. 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.

Forrest Goodwin, and H. E. Cook, for plaintiff.

Charles F. Johnson, for defendant.

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

KING, J. This case is before the Law Court on defendant's exceptions and motion for a new trial.

In prosecuting the work of constructing a dam and power plant across the Sebasticook river at Winslow the defendant excavated a large quantity of slate rock and dirt which it deposited a short distance below the excavation in a pile some 12 to 15 feet high and extending from the shore out into the river 85 to 100 feet. Shortly before February 27, 1908 the defendant began removing this pile. At that time its top and sides were frozen, forming a thick crust which had to be broken down and picked in pieces to facilitate its being loaded on teams and barrows. Blasts with dynamite were made frequently to break this crust and dislodge overhanging portions of it. A crew of about twenty men under the charge of Lewis Emerson as foreman were engaged in the work. On February 26, 1908 the plaintiff was employed by the defendant's superintendent to assist in this work, and was directed to report for duty to the foreman. He worked the afternoon of that day near the shore end of the pile. The next forenoon, being stormy, he did not work, but joined the crew when the whistle blew after the noon hour, and in a few minutes thereafter, while at work with his pickaxe at the bottom of the slope of the pile, and at a point about two-thirds of the length of the pile from the shore, a large piece of this frozen rock and dirt fell from the top of the pile, killing one man, Mr. Glidden, and entirely burying the plaintiff beneath it, causing him the injuries for which this action is brought.

There was a crack on the top of the pile, above the place where the plaintiff was working when injured, which one witness described

as "from two to three inches wide" and "probably ten feet or such a matter" long, and described by another witness as "a crack perhaps three-fourths of an inch wide in some places" and "fifteen or eighteen feet long."

During the forenoon of the day of the accident it snowed, the weather being soft and warm, and as the work progressed the rock and dirt were worked out from under the crust leaving an overhanging mass at the top above the place of the accident. During that forenoon an attempt was made to pry off and dislodge this mass from the top with bars. Failing in this the foreman decided to blast it off with dynamite, and during the noon hour he and Glidden drilled two holes up underneath the overhang, and were filling the first hole with dynamite when the whistle blew and the crew came out to work. While they were preparing to load the other hole the mass suddenly fell with the sad results stated.

The plaintiff claimed that his injuries were caused by the negligence of the defendant in placing him at work in an unsafe place, and in not informing him of certain dangerous conditions known to the defendant, but of which he had no knowledge.

On the other hand the defendant contended that the risk of portions of the frozen crust of this pile of rocks and dirt falling from the top to the bottom of the slope as the work progressed was a risk incident to and attendant upon the exercise of the plaintiff's employment, which he assumed by entering upon the work, and further that he was warned by the foreman not to work at that place, and that his own negligence contributed to his injuries.

The exceptions are to the refusal of the presiding Justice:

(1) To direct a verdict for the defendant. (2) To instruct the jury that Emerson, the foreman, was a fellow servant of the plaintiff and that the defendant company was not responsible for his negligence in the premises. (3) To instruct the jury that, if the place in which the plaintiff was set to work was unsafe and unsuitable it had become so through the act of a fellow servant.

The jury answered in the affirmative these specific questions submitted to them by the presiding Justice:

1. Did the plaintiff exercise in the premises the due care required of him so that no negligence of his contributed to his injury?

2. Was the nature of the danger or risk such that the plaintiff would not have appreciated it by the exercise of ordinary care to understand it?

3. Is it true that the defendant company did not warn the plaintiff of the danger of the work he was employed in?

4. Was it negligence on the part of the defendant company not to warn the plaintiff of such danger?

I. It is apparent that the place where the plaintiff was working when injured was unsafe, because of the danger of this portion of overhanging crust falling. Important and special causes of that danger were the crack on the top of the crust, the effect of the attempt to pry the overhang off with bars during the forenoon, and the drilling of the holes up underneath it. Of these special causes of danger the plaintiff had no knowledge. It is not claimed that he knew of the existence of the crack. He said he did not, and it could not be seen from below. Neither did he know what had been done that forenoon in his absence, nor that the holes had been made. There was but little time for him to have observed and appreciated even the extent of the overhang resulting from the work of the forenoon, for the accident happened within a few minutes after the whistle blew. There were others of the crew working near him at the time of the accident, two workmen being as near him as they could work with pickaxes. In view of all the facts and circumstances, and provided the plaintiff was not warned of the danger, it is not made manifest to the court that the jury erred in their answers to the first and second questions submitted, and thus finding that the plaintiff was in the exercise of due care, and that the nature of the danger was such that he would not have appreciated it by the exercise of due care.

II. The important question of fact in the case, and which was sharply contested, was whether the plaintiff was warned of the danger. The foreman claimed that he was; that when the crew, including the plaintiff, came out to work he directed them to work over near the shore, and that, a few minutes later, finding the plaintiff and

another workman back at the place where plaintiff was hurt, he sent them over with the others, putting his hand on the plaintiff's shoulder with some show of force, and there was some testimony tending to corroborate the foreman. The plaintiff denied all this and claimed that he was not warned of danger by any one, and that the foreman directed him to work at this particular place. There was testimony from two other workmen tending to corroborate the plaintiff. This question of fact was for the jury to determine. It was particularly called to their attention by the third special question submitted to them. Their answer shows that they did not overlook it. They saw the witnesses, and it was for them to judge of their credibility and the weight to be given to their testimony. They decided in the plaintiff's favor, and it does not appear to this court that their decision was so unmistakably wrong that it must be set aside.

III. Was it negligence on the part of the defendant company not to warn the plaintiff of the special and peculiar dangers that then were attendant upon the place where the plaintiff was set at work? The jury found that it was, and we think that finding is justified in fact and in law.

It is too well settled now to admit of discussion that one of the duties which an employer of labor assumes towards his employee is to exercise reasonable care and diligence to provide a reasonably safe place at which the employee is to work. And, moreover, the law implies that the discharge of this duty requires the master to notify his servant of any and all special risks and dangers of the employment, and of all dangerous conditions attendant upon the place of the exercise of the employment, of which the master has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the servant and would not be known and appreciated by him if in the exercise of reasonable care on his part.

This duty thus imposed upon the master is personal. The servant has the right to look to him for the discharge of it. If, instead of discharging it himself, the master employs some other person to do it for him, then such other person stands in the place of the master,

and becomes a substitute for him — a vice-principal — in respect to the discharge of that duty, and the master then becomes liable for the acts and the negligence of such other person in the premises to the same extent as if he had performed those acts and was guilty of the negligence personally. We need only cite the quite recent case of *Welch* v. *Bath Iron Works*, 98 Maine, 361. But see the recent case of *Manuel* v. *Mayor, etc., of City of Cumberland*, 73 Atl. Rep. p. 709, and case there cited.

From the evidence, and special findings of the jury, in this case we think it must be accepted by the court as established in fact that the defendant, acting by its foreman, set the plaintiff at work in the place where he was injured; that that place was then attended with certain risks of danger which the plaintiff did not know, and would not have known and appreciated by the exercise of reasonable care on his part, but the knowledge of which was essential to the plaintiff's safety; and that the defendant's foreman when he set the plaintiff at work in that place knew of those risks of danger and neglected to notify the plaintiff of them.

It follows then, from an application of those principles of law above referred to, that this neglect of the foreman to notify the plaintiff of those risks of danger is in law the neglect of the defendant. It had entrusted to its foreman the duty of placing the defendant in a reasonably safe place to work, the discharge of which duty, under the facts established in this case, involved the necessity of informing the plaintiff of the risks of danger attending the work in that place which the foreman knew. In the discharge of that personal duty of the defendant the foreman became its substitute, and stood in its place, and his negligence was the negligence of the defendant. The first exception and motion, presenting as they do the same question in effect, must, therefore, be overruled.

IV. It follows from what has been said above that there was no error in the refusal of the presiding Justice to instruct the jury that the foreman was a fellow-servant of the plaintiff and that the defendant was not responsible for his negligence in the premises.

In respect to the negligence here complained of, the failure to inform the plaintiff of the risks of danger attendant upon the place

where he was set at work—for, the foreman was not a fellow-servant of the plaintiff, but a substitute for the defendant, a vice-principal, for whose negligence the defendant was responsible.

V. Lastly, there was no reversible error in the refusal to instruct the jury that, if the place in which the plaintiff was set at work was unsafe and unsuitable, it became so through the act of a fellow servant. As a statement of fact that may be true in whole or in part, but it is of no consequence in the determination of the rights of the parties here. The negligence relied upon in this suit is the failure of defendant to inform the plaintiff of risks of danger attending his working in the place where he was set at work. It is unimportant how or by whom those risks were created, so long as they existed in fact, and the plaintiff was entitled by law to be notified of them by the defendant. The plaintiff does not here claim that the foreman was not his fellow servant so far as he may have personally acted with his own hands in working out the rocks and dirt from under the overhang, or in working upon it to dislodge it, or in drilling the holes up underneath it. None of those acts were necessarily negligent acts; so far as anything appears here to the contrary they may have been perfectly proper and necessary acts in the prosecution of the common work of removing the pile of rocks and dirt. The plaintiff's case is predicated, not upon the proposition that the foreman did cause, or assist in causing, the dangerous conditions which rendered the place where he was set at work unsafe, but upon the alleged claim that the defendant delegated to its foreman the discharge of a personal duty, which it owed to him, to inform him of those dangerous conditions, and that the foreman was negligent in the discharge of it.

It is not contended in argument before this court that the damages awarded by the jury to the plaintiff for his injuries are excessive. Accordingly the entry will be,

Exceptions and motions overruled.
Judgment on the verdict.

ELIJAH T. POND *vs.* CARROLL S. DOUGLASS et als.

Piscataquis. Opinion October 8, 1909.

Deeds. Reservations. Reverter. Determinable Fee. Title. Revised Statutes, chapter 75, section 1; chapter 106, section 24.

The estate known in law as a base, determinable or qualified fee with the possibility of a reverter is recognized in Maine and is descendible.

Where one grants a base or determinable fee since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him, i. e., he has no future vested estate in fee; only what is called a naked possibility of reverter, which is incapable of alienation or devise although it descends to his heirs.

The possibility of reverter denotes no estate but only the possibility to have the estate at a future time. One kind of such possibility is that a common law fee other than a fee simple may revert to the grantor by the natural termination of the fee. The possibility of reversion expectant on such an estate is left in the person who limits it and in the meantime the whole estate is in the grantee or owner subject only to this possibility of reverter in the grantor. The grantee has an estate which may continue forever though there is a contingency which when it happens will determine the estate. This contingency cannot with propriety be called a condition. It is a part of the limitation and the estate may be termed a fee.

A naked possibility of a reverter of a title to land does not denote an estate or any present legal interest in it, and gives no right of entry into it. It is not an existing right of reversion but a bare possibility which is uncertain.

The statutes of Maine contain no express provision relating to the conveyance of the possibility of a reverter of the title to real estate.

Revised Statutes, chapter 75, section 1, providing that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it or all his interest in it by a deed," etc., has never been held by the court of Maine to include a mere possibility of a reverter.

On April 4, 1834, Jesse Washburn conveyed to his son Peleg Washburn, his homestead farm by warranty deed containing the following clauses, namely: "Excepting . . . . one half acre reserved for a 'free meeting house' said farm now containing about one hundred acres . . . . Note, should the proprietors of said meeting house take less then half an acre of land for the use of said meeting house, or should the land revert back by reason of non-occupation for that purpose, then the land shall be considered to belong to the farm and shall pass with it to the said Peleg." On April 8, 1834, Jesse Washburn conveyed the reserved land to the pro-

prietors of the meeting house by warranty deed with the following habendum. "To have and to hold the same to the said proprietors, their heirs and assigns to their use and benefit so long as said lot shall be occupied for a meeting house or house of public worship." On the 22nd day of April, 1835, Peleg Washburn conveyed back to Jesse Washburn the homestead farm conveyed to him the year before by warranty deed "excepting one half acre reserved for a free meeting house. Prior to May 4, 1890, the meeting house lot ceased to be occupied for a meeting house or house of public worship.

Held: That the possibility of reverter of the title to the meeting house lot was not transferred by the deed from Jesse Washburn to Peleg Washburn, but remained in Jesse Washburn after his deed to the proprietors of the meeting house, and when after his death the qualified fee was terminated by the cessation of the occupancy of the lot for a house of public worship, the reversion descended to those who were the heirs of Jesse Washburn at the time of his death.

On report. Judgment for plaintiff.

Writ of entry "brought by the plaintiff against the defendants wherein the plaintiff demands five-eighths in common and undivided of certain real estate in the village of Guilford," Piscataquis County.

Plea, the general issue, with written claim for betterments as provided by Revised Statutes, chapter 106, section 24.

At the conclusion of the evidence, the case was reported to the Law Court for decision, with the following stipulation: "If the plaintiff is not entitled to recover, judgment shall be rendered for defendant; if the plaintiff is entitled to recover, the case shall be remanded to nisi prius, for assessment by commissioners already agreed upon by the parties, of defendant's compensation for buildings and improvements under the provisions of R. S., chapter 106, section 24."

The case is stated in the opinion.

J. S. Williams, and Warren C. Philbrook, for plaintiff.

Hudson & Hudson, for defendants.

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

WHITEHOUSE, J. This is a writ of entry brought by the plaintiff to recover five-eighths of a small parcel of land which was for

many years occupied as the site for a meeting house in Guilford, and prior to April 4, 1834, constituted a part of the homestead farm of Jesse Washburn. The plaintiff derived title through intermediate conveyances from some of the heirs of Jesse Washburn, who died prior to January 1, 1865. But it is not in controversy that the plaintiff holds conveyances covering twenty-one fortieths of the lot.

On April 4, 1834, Jesse Washburn conveyed to his son Peleg, his homestead farm by warranty deed containing the following clauses, namely: "Excepting . . . . one half acre reserved for a 'free meeting house' said farm now containing about one hundred acres. . . . . Note, should the proprietors of said meeting house take less than half an acre of land for the use of said meeting house, or should the land revert back by reason of non-occupation for that purpose, then the land shall be considered to belong to the farm and shall pass with it to the said Peleg."

It appears that prior to the execution of this deed Jesse Washburn had contracted to sell to the proprietors of the Guilford free meeting house, a lot of land on which to build a church. On April 8, 1834, he conveyed the lot to the proprietors of the meeting house by warranty deed with the following habendum. "To have and to hold the same to the said proprietors, their heirs and assigns to their use and benefit so long as said lot shall be occupied for a meeting house or house of public worship." It appears that the church was soon after erected upon that site but that the lot ceased to be occupied for a meeting house or house of public worship prior to May 4, 1890. On the 22nd day of April, 1835, Peleg Washburn conveyed back to his father Jesse Washburn the homestead farm conveyed to him the year before by warranty deed "excepting one half acre reserved for a free meeting house."

It is contended in behalf of the plaintiff that the deed from Jesse Washburn to the proprietors of the meeting house conveyed a qualified, base or determinable fee to the church society with only the naked possibility of reverter to the grantor Jesse Washburn but that such a mere possibility of reverter was incapable of alienation or devise, although it would descend to his heirs. It is accordingly

claimed in the first place that the deed from Jesse Washburn to Peleg of April 4, 1834 was not operative to convey such an interest as this possibility of reverter, and when the lot ceased to be occupied for church purposes the title descended to the heirs of the grantor Jesse Washburn.

It is further contended that even if such a possibility of reverter had been the subject of assignment or conveyance by deed, that the terms of the note contained in the deed from Jesse to Peleg Washburn, are not apt and sufficient to operate as a present conveyance of the interest to Peleg but only as a personal covenant between the parties that if the title to the lot should revert while Peleg held the homestead it should, in the language of the note, "be considered to belong to the farm." Finally it is contended that if the possibility of reverter was conveyed by Jesse to Peleg, it was re-conveyed by Peleg to Jesse by his deed of April, 1835, and that it was vested in Jesse at the time of his death. On the other hand it is contended in behalf of the defendants that this reversionary interest was conveyed by Jesse Washburn to Peleg by the deed of April 4, 1834 and that by reason of the omission in Peleg's deed to his father of the note found in the deed of the latter to Peleg, this alleged reversionary interest was not re-conveyed to Jesse Washburn. Peleg's deed to his father contains only the exception of this half acre which had already been conveyed to the proprietors of the meeting house. It is accordingly claimed that when the lot ceased to be occupied for a meeting house or house of public worship, the title thereto vested in Peleg Washburn and the defendants hold title to the entire lot by virtue of conveyances from him.

The estate known in law as a base, determinable or qualified fee with the possibility of a reverter is recognized in this State and Massachusetts and is descendible. *Moulton* v. *Trafton*, 64 Maine, 218; *Farnsworth* v. *Perry*, 83 Maine, 447; *First Univ. Soc.* v. *Boland*, 155 Mass. 171.

By his deed conveying this lot to the proprietors of the free meeting house "to their use and benefit so long as said lot shall be occupied for a meeting house or house of public worship" Jesse Washburn conveyed to the Society a qualified fee determinable on

the cessation of the use of the lot for church purposes and retained in himself a mere possibility of reverter. "Where one grants a base or determinable fee since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him, that is he has no future vested estate in fee; only what is called a naked possibility of reverter, which is incapable of alienation or devise although it descends to his heirs." Tiedeman Real Prop. (3d Ed.) sec. 291. So in Challis on Law of real property, page 63, the author says: "Possibility of reverter denotes no estate but as the name implies only the possibility to have the estate at a future time. Of such possibilities there are several kinds of which two are usually denominated by the term now under consideration:

(1) The possibility that a common law fee may return to the grantor by breach of a condition subject to which it was granted; and (2) the possibility that a common law fee other than a fee simple may revert to the grantor by the natural termination of the fee." The possibility of reversion expectant on such an estate is left in the person who limits it and "in the meantime the whole estate is in the grantee or owner subject only to this possibility of reverter in the grantor. The grantee has an estate which may continue forever though there is a contingency which when it happens will determine the estate. This contingency cannot with propriety be called a condition. It is a part of the limitation and the estate may be termed a fee." 1 Preston on Estates, 484; See also *Gray on Rule* v. *Perpetuity*, sec. 13, 2 Washburn on Real Property, 4th Ed. sec. 390. In accordance with this rule of the common law was the recent decision in *North* v. *Graham*, 235 Ill. 173, (1908), 85 No. East 267, in which the facts were strikingly analogous to those in the case at bar. In that case a deed of the lot in question was made to the trustees of a Methodist Church containing this provision: "Said tract of land above described to revert to the party of the first part whenever it ceases to be occupied for a meeting house or church." It was held in an elaborate opinion that the estate taken by the church was a determinable or qualified fee; that the grantor retained no future vested estate in fee nor

reversion, but merely a naked possibility of reverter which was incapable of alienation or devise though it might descend to his heirs; and that as the grantor of this qualified fee died possessed of the possibility of reverter before the termination of the fee his interest descended to those who were his heirs at law at the time of his decease and not to those who were his heirs at the termination of the qualified fee; citing *Presbyterian Church* v. *Venable*, 159 Ill. 215, (42 No. East. 836); *Harrison* v. *Weatherby*, 180 Ill. 418. (54 N. E. 237); *Nicoll* v. *N. Y. & Erie R. R. Co.*, 12 N. Y. 121.

Indeed it is not controverted by the counsel for the defendants that this rule of the common law laid down by all the textwriters and recognized and enforced by the Illinois court in the very late decision above cited of *North* v. *Graham*, is the law of this State unless it has been abrogated by our legislature. But our statutes contain no express provision relating to the conveyance of such a possible interest in real estate, and the most comprehensive provision respecting conveyances by deed is found in R. S., chapter 75, section 1, which declares that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it by a deed" &c. But a naked possibility of a reverter of a title to land does not denote an estate or any present legal interest in it, and obviously gives no right of entry into it. It is not an existing right of reversion but a bare possibility which is uncertain. The provision above quoted is a condensed revision of the statute as it existed in 1834, and it has never been held by our court to include a mere possibility of a reverter. The statutes of Illinois, contain more extended and explicit innovations than our own upon the rules of the common law respecting conveyances by deed, including interests in lands of which the grantor is not in possession, but they were not construed by the court to embrace the possibility of a reverter in *North* v. *Graham*, supra; nor has any authority been brought to the attention of the court in which equivalent terms in other statutes have been so construed. If it be deemed advisable to make such a possibility of an interest the subject of a conveyance by deed, it is the

province of the legislature to so provide by an appropriate amendment to our statute.

In the case at bar, the possibility of reverter of the title to the lot in question was not transferred by the deed from Jesse to Peleg Washburn, but remained in the former after his deed to the Proprietors of the Meeting House; and when after his death the qualified fee thereby conveyed was terminated by the cessation of the occupancy of the lot for a house of public worship, the reversion descended to those who were the heirs of Jesse Washburn at the time of his decease. As hereinbefore stated the plaintiff acquired title by deeds from these heirs of twenty-one fortieths of the lot, and judgment must accordingly be rendered for the plaintiff for twenty-one fortieths; but in pursuance of the stipulation in the report the case is remanded to the trial term for assessment by commissioners already agreed upon by the parties, of the defendants' compensation for buildings and improvements under the provisions of R. S., chapter 106, section 24.

Judgment for the plaintiff for twenty-one fortieths of the lot described in the writ. Case remanded as stated in the opinion.

CHARLES S. HUTCHINS *vs.* HERBERT BLAISDELL, and certain lumber.

Androscoggin. Opinion October 9, 1909.

Logs and Lumber. Liens. Statutes. Rule of Construction. Amendment. Revised Statutes, 1883, chapter 91, section 38; 1903, chapter 93, section 46.

The safe rule for the interpretation of Revised Statutes, chapter 93, section 46, inasmuch as it gives protection to one of the parties but compels the other to pay a debt which he had no voice in contracting, is to neither extend nor restrict its operation beyond the fair meaning of the words used, and to give such a construction as the language naturally imports.

Under Revised Statutes, chapter 93, section 46, which gives a lien for cutting, hauling, rafting and driving logs or lumber, no lien is created for "sticking" which is not a necessary incident of hauling but a distinct and independent branch of work requiring experience and skill in order to accomplish the best results.

Where in an action of assumpsit to enforce a lien for "hauling 158,221 feet of lumber at 60c. per M., $94.93," the plaintiff testified that his contract covered both "hauling" and "sticking," and the presiding Justice ruled that there was no lien and denied a motion to amend the writ so as to cover a claim for "hauling" only, *Held:* That the plain purpose of the proposed amendment was to reduce the price so as to cover the hauling only, and to this the plaintiff was entitled, and the amendment should have been allowed. Whether or not the price charged could be apportioned between hauling and sticking was a matter of evidence. If the evidence was sufficient to make the separation, a lien would be established for the amount proven for the hauling, otherwise the plaintiff would fail.

Bondur v. *LeBourne*, 79 Maine, 21, distinguished.

On exceptions by plaintiff. Sustained.

Assumpsit upon an account annexed to enforce a statutory lien for labor performed for the defendant upon certain lumber. During the trial the presiding Justice ruled that under the evidence the plaintiff had no lien and also denied the motion of the plaintiff to amend his writ, and to these rulings the plaintiff excepted.

The case is stated in the opinion.

A. L. Kavanagh, for plaintiff.

George C. Wing, and F. O. Purington, for owner of lumber.

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

CORNISH, J. Action of assumpsit in which the plaintiff seeks to enforce a statutory lien for labor performed for the defendant, upon lumber, under the following account annexed: "To hauling 158,221 feet of lumber at 60c per M. $94.93." R. S., ch. 93, sec. 46, under which this lien is claimed provides: "Whoever labors at cutting, hauling, rafting or driving logs or lumber . . . has a lien on the logs and lumber for the amount due for his personal services and the services performed by his team." The account annexed comes within this provision, but the plaintiff himself testified that under his contract with Blaisdell he agreed to "haul and stick" the lumber for 60c. per thousand and that in fact he did haul it from the mill about 200 yards into a clearing and there "stuck" it. The presiding Justice ruled that inasmuch as the labor included "sticking" there was no lien. The plaintiff thereupon moved to amend his writ so as to establish a claim for hauling only. This motion was denied on the ground that the price for hauling and sticking could not be apportioned. The case is before this court on plaintiff's exceptions to both rulings.

1. Does the statute give a lien for sticking lumber? We think not. The evidence is barren of any explanation of the term but it is familiar knowledge that it is the process of placing thin strips of wood between layers of boards or timber in order to secure a proper circulation of air and the consequent seasoning of the lumber without warping or decay. It is not a necessary incident of hauling, but a distinct and independent branch of work that requires experience and skill in order to accomplish the best results. The work must be carefully done and requires time, for lumber improperly stuck may be greatly damaged. One crew may be and often is hired to haul and another to stick. A man may be competent to do the one but incompetent to do the other. A contract to haul would include loading and unloading but would not be construed to include sticking, because not all lumber is required to be stuck, and a contract to haul and stick would not be fulfilled by simply hauling and unloading in piles. The legislature might well have provided a

lien for such work but it has not yet done so, and the court cannot create it. The case of *Bondur* v. *LeBourne*, 79 Maine, 21, relied upon by the plaintiff is readily distinguishable in its facts from the case at bar, but rested upon the same legal principle adopted here.

The claim in that case was for cutting, peeling and piling poplar lumber for pulp. The court granted the lien on the express ground that the evidence showed that the additional work was a necessary incident of the cutting. The court say:

"To be sure, the contract was specific in terms to prevent any misunderstanding, and included 'peeling and piling,' as well as 'cutting,' which term alone is mentioned in R. S., c. 91, sec. 38, as being the foundation of a lien. But it was poplar, cut into logs of four feet in length, for the particular purpose of being manufactured into pulp. Moreover, the evidence is that it must be 'peeled' before it can be thus manufactured, not as in the case of hemlock because the bark is of any value but in order to fit it for manufacture, and which is as essential as cutting, and, as one of the witnesses testifies, 'peeling is an incident and necessary to it as pulp lumber.' Of course, it must be 'piled' by the chopper, who cuts it by the cord, in order that his surveyor might ascertain the quantity and thereby furnish him the means of knowing how much he was entitled to under the contract which was to be $1.25 per cord."

In the case at bar the lien is denied on the ground that the additional work was not a necessary incident of the hauling.

The plaintiff asks for a liberal, the defendant for a strict interpretation of the statute but the safer way lies in the middle course, such a construction as the language fairly imports. In answer to the same suggestions made in *Blanchard* v. *Railway Co.*, 87 Maine, 241, in regard to the construction of a similar statute, providing a laborer's lien, this court defines its position in these words:

"It may not be out of place to add that the statute under consideration is not strictly remedial; that while it confers benefits it also imposes burdens; that while it gives protection to one of the parties it compels the other party to pay a debt which he had no voice in contracting. The correct rule for the interpretation of such

a statute is to neither extend nor restrict its operation beyond the fair meaning of the words used. To forcibly extend its operation would be unfair to one of the parties. To forcibly restrict its operation would be unfair to the other party."

This rule was reiterated in *Meands* v. *Park*, 95 Maine, 527. Adopting this rule as a guide we are forced to conclude that labor performed in "sticking" lumber is not within the protection of the statute, and on this point the ruling was correct.

2. The plaintiff's motion to amend we think should have been allowed. The bill of exceptions states that the plaintiff's motion was to strike out the non-lien item of "sticking." This is not technically accurate. "Sticking" was not mentioned in the declaration or account, but simply "hauling." However, the plain intention of the amendment was to reduce the price so as to cover the hauling only, as is shown by the ground of the court's refusal to allow the amendment which was that "the price for hauling and sticking could not be apportioned."

Whether or not the price could be apportioned was a matter of proof and not of pleading, and could be determined only by evidence. It is in every such case a question of fact. We see no inherent difficulty in the proposition. Men familiar with the business could readily give their judgment of the proportion of the 60 cents on a 200 yard haul that should be applied to the hauling and the proportion to the sticking. If the jury or court should decide that the ratio for instance were two-thirds and one-third, then the plaintiff is entitled to a lien on the lumber to the amount of 40 cents per thousand. A laborer should not be deprived of his lien for services rendered in one class of work simply because he also rendered services in another for which there is no lien. The latter does not ipso facto destroy the former. To make such apportionment is in effect like having two items in this account, one for hauling at forty cents and the other for sticking at twenty cents per thousand. The plaintiff would then unquestionably have the right to amend by striking out the non-lien item. *Spofford* v. *True*, 33 Maine, 283; *Deering* v. *Lord*, 45 Maine, 293; *Sands* v. *Sands*, 74 Maine, 239. It should make no difference whether the non-lien charge is separate or is

combined with the lien charge. If evidence can separate it, the plaintiff should not be deprived of his lien. This was done in *Bondur* v. *LeBourne*, supra, where the word "peeling" was stricken out. It is true that in merging lien and non-lien clauses in one judgment, a plaintiff is held to have waived his lien, because it is impossible to then make a separation. *Lambard* v. *Pike*, 33 Maine, 141; *Coburn* v. *Kerswell*, 35 Maine, 126; *Taggard* v. *Buckmore*, 42 Maine, 77; *Bank* v. *Redman*, 57 Maine, 405. To avoid obtaining such a non-enforceable judgment was the object of the plaintiff's request.

It is also true that when the evidence in a given case shows that the laborer has so intermixed and interwoven the lien and the non-lien services that it is utterly impossible for the court to make any such distinction between the two kinds as would authorize a lien for judgment for any definite amount, the lien fails. *Baker* v. *Fessenden*, 71 Maine, 292; *Kelley* v. *Kelley*, 77 Maine, 135. It remains, however, a matter of proof and the plaintiff should be given the opportunity to introduce evidence on that point. If the evidence is sufficient to make the separation a lien is established for the amount proven, otherwise he fails. The object of the proposed amendment was to enable the plaintiff to exercise this right and its rejection as a matter of law was subject to exception. *Hayford* v. *Everett*, 68 Maine, 505.

On the second point therefore, the entry must be,

Exceptions sustained.

RUTH F. BROWN et als. *vs.* CHARLES O. DICKEY.

Waldo. Opinion October 19, 1909.

Easements. Deeds. Lease in Perpetuam. Words of Inheritance. Dedication. Plan. Evidence.

An easement is created by (1) express or implied grant, (2) reservation or exception in the deed of conveyance, (3) prescription, (4) statutory proceedings, (5) estoppel.

An implied grant of an easement in favor of a grantee arises from circumstances where at the time of the conveyance the grantor was the owner of land constituting both the dominant and servient estates.

Two classes of easements are recognized, one called quasi easements which are existing conditions in the land retained the continuance of which would be so clearly beneficial to the land conveyed that they would be presumed to be intended. These easements must be such as are apparent in the sense of being indicated by objects which are necessarily seen or would be ordinarily observable by persons familiar with the premises.

The other class of easements by implied grant is where the grantor's conveyance describing the land as bounded by a street, passage-way or an existing park which at the time belonged to the grantor has the effect of vesting an easement of right of way or of light and air in the grantee by estoppel.

It is a well settled rule of the common law of Maine and Massachusetts that a written instrument without a seal is not a deed and cannot convey land in fee.

The word "heirs" is essential in a deed of conveyance to create an estate in fee.

Dedication is the intended appropriation of land by the owner for some proper public use, reserving to himself no rights inconsistent with the full exercise and enjoyment of such use.

Held: That certain vacant lots as marked on the plan of a park system did not imply dedication.

Where the plaintiffs claimed that a certain vacant lot had been dedicated to the use of the public, *held* that the plaintiffs had failed to sustain the burden of proof resting upon them to show by acts and declarations of the owner a clear and unequivocal intention to so dedicate the vacant lot.

Where the plaintiffs who were the widow and heirs of one J. Warren Brown, deceased intestate, brought an action to recover damages by reason of the erection of a building by the defendant on a vacant lot of land adjacent to the land and dwelling house thereon possessed by the plaintiffs, and in

which said vacant lot the plaintiffs claimed an easement for its free and unobstructed use in connection with their house and land "for the purpose of light, air, view, passing over the same," etc., and it appeared that the plaintiffs as widow and heirs of said J. Warren Brown were holding the land occupied by them under a lease in perpetuam, not under seal, given to said J. Warren Brown and "his successors or assigns," and which contained no words of inheritance, *held* (1) that no estate of inheritance was conveyed to said J. Warren Brown by the lease; (2) that the plaintiffs as widow and heirs of said J. Warren Brown had no title under the lease to the land occupied by them, and therefore had no right of action for the obstruction of any easements in land servient thereto.

On report. Judgment for defendant.

Action on the case to recover damages for the obstruction of an alleged easement claimed by the plaintiffs. Plea, the general issue. After the evidence had been taken out at the trial the case was reported to the Law Court for decision, damages to be assessed at $10.00 if judgment was for the plaintiffs.

The case is stated in the opinion.

Dunton & Morse, for plaintiffs.

Mayo & Snare, for defendant.

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

PEABODY, J. This is an action on the case brought by the plaintiffs to recover damages by reason of the erection by the defendant of a building on the lot of land in Northport, Maine, fifteen feet in width and sixty feet in length, adjacent to and northerly of a lot of land and dwelling house thereon, possessed by the plaintiffs, in which lot the plaintiffs allege they have an easement for its free and unobstructed use in connection with their house and lot "for the purpose of light, air, view, passing over the same, preventing the erection of other buildings within fifteen feet at least of their house aforesaid, and for any other purpose or purposes which might enhance the value of their said house and lot and render it more desirable and enjoyable as a summer home."

The case is on report.

The plaintiffs are the widow and heirs of J. Warren Brown, who died intestate in 1892, through whom their title is derived.

On April 10, 1882, Hiram Ruggles, as Treasurer of the Northport Wesleyan Grove Campmeeting Association, gave to said J. Warren Brown, his successors or assigns, a lease in perpetuam of lot No. 303 as per the plan of land of the Association made by R. B. Miller, surveyor, bounded as follows:

"Beginning on the easterly side of 'Bay View Park' at the corner of the vacant lot, thence southerly on 'Bay View Park' twenty-five feet to a vacant lot, thence easterly on said vacant lot 60 feet, more or less, to land of Frank Knowlton, thence northerly by said Knowlton's land twenty-five feet to a vacant lot, thence westerly by said vacant lot, sixty feet, more or less, to the place of beginning. Intending hereby to convey to said Brown, lot No. 303 as per plan of said R. B. Miller."

This lease was not under seal and was not recorded.

The plan was of a parcel of land purchased by the Association for an addition to its campground, on which was delineated a tier of lots containing the strip of land in controversy in this case, consisting of lots alternately twenty-five and fifteen feet in width by sixty feet in length, and marked on said plan the twenty-five foot lots by numbers and the fifteen foot lots by the size "15 x 60" respectively, and a park marked "Bay View Park" on which the lots fronted.

The defendant admits the erection of the building on a portion of the fifteen foot lot adjacent to lot No. 303, but claims that he has title thereto in fee under a warranty deed of Isaac H. W. Wharff dated July 19, 1906, whose title was under a warranty deed of the Northport Wesleyan Grove Campmeeting Association, dated September 14, 1904, said land being described in said deed as follows:

"Beginning at northerly corner of lot 302, thence westerly on line of Park forty (40) ft. to lot 303; thence on line of lot 303 southerly sixty (60) feet more or less to land of one Knowlton, thence easterly on said Knowlton's line forty (40) ft. to easterly corner of lot 302; thence northerly on easterly line of lot 302 sixty (60) ft. to place of beginning."

These deeds were duly recorded.

The lot on which the defendant erected the structure is mentioned in the lease to J. Warren Brown only as a boundary of the demised

lot, but the plaintiffs rely upon the legal status of the fifteen foot strips of land in reference to the holders of the twenty-five foot lots who acquired title after the Northport Wesleyan Grove Campmeeting Association had plotted land, showing upon a plan the small lots marked thereon "15 x 60," designated in the leases "vacant lots" and mentioned in the records of the Campmeeting Association as "spaces," and they claim that they have an easement in this lot as appurtenant to lot No. 303.

There is undisputed evidence if admissible showing that the treasurer of the Association told the agent of J. Warren Brown when the lease was negotiated that the fifteen foot spaces were reserved for the purpose of giving the lessees and occupants of the twenty-five foot lots the benefits of light, air, passage to the rear of their buildings. This statement could be of no avail to the plaintiffs against the defendant if he was an innocent purchaser of the land in question without notice of any arrangement enlarging their rights beyond the ordinary meaning of the language describing the demised premises. The defendant testifies that he had no knowledge of such an arrangement when he purchased the land in question, but his familiarity with the affairs of the Association for sixteen years, the tenor of his letters and his reticence when charged affirmatively and interrogatively with acting as agent of the Association to test its right to sell the fifteen foot lots adjacent to lots leased for residences, raise such a doubt of his being, in a legal sense, an innocent purchaser, as to make him chargeable with notice.

We shall therefore consider the defendant's title such as the Association had when it gave its warranty deed to his grantor, and determine in view of the law and facts whether he has interferred with the exercise of the easements claimed by the plaintiffs, and whether they have such easements under the lease to J. Warren Brown.

An easement is created by (1) express or implied grant, (2) reservation or exception in the deed of conveyance, (3) prescription, (4) statutory proceedings, (5) estoppel. 1 Tiffany Mod. Law of Real Property, sec. 315; Tiedman on Real Property, secs. 599, 600, 601; *Cook* v. *Stearns*, 11 Mass. 533.

We may eliminate from the controversy any easement created by express grant, as the description in the lease of the supposed dominant estate limits by fixed and definite metes and bounds the demised premises to the land so described, *Carville* v. *Hutchins*, 73 Maine, 227, easements by reservation and exception, which are created only in favor of grantors, easements by prescription, because the plaintiffs' predecessor in occupancy held the land under a lease from the Northport Wesleyan Grove Campmeeting Association and there has been no repudiation of the tenancy. *Binney* v. *Chapman*, 5 Pick. 124; *Towne* v. *Butterfield*, 97 Mass. 105; *Hudson* v. *Coe*, 79 Maine, 83; Jones Landlord and Tenant, sec. 696, also any easement by force of statutory proceedings in the lot in controversy.

The real questions in issue, therefore, are, whether J. Warren Brown by his lease of lot No. 303 acquired any proprietory rights in the adjacent lot by (1) implied grant or (2) by estoppel against the Association and its successors in title, and (3) whether the plaintiffs acquired any title under the perpetual lease given to J. Warren Brown as his widow and heirs.

An implied grant of an easement in favor of a grantee arises from circumstances where at the time of the conveyance the grantor was the owner of land constituting both the dominant and servient estates. Two classes are recognized, one called quasi easements which are existing conditions in the land retained the continuance of which would be so clearly beneficial to the land conveyed that they would be presumed to be intended. These easements must be such as are apparent in the sense of being indicated by objects which are necessarily seen or would be ordinarily observable by persons familiar with the premises. No such conditions affecting the lot in question were apparent when the lease of lot No. 303 was given to J. Warren Brown, nor was any easement by necessity implied from the conditions and mode of the use of the land. 1 Tiffany Mod. Law of Real Property, sec. 317. The other class of easements by implied grant is where the grantor's conveyance describing the land as bounded by a street, passageway or an existing park which at the time belonged to the grantor has

the effect of vesting an easement of right of way or of light and air in the grantee by estoppel. *Cole* v. *Hadley*, 162 Mass. 579; *Fox* v. *Union Sugar Refinery*, 109 Mass. 292; *Dorman* v. *Bates Mfg. Company*, 82 Maine, 438; *Bartlett* v. *Bangor House*, 67 Maine, 460. But in this case the intention of the parties to impose on the adjacent fifteen foot lot the burden claimed by the plaintiffs is not shown by the description in the lease nor by any marks upon the plan, and the language being definite and not ambiguous cannot be modified by parol evidence. *Carville* v. *Hutchins*, supra; *Winthrop* v. *Fairbanks*, 41 Maine, 307; 8 Ency. of Evidence 50; *Stevens* v. *Haskell*, 70 Maine, 202; 1 Greenleaf on Evidence, 275.

But the plaintiffs seem to rely upon the contention that the Northport Wesleyan Grove Campmeeting Association dedicated to the public not only Bay View Park but the several lots marked on their plan "15 x 60."

In *Campmeeting Association* v. *Andrews*, 104 Maine, 342, dedication is defined as the intended appropriation of land by the owner for some proper public use, reserving to himself no rights inconsistent with the full exercise and enjoyment of such use. By the decision of that case the lot of land in Northport known as Bay View Park, which is the same so designated on the plan referred to in the lease to J. Warren Brown, has been adjudicated as dedicated by the Northport Wesleyan Grove Campmeeting Association to the public as a park; and the plaintiffs claim that the vacant lots marked on the plan "15 x 60" were by the same acts of the Association, according to the same rule of law as applied to the Park, dedicated to the public to use for the purposes alleged in their writ, and that they, being the occupants of an adjoining lot upon which their dwelling house stands, have suffered special damages by the defendant's acts. But we think that the acts of the Association which were held to prove a dedication of the Park, are distinguishable from any which apply to the vacant lots. The vacant lots as marked upon the plan do not imply dedication. *Chicago* v. *Drexdell*, 141 Ill. 87. The use of these lots is not adapted to any public purpose; the obstruction of them would not work hurt,

inconvenience or damage to the public, and they are no part of the park system, but are reservations available to the Association to utilize under its general supervision of the occupancy of summer residents, or to sell absolutely or under desirable restrictions to the owners or lessees of adjacent lots. The plaintiffs have not sustained the burden of proof which rests upon them to show by acts and declarations of the owner a clear and unequivocal inattention to dedicate these lots to the use of the public. *White* v. *Bradley*, 66 Maine, 254; *Bangor House* v. *Brown*, 33 Maine, 309; *Hogue* v. *Albina*, 10 L. R. A. 673.

The plaintiffs' predecessor in occupancy saw and appreciated the relation of the locus, then vacant, to his lot and he could have negotiated and acquired under his lease the rights for which the plaintiffs contend, but he depended upon the individual representations of an officer of the Association as to what was the purpose of the vacant lots when the land was plotted and delineated upon a plan. It does not appear that these representations were authorized by the Association, and so were ineffectual. *Peirce* v. *Morse-Oliver Co.*, 94 Maine, 406; *Stratton* v. *Todd*, 82 Maine, 149.

But the defendant further contends that the plaintiffs have no title to the lot of land demised under the lease in perpetuam to J. Warren Brown, because, (1) the instrument was not under seal, and because, (2) it did not run to the heirs of the lessee.

It is a well settled rule of the common law of Maine and Massachusetts that a written instrument without a seal is not a deed and cannot convey land in fee. *Manning* v. *Laboree*, 33 Maine, 343; *McLaughlin* v. *Randall*, 66 Maine, 226; *Copper Mining, etc., Co.* v. *Franks*, 85 Maine, 321.

In *Buffum* v. *Hutchinson*, 1 Allen, 58, it was held that "The word 'heirs' is essential in a deed of conveyance to create an estate in fee; and if a man purchased land to himself forever or to him and his assigns forever, he takes only an estate for life," citing 4 Kent Com. 6. The same rule is stated in *Sedgwick* v. *Laflin et al.*, 10 Allen, 430, also in Tiedman on Real Property, sec. 37. This second point of defense seems literally to be sustained in 2 Taylor's Landlord and Tenant, 9th ed. 463, "The heir of a lessee can, as such,

have no claim to the demised premises, unless the lease be dependent upon the life of another and shall have been granted to the lessee and his heirs." No estate of inheritance having been conveyed to J. Warren Brown by the lease, the plaintiffs as the widow and heirs have no title under it to lot No. 303, and therefore have no right of action for the obstruction of any easements in land servient thereto. They are at most tenants at sufferance and cannot maintain the action against the defendant who holds title through their landlord, the Campmeeting Association. *Esty* v. *Baker*, 50 Maine, 325; Taylor's Landlord and Tenant, 774.

Judgment for defendant.

NIELS PETER NIELSON, pro ami,

vs.

INTERNATIONAL TEXTBOOK COMPANY.

Cumberland. Opinion October 28, 1909.

Infants. Necessaries. Exceptions.

1. Articles suitable and which would be beneficial to an infant are not ex vi termini necessaries.
2. It is not necessary that an infant, in order to recover back money paid by him in execution of a voidable contract, should place the other party in statu quo. The fact that the infant may have received and retains intangible benefits from the use of property purchased is no bar to such action.
3. Where an exception to a charge to the jury consists of an extract, detached from its context, the whole charge must be examined in order to determine if the exceptions be well taken.

On motion and exceptions by defendant. Overruled.

Assumpsit for money had and received brought in the Superior Court, Cumberland County. On January 11, 1907, the plaintiff, being then a minor, signed a written contract with the defendant

for it to furnish him with a course of correspondence instruction in the Electrical Engineering Course and paid therefor the sum of eighty-eight dollars in advance. October 21, 1908, and before he became of age, the plaintiff brought the aforesaid action to recover back the money paid by him to the defendant. Verdict for plaintiff for $90.55.

The bill of exceptions further states the case as follows:

"After the evidence had been taken out the defendant requested the following instructions for the jury:

"1. In order to recover in this case the plaintiff must restore all the considerations which he received from the defendant.

"2. If you find that this course was suitable and would have been beneficial to the plaintiff he cannot recover in this action.

"The judge refused to give the requested instructions to which refusal the defendant excepts. The defendant also excepts to the following portions of the Judge's charge:

'Now in order for this plaintiff to maintain his action, he must do all that he reasonably can to restore the other side to the condition in which they were before the contract was made. He testified that he received some books, and those he has returned to the defendant. That much he has been able to do. Whatever benefit he derived from the instruction that he received, he cannot restore; that is an intangible thing which it is impossible for him to return. Under the circumstances of this case, all that he is required to do is to put the other party as near as possible in the same position that they were in before the contract was made; and that he claims he has done by returning the books, and that there is nothing more that he can do. If that is so,—if he has done everything that he can, then he is entitled to maintain the action, unless the contract was for necessaries.'

'Necessaries for an infant may include support and maintenance, food, lodging, clothing, medicines and medical attendance furnished him when his physical condition required them, and an education suitable to his station in life.

'Now, without any question, an ordinary or common school education is a necessary. The courts have so held. The courts

have also held that a collegiate education,—that is, a full academic course of four years in college, is not a necessary. They have likewise held that a professional education, like a training for the ministry in a theological school, or a training for the practice of law in a law school, or a course in a medical school,—is not a necessary. On the other hand, the courts have held that a training by means of which a young man learns a trade, is a necessary.' "

Besides the above quoted parts of the charge to which exceptions were taken, and in relation to "necessaries," the presiding Justice also instructed the jury as follows:

"The term 'necessaries' generally speaking, is not confined merely to such things as are required for bare subsistence, but includes those things without which an individual cannot reasonably exist, and which are useful, suitable, and necessary for his support, use, comfort, taking into consideration the infant's state and condition in life. The articles furnished must be actually necessary, in each particular case, for the minor's use and substantial good, not for mere ornament or pleasure. Beyond this, there is no positive rule by means of which you may determine what are or what are not necessaries; because, as I have already stated, what might be considered necessaries for one infant, would not be so considered for another whose status is different as to rank, fortune and social position. The question is one to be determined from the facts surrounding each particular case also."

The defendant also filed a general motion for a new trial.

William Lyons, for plaintiff.

Emery G. Wilson, for defendant.

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

BIRD, J. Ordinarily the question whether articles sued for are necessaries or not is a question of fact to be submitted to the jury under proper instructions, unless in a very clear case where the court would be warranted in directing a jury authoritatively that some articles cannot be necessaries for any minor: *Davis* v. *Caldwell*, (Shaw, C. J.) 12 Cush. 512, 514; see *Raynes* v. *Bennett*, 114

Mass. 424, 429. In the present case it was undoubtedly proper to submit the question to the jury but the defendant claims error in the charge of the court and in its refusal of requested instructions.

The second requested instruction, "If you find that this course was suitable and would have been beneficial to the plaintiff, he cannot recover," was properly refused. It does not correctly state the law, containing as it does terms applicable to the class of necessaries and terms applicable alike to necessaries and voidable contracts. Nor is it sufficiently comprehensive: *Grand Trunk Ry. Co.* v. *Latham*, 63 Maine, 177.

The defendant urges that the portion of the charge to which exceptions are taken indicated that the court intended the jury to understand that the course of study sold to plaintiff came within the category of professional education. Where, however, the part of the charge excepted to is but an extract detached from its context it is ordinarily necessary to a determination of the exceptions to examine the whole charge: *Donnelly* v. *Granite Co.*, 90 Maine, 110, 117. In the case at bar the infirmity excepted to, if existent, is cured by the closing paragraph of the charge; "It [the course of instruction] seems to stand on intermediate ground, being between that of a trade and a learned profession. But it is for you to determine whether this particular course of instruction was suitable and requisite for this particular young man, as you have seen him here, and as the other facts in the case have given you information in regard to him:" See *State* v. *Watson*, 63 Maine, 128; and also *Bangs* v. *Railroad Co.*, 89 Maine, 194, 198.

It is not necessary that an infant, in order that he may recover back money paid by him in execution of a voidable contract, should place the other party in statu quo. "If he had received property during infancy and had spent, consumed or destroyed it, to require him to restore it, or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him;" *Boody* v. *McKenney*, (Shepley, C. J.) 23 Maine, 517, 525, 526; see also *MacGreal* v. *Taylor*, 167 U. S. 688, 699-700; *Vent* v. *Osgood*, 19 Pick. 572, 577. That plaintiff had derived some intellectual benefit from the use of the books

returned by him, should not place him in a worse condition than that of one who has actually consumed or destroyed tangible property. The refusal of the first requested instruction was not error.

The defendant presents a general motion for new trial. It cannot be sustained. The issues submitted to the jury were simple and the instructions given sufficiently favorable to defendant. The material facts were not in controversy. What were the logical and correct inferences from the facts? In the conclusions of the jury we find no manifest error.

Exceptions and motion overruled.

WACZON WAICZENKO, Administrator,

vs.

OXFORD PAPER COMPANY.

Androscoggin. Opinion November 4, 1909.

Writs. Amendment. Master and Servant. Verdict.

Where a plaintiff was allowed to amend his declaration after the commencement of the trial and also to further amend the same after the evidence was introduced on both sides, *held*, that the amendments were within the discretion of the presiding Justice.

Where the plaintiff's intestate was called into the defendant's "wash room" to assist in moving the nozzle of a blow pipe which conveyed hot pulp and which was ordinarily moved by a rope attached thereto but which had become clogged so that it could not readily be moved by use of the rope and the plaintiff's intestate was attempting to turn the nozzle by pushing the same and it suddenly discharged its contents and became light and gave way under the force the plaintiff's intestate was applying to it and he was precipitated into a vat and scalded and burned so that he died a week later, *held*, that even if the authority which was given to the foreman of the "wash room" to call men from other rooms to assist in moving the nozzle was limited to the pulling by them on the rope, yet it must be brought to the knowledge of the servant to afford the defendant the benefit of the limitation.

Where in an action on the case brought to recover damages sustained by the plaintiff's intestate who was injured while in the defendant's employ so that he afterwards died, and the verdict was for the plaintiff and for $1050, *held*, that the verdict should not be disturbed.

On motion and exceptions by defendant. Overruled.

Action on the case brought by the plaintiff as administrator of the estate of John Waiczenko, deceased intestate, to recover damages for personal injuries sustained by the decedent while in the employ of the defendant, and caused by the alleged negligence of the defendant, and which resulted in his death. Plea, the general issue. Verdict for plaintiff and for $1050.

"At the commencement of the trial, the plaintiff, against the objection of the defendant was allowed to add" certain specifications "as an amendment to his declaration," and "after the evidence was introduced on both sides the plaintiff, against the objection of the defendant," was allowed to further amend his declaration. To the rulings allowing these amendments and also to certain other rulings, the defendant excepted. The defendant also filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

PEABODY, J. This was an action on the case brought by the administrator of John Waiczenko, deceased intestate, to recover damages for injuries received by the intestate while employed by the defendant company through its negligence.

The verdict was for the plaintiff and was $1050.

It is before the Law Court on the defendant's general motion for a new trial and on exceptions to the ruling of the presiding Justice.

The specific cause of action set out in the plaintiff's writ is in substance that on the third day of March, 1907, the defendant was the owner of a mill in Rumford Falls in Oxford County, used for the manufacturing of pulp and paper, in which were certain machinery and appliances, among which were four large wooden

tanks or vats about twenty feet in depth and ten feet in diameter set close to each other, projecting about three feet above the floor of one of the rooms called the "wash room," covering the space between the vats on a level with the tops, was a metal platform without railings, and between the vats above them and the platform was a rotary metal blow pipe about three feet in diameter with the nozzle curved in such a way as to empty its contents, consisting of hot pulp, into each of the vats. The nozzle of the pipe was ordinarily moved by a rope attached and pulled by men from the floor of the room.

John Waiczenko, the deceased, who was employed in a room known as the "leach room," was inexperienced in operating the pipe and was without knowledge that the contents of the vats were hot, and was not informed of the risks and dangers of moving the pipe; the pipe was clogged so that it could not be readily turned or moved by use of the rope and had to be moved on the platform by the employees pushing it when in operation, conveying the hot pulp and discharging it into the vats. While obeying the direction of his superior in charge of the wash room, the deceased was attempting to turn the nozzle by pushing it on the platform, when it suddenly discharged its contents and it became light, and the force he was applying was such that it gave way and he was precipitated into one of the vats and was burned and scalded by the hot pulp and water, suffering great pain in body and mind for one week when he died as a result of his injuries. He incurred certain expenses for medicine, medical attendance and nursing. He was given no instruction or information how to operate or turn the pipe, nor any warning as to the dangers and hazards incident to the work. He was in the exercise of due care and his injuries were caused by no fault on his part, but solely through the negligence of the defendant.

Two questions are raised by the exceptions to the ruling of the Justice, viz:

1. Allowing the amendments to the writ. We think it was clearly within the discretion of the court,

2. Ruling that even if the authority which was given to the foreman of the wash room to call men from other rooms to assist, was limited to the pulling by them on the rope, it must be brought to the knowledge of the servant to afford the defendant the benefit of the limitation. This ruling and the refusal of the Justice to modify it are sustained by the authorities. *Bryant* v. *Moore*, 26 Maine, 84: 26 Cyc. 1163.

The relation of master and servant at the time of the accident is not denied; but the defendant contends that the representative of the deceased servant is not entitled to recover because it is not shown that the deceased was, at the time the injuries were received, in the exercise of reasonable care, and because the risk of the dangers of the place was assumed by him as incident to the work he was doing.

The place to which he was ordered was obviously dangerous by reason of the small size of the platform, its generally slippery condition and open vats with their contents being immediately underneath; but if the servant after an opportunity to observe and appreciate the conditions, consented to do what was requested, he assumed in law the risk, or if he was under the circumstances negligent in his acts of moving the pipe by pushing or kicking it, the defendant would not be liable.

It is shown that it was a custom to borrow men from the various rooms, if desired, to assist in moving the blow pipe.

Waiczenko was about nineteen years old and could not speak English. By the weight of evidence it appears that he worked but two nights in the particular employment which gave occasion for him to assist in the work of moving the pipe in the wash room. McGinnis, under whom he was working in the leach room from which he had been called, had never given him instructions with reference to the pipe or as to risks and dangers in moving it. His testimony shows that he had seen the pipe discharge its load of pulp suddenly, and lighten quickly, and had seen the men trying to move it when clogged; that it was moved by them by pushing with their feet and pulling on a rope.

Uselis, who worked in the leach room, testifies that the deceased had been working two nights before the injury, and that he had not

before that night been called into the "wash room;" that he had also seen the pipe discharge its contents suddenly many times; that as he got into the wash room he saw the boss of the room motion him to go upon the platform; that he placed his foot on the pipe and pushed; the contents were discharged and Waiczenko fell into the tank.

The Superintendent of the mill states that the place on the platform where they pulled around the pipe was unsafe for men to work on not used to the conditions, and would not be safe without a hand hold which they might have on an overhead bar by approaching from one side, but not on the other; that it was customary for the men to approach from either way.

The jury were fully instructed and the conclusion reached by them must have been that the conditions of the place and the nature of the work done were dangerous, and were not such risks as he would by law be presumed to assume. We think it was justified by the evidence. The servant was acting in obedience to the order of the defendant's foreman in charge of the room, indicated by motioning and by accompanying acts, and he had a right to rely upon the judgment of his superior. *Jensen* v. *Kyer*, 101 Maine, 106.

The question of contributory negligence is involved somewhat in the want of evidence to show precisely how the accident happened, but the jury may have properly found that the platform was slippery and that the pipe moved suddenly at the instant the servant pushed or was in the act of pushing with his foot, the irregularity not being purely accidental but of usual occurrence.

It remains to consider whether the servant's injury was solely the result of the defendant's negligence.

The place was dangerous to one unfamiliar with it. The plaintiff's intestate, when called to assist, was not specially informed by the master of the conditions which made it dangerous so as to give him an opportunity to decide whether he would assume the risks incident to the place and work.

It might be negligence either in not doing what was practical and what persons of ordinary caution and prudence would have done to render it reasonably safe, or in not notifying the servant of the

dangers of which he was unaware. The jury would be justified in finding from the evidence that neither of these duties was fulfilled by the defendant toward the plaintiff's intestate. It was a question for them to decide and we should not disturb the verdict.

Exceptions overruled.
Motion overruled.

CHANDLER W. ABBOTT *vs.* ALTON C. ABBOTT.

Knox. Opinion November 5, 1909.

Exceptions. Right of Exception Limited to Parties. Statute, 1905, chapter 61. Revised Statutes, chapter 65, section 28; chapter 79, section 55; chapter 84, section 31.

The right of exception in actions at law is limited to the parties to the action. A mere subsequent grantee of the property attached who appears only to oppose a motion for an order of notice has no right of exception if overruled.

On exceptions by defendant's grantee. Dismissed.

Assumpsit on account annexed and real estate attached. No service had been made on defendant before entry of the writ. Service was ordered but not complied with. A motion for a new order of service was then made and the defendant's grantee, S. J. Gushee, especially appeared and objected to the motion. His objection was overruled and thereupon he excepted.

The case is stated in the opinion.

J. H. Montgomery, for plaintiff.

R. I. Thompson, and Arthur S. Littlefield, for S. J. Gushee.

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

EMERY, C. J. In this action of assumpsit the writ is dated Feb. 6, 1904, and upon it is a return of a real estate attachment as made

Feb. 9, 1904. No service was made upon the defendant. The writ was entered at the April term, 1904, and the action remained upon the docket without valid service until the April term, 1909, although an order of service had been obtained at the September term, 1904, but not complied with. At the April term, 1909, the plaintiff moved for another order of service upon the defendant. Counsel appeared for Mr. Gushee, the defendant's grantee, "for the especial purpose of objecting to any order of service upon the defendant and for no other purpose." They objected to the motion for order of service upon the ground that five years had then elapsed since the attachment was made without its having been brought forward by the register of deeds, whereby the attachment had expired and the court was bereft of authority then to make an order for service. This contention was overruled and Mr. Gushee excepted.

Counsel presumably assumed to appear and object to the motion under ch. 61 of Public Laws of 1905, enacted after the entry of the action and the granting of the first order of service. The language of the statute is: "No first order for service shall be made at any other than the return term; and no subsequent order if any person objects thereto unless for good cause shown." That statute, however, does not provide that any person so objecting may have exceptions to the overruling his objection, nor is the right of exception a necessary incident of the right to object. The legislature may give the latter without giving the former. In cases in the probate court, the right of appeal is granted to "any person aggrieved." R. S., ch. 65, sec. 28. In actions at law, however, the right of exception is limited to "a party aggrieved." R. S., ch. 79, sec. 55. Mr. Gushee is not named in the writ as a party. He does not prosecute or defend the action. He does not appear to be interested in its subject matter. In fine, he is not "a party" within the statutory meaning of the term. *Reed* v. *Reed*, 25 Maine, 242; *Reed* v. *Canal Corporation*, 65 Maine, 53; *Martin* v. *Tapley*, 119 Mass. 116; In *Thomas* v. *Thomas*, 98 Maine, 184, the person excepting was the defendant himself, a party to the process. As a subsequent grantee, Mr. Gushee could have made himself a party (R. S., ch. 84, sec. 31) but he carefully refrained from doing so, and

declared that he appeared only to object. To extend to persons of his status the right of exception granted only to parties would be an act of usurpation and a fruitful cause of delay in legal proceedings.

We do not decide that the order of notice is valid or would be of any avail if complied with. We only decide that Mr. Gushee has no right of exception to the order.

Exceptions dismissed.

AUGUSTA C. MATHER et al. *vs.* EDWARD R. CUNNINGHAM et al.

Waldo. Opinion November 15, 1909.

Law Court. Same has no Power to Recall Judgment. Revised Statutes, chapter 79, section 49.

Where a petition was filed praying the Law Court to recall its certificate of decision and mandate in a case which had been heard and determined by the Law Court and restore the case to the docket of the Law Court and the case had already gone to judgment when the petition was filed, *held* that there was no statute or rule of law which authorized the Law Court to recall such judgment and reinstate the case on the docket of the Law Court.

On petition to Law Court by plaintiffs. Dismissed.

The plaintiffs appealed from the decree of the Judge of Probate, Waldo County, appointing Albert W. Cunningham administrator of the estate of his brother Henry H. Cunningham who died in Shanghai, China, June 10, 1905, and the matter was finally heard and determined by the Law Court. See 105 Maine, 326. But as the opinion and the mandate were silent upon the question of costs, the plaintiffs filed a petition in the Law Court praying that court to "recall its certificate of decision and mandate in said case and restore the case to the docket of this court sitting as a court of law, for the purpose of hearing the parties in said matter as to the costs therein."

The case appears in the opinion.

Arthur S. Littlefield, for plaintiff.

Dunton & Morse, for defendants.

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

SPEAR, J. "To the Honorable, The Justices of the Supreme Judicial Court, sitting as a Law Court at Bangor, in and for the State of Maine, on the first Tuesday of June, A. D. 1909.

"The plaintiffs, petitioners to Your Honors, respectfully represent in the above entitled matter, that Court did on the tenth day of April, 1909, send to the Supreme Judicial Court in and for the county of Waldo, its mandate reversing the decree of the lower court in the matter in which said appeal was taken; and did render its opinion therein, sustaining the contention of the plaintiffs in said appeal; but that said mandate and the opinion were silent upon the question of costs; and that so far as said mandate affects the same, the plaintiffs would not have the right to have costs taxed in their favor therein. . . .

"Wherefore, inasmuch as this Honorable Court, sitting as a court of law, has in other cases made an allowance of costs prior to the mandate of its decision, which mandate in that respect it has been the practice of the supreme court to follow, your petitioners pray that this Honorable Court will recall its certificate of decision and mandate in said case and restore the case to the docket of this court sitting as a court of law, for the purpose of hearing the parties in said matter as to the costs therein, and that upon such hearing it will order that the costs of such appeal to be taxed by the court shall be paid by the appellees."

It would appear from this petition and prayer that the case had already gone to judgment when the petition was filed. R. S., chapter 79, sec. 49. We know of no statute or rule of law which authorizes the Law Court to recall judgment in this case and reinstate it upon the docket of the Law Court.

"The Supreme Court, while sitting as a court of law, is not a court of original jurisdiction," *Baker* v. *Johnson*, 41 Maine, 15,

and "cannot grant leave to amend." *Crocker* v. *Craig*, 46 Maine, 327.

"Under the present organization of our judiciary, the Law Court is not a court for trials, and has such and only such jurisdiction as is conferred upon it by statute." *State* v. *Gilman*, 70 Maine, 333.

"The Law Court in this State is not a constitutional court. It is not a court of original or of common law jurisdiction. The court is created by statute, and has that jurisdiction only which the statute has conferred upon it, and that is a limited jurisdiction. It has no other authority. The State has the right in creating the Law Court, to limit its power and to determine upon what conditions they shall be exercised. The court cannot properly extend its statutory powers nor dispense with the conditions imposed." *Stenographer Cases*, 100 Maine, 275.

Petition dismissed.

SILAS BARTLETT *vs.* EDWARD S. PITMAN AND A. I. HARVEY.

Androscoggin. Opinion November 15, 1909.

Promissory Notes. Principal and Surety. Extension to Principal. Consideration.

Where the principal and surety duly signed a promissory note and delivered the same to the payee and the payee and the principal without the knowledge or consent of the surety, orally agreed to extend the time of the payment of the note for one year after it became due, and no consideration for the agreement was shown, *held* that the surety was not thereby discharged.

On exceptions by defendant surety. Overruled.

Assumpsit on a promissory note signed by the defendant Pitman as principal and by the defendant Harvey as surety. For plea the defendant Harvey filed the general issue with brief statement as follows: "That he was an accommodation signer on the note declared on in plaintiff's writ and declaration and that plaintiff who

was the payee in said note, with full knowledge that the defendant signed said note as an accommodation signer, extended the time of payment on said note for the term of one year after said note became due, without any notice or agreement with said defendant, Austin I. Harvey, the accommodation signer on said note, whereby the defendant, Austin I. Harvey, was discharged from the payment of said note and from all liability thereon." At the conclusion of the evidence the presiding Justice directed a verdict for the plaintiff and against both defendants for the amount of the note and interest. The defendant Harvey excepted to certain rulings. The following question was also submitted to the jury: "Did the plaintiff agree with Edward S. Pitman to extend the time of payment after the note became due? Answer. "Yes."

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

W. H. Hines, for defendant Pitman.

H. H. Patten, for defendant Harvey.

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

SPEAR, J. This was an action upon a promissory note signed by Edward S. Pitman, principal, and A. I. Harvey, surety. The note was signed by Harvey before delivery to the plaintiff. The defense was the general issue with a brief statement that the defendant Harvey was an accommodation signer and that the plaintiff, the payee, in the note, extended the time of payment for the term of one year after the note became due without the knowledge or consent of the defendant Harvey. The evidence tended to support the brief statement and the jury in answer to the question whether the note was so extended, answered in the affirmative, although the definite time of one year was not specified in the question. At the close of the charge of the presiding Justice, the defendant's counsel said: "One other question I would like to have appear, that we also claim in defence that if the time of payment was extended by the plaintiff for a definite time, without the consent of the surety, that would discharge him." The court declined to give the

requested instruction and ordered the jury to return a verdict for the plaintiff. The defendant excepted to the refusal of the court to give the requested instruction and the case comes up on that exception.

Nothing appears in the evidence to show any contract between the plaintiff and the principal defendant beyond that specified in the brief statement, namely, a naked agreement to extend payment one year. There is no intimation of any new consideration for this contract. Consequently the agreement was not one which the principal could have enforced against the plaintiff. It therefore did not affect the rights of the surety. *Berry* v. *Pullen*, 69 Maine, 101; *Turner* v. *Williams*, 73 Maine, 466; *Bank* v. *Dow*, 79 Maine, 275; *Bank* v. *Parsons*, 138 Mass. 53.

These cases seem to be conclusive upon the point raised by the exceptions.

Exceptions overruled.

JAMES COOK *vs.* DENNIS MCGILLICUDDY.

Knox. Opinion November 15, 1909.

Contributory Negligence.

Where the plaintiff in an action on the case recovered a verdict for personal injuries sustained by him in falling down a flight of unrailed and unlighted stairs, in the darkness of the early morning, in the defendant's boarding house where he was a boarder, *held* that without considering the question whether the condition of the premises was such as to warrant the jury in finding negligence on the part of the defendant, the plaintiff's own story revealed such a want of due care on his part as rendered the verdict clearly wrong.

On motion and exceptions by defendant. Motion sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff in falling down a flight of unrailed and

unlighted stairs in the defendant's boarding house. Plea, the general issue. Verdict for plaintiff for $394. During the trial the defendant requested the presiding Justice to instruct the jury "if when the plaintiff came to the head of the stairs it was so dark that he could not see he ought not to have proceeded without a light and to do so was of itself contributory negligence." The requested instruction was refused and the defendant excepted. The defendant also filed a general motion for a new trial.

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Frank W. Butler, for defendant.

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

CORNISH, J. Motion to set aside a verdict for the plaintiff in an action on the case for personal injuries sustained in falling down a flight of unrailed and unlighted stairs in defendant's boarding house. There is little conflict of evidence on the material facts which are as follows: The defendant at the time of the accident was the lessee of the second and third stories of a building in North Jay used by him as a boarding house, the first story being occupied by stores. The smoking and dining rooms were situated on the second, the sleeping rooms of the boarders on the third floor. The stairs leading from the second story started from a landing near the smoking room and rose between solid walls on either side to the hall in the third story which ran at right angles, and out of which the chambers opened, the plaintiff's among the others. Between the top of the stairs and the hall was a landing about four or five feet long and the same width as the stairs which was three feet and three inches. These stairs were unrailed, but a board and moulding finish, which the plaintiff calls a facing board, seven inches wide and projecting one inch, was attached to the wall at a distance of about two or three feet from the floor, and extended around the upper hall and the landing as well as on either side of the stairway as appears from the photographs introduced in the case. By day the stairway was lighted by a window in the door at the foot of the

stairs and by another in the front of the building opposite the top. At night a lantern was hung near the foot of the stairs, but in the early morning it was not lighted.

The plaintiff reached North Jay about four o'clock in the afternoon of Saturday, November 7, and went directly to this boarding house. He remained there over Sunday, and Monday morning began work as a stone cutter. He worked Monday and Tuesday, returning to these premises for meals and lodging. On the morning of Wednesday, November 11, he arose as usual before light, dressed in the dark and then started to go down stairs through the unlighted hall. What followed can best be stated in his own words. "I came out of my room, put my hand along the wall and felt my way along to the head of the stairs. I followed along the hallway until I come to the corner of the stairs and I stopped there and felt for a match, that is, when I thought I was very near the corner, I didn't have no matches. I felt along with my left hand and struck this facing board where it runs up and down. I guess it projects about half an inch. I reached for the rail and stepped at the same time. . . . I supposed there was a rail there to get hold of. I went to step and went right off the same time. There was no rail there."

Without considering the question whether the condition of the premises was such as to warrant the jury in finding negligence on the part of the defendant, the plaintiff's story reveals such a want of due care on his own part as renders the verdict clearly wrong. The plaintiff was a man of mature years who had worked at his trade in many places in this State. He attributes his accident to the want of light and railing, yet the darkness was apparent and the lack of railing he either had discovered previously or might have discovered had he given that attention to his surroundings which the law requires. Certainly the opportunity to do so had been ample. He had lived in the house from Saturday afternoon to Wednesday morning going up and down these stairs by day and by night. So that on the morning of the accident the unlighted and unrailed stairs were in the eye of the law obvious to him. There was a lamp in his room which he might have used had he seen fit. When he

reached the landing at the top of the stairs, he apparently realized the danger of proceeding further without a light because he said he felt in his pocket for matches but could find none. He appreciated the peril involved in going ahead in the darkness, yet he took the fatal step. His proceeding under those circumstances falls little short of recklessness. His only excuse is that he was trying to find a railing which did not exist and which he ought to have known did not exist. This excuse will not avail. Had he been a stranger wandering ignorantly in the dark, he could not have recovered. *Wilkinson* v. *Fairie*, 1 H. & C. 633; *Campbell* v. *Abbott*, 176 Mass. 246; *Parker* v. *Portland Publishing Co.*, 69 Maine, 173. His familiarity with the premises does not lighten the burden of due care which the law requires him to sustain. Either horn of the dilemma is fatal to his claim.

Motion sustained.

ALMON H. FOGG COMPANY *vs.* ARTHUR W. BARTLETT et als.

Aroostook. Opinion November 17, 1909.

Six Months' Bond. Sureties Released by Discharge of Principal in Bankruptcy. Revised Statutes, chapter 114, sections 49, 55.

Where a judgment debtor under arrest on execution, on February 12, 1908, in accordance with the provisions of Revised Statutes, chapter 114, section 49, gave the bond commonly known as a six months' bond, and on February 29, 1908, was duly adjudged a bankrupt under the United States bankruptcy law, and on April 24, 1908, was duly discharged in bankruptcy and the judgment was a debt provable in bankruptcy, *held* that the discharge in bankruptcy released both the principal and the sureties from all further liability on the bond.

On report. Judgment for defendants.

Action of debt on a six months' bond given by the defendant Bartlett as principal and the other defendants as sureties, in accordance with the provisions of Revised Statutes, chapter 114, section 49.

The bond was dated February 12, 1908. February 29, 1908, the defendant Bartlett was duly adjudged a bankrupt and April 24, 1908, he was duly discharged in bankruptcy. The suit on the bond was commenced August 22, 1908. The only defense claimed by any of the defendants was the bankruptcy and discharge in bankruptcy of the defendant Bartlett. When the matter came on for hearing, an agreed statement of facts was filed and the case was then reported to the Law Court for determination.

The case is stated in the opinion.

Doherty & Tompkins, and Leonard A. Pierce, for plaintiff.

Harry M. Briggs, for defendants.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

PEABODY, J. This was an action of debt against the sureties on a statutory bond given in accordance with R. S., chapter 114, section 49, for the release of the principal from arrest on execution.

The case is before the Law Court on an agreed statement of facts and the stipulations of the parties.

The defendant, Arthur W. Bartlett, having been arrested on an execution in favor of the plaintiff, was released on giving the bond in suit dated February 12, 1908, signed by himself as principal and the other defendants as sureties. The principal was adjudged a bankrupt by the District Court of the United States for the District of Maine, February 29, 1908, and received a discharge in bankruptcy April 24, 1908.

It is contended by the defendants that this discharge of the principal is a valid defense to the action.

The bond was given to the plaintiff as a statutory equivalent for the security afforded it by the arrest of the debtor. The sureties had intervened and by obtaining the release of the debtor, deprived the creditor of whatever advantage it had gained by his arrest. By the conditions of the bond they had agreed that the debtor should within six months of its date cite the creditor before two justices of the peace and of the Quorum, submit himself to examina-

tion, and take the oath prescribed in Revised Statutes, chapter 114, section 55, pay the debt, interest, costs, and fees, arising in said execution, or deliver himself into the custody of the keeper of the jail to which he was liable to be committed under the execution. Neither of these alternative agreements was fulfilled and the defendants are liable unless this was made unnecessary by the debtor's discharge in bankruptcy before the expiration of the six months. They assumed the risk of future events which might be contemplated unfavorable to the creditor. The debtor might voluntarily place himself in a situation to be exempt from arrest, or he might abscond, so that the sureties could not surrender him according to one of the conditions of the bond. He might become insane and incapable of making a disclosure of his property affairs so as to fulfil that condition of the bond.

Under the general rule of law which prevails in Maine that the sureties on a poor debtor's bond can be discharged only by a literal fulfilment of its conditions neither of these events would relieve them from liability. *Haskell* v. *Green*, 15 Maine, 33; *Harrington* v. *Dennie*, 13 Mass. 92. But there may be circumstances which would constitute an equitable defense to a suit on the bond if happening within the period of the six months in which its conditions are to be fulfilled. The death of the principal, his voluntary release by the creditors, or a change of statute making performance of the conditions of the bond unlawful, would discharge the sureties. 3 Ency. Pleading & Practice 186; *Champion* v. *Noyes*, 2 Mass. 483.

The last case cited is very similar to the case at bar. To a scire facias on a bail bond a plea in bar was filed, that the principal is a certified bankrupt, that the original judgment was for a provable debt owed to the plaintiff before the bankruptcy, and that the certificate had been allowed. It was held on demurrer that the plea in bar was good. The court say in the elaborate opinion, "Were the principal in the case surrendered, the court could not commit him; or if committed, he would the next moment be entitled to his discharge. To surrender him under these circumstances would be expensive to the bail, oppressive to the principal, and useless to the plaintiff." The decision is sustained by the weight

of authority. Collier on Bankruptcy (6th ed.) 214, 215; 3 Ency. Pleading & Practice 185; 3 Am. & Eng. Ency. (2nd ed.) 633; 5 Cyc 32. The contrary appears to have been held in *Goodwin* v. *Stark*, 15 N. H. 218.

Marr et al., Petr's, v. *Clark et al.*, 56 Maine, 542, presents a case where the principal on a bond given to procure his release from arrest on mesne process undertook to fulfil one of its conditions by making "true disclosure of his business affairs and property under oath." In the proceeding before the justices he stated under oath that he had no real or personal estate and that he had filed his petition in bankruptcy and produced his certificate; but he refused to answer further, claiming that this was a full disclosure. It was held in the opinion of the court by Danforth, J., "If the bankrupt law will relieve the debtor from fulfilling the conditions of his bond he may avail himself of that relief in any legitimate way, but he has sought his discharge in a method entirely independent of the bankruptcy law." It was decided that he had not done all that his obligations under the statute required. This case is cited in support of the plaintiff's position, but it simply decides that the debtor had not complied with this alternative condition of the bond; the reasoning of the court favors the defense.

The decision in *Hackett* v. *Lane et als.*, 61 Maine, 31, goes no further than to hold that where the defendants on a poor debtor's bond rely in defense upon the distinct ground that the principal obligor has fully performed one of the alternative conditions of the bond, it must appear that he followed the statute implicitly in all its requirements.

The agreed statement and stipulations give to the defendants the benefit of the plea of a discharge in bankruptcy of the principal obligor before the forfeiture of the bond.

Judgment for defendants.

JOSEPH A. COFFIN *vs.* FRANK HALL.

Washington. Opinion November 18, 1909.

Pleading. Declaration. Arbitration and Award. Void Award.

When on demurrer a declaration has been adjudged insufficient the adjudication can be reviewed only on exceptions.

A declaration in an action of assumpsit is technically defective when it does not directly allege a promise on the part of the defendant.

When the declaration in an action of assumpsit does not directly allege a promise on the part of the defendant, and there is only an inference of law from the terms of the contract set out in the declaration, it is not sufficient.

Where an award was made under a submission at common law, and the submission stated clearly that the matter to be determined was what was "a fair and equitable annual rental" of the premises occupied by the defendant and claimed to be owned by the plaintiff, and the arbitrators in determining the question of a fair and equitable rental awarded that certain repairs should be made by each party, thus basing their estimate upon the conditions of good repair of the property to be made and to be maintained in the future, and also omitted to include matters which were material to the question in issue between the parties, *held* that the award was void.

On exceptions by defendant. Sustained.

Assumpsit on an award made under a submission at common law. At the return term of the writ the defendant demurred generally to the declaration, the demurrer was sustained and the plaintiff was given leave to amend. At the second term, the plaintiff filed an amended declaration, and the defendant demurred generally to the same. The demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

E. N. Benson, for plaintiff.

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

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

PEABODY, J. This is an action of assumpsit on an award made under a submission at common law. At the entry term of court

the defendant filed a general demurrer to the declaration which was sustained, and the plaintiff was given leave to amend. At the second term an amendment to the declaration was filed by the plaintiff to which the defendant filed a general demurrer. This was overruled by the presiding Justice, to which ruling the defendant excepted, and the case is before the Law Court on his exceptions.

The original declaration, the submission and award, the new declaration and the demurrer thereto, and ruling thereon, were made part of the bill of exceptions.

The insufficiency of the new declaration is claimed by the defendant upon two grounds, first, because the case is res judicata, and second, because the amended declaration is bad in substance.

The original declaration is made part of the bill of exceptions for the purpose of showing that it is essentially the same as the amended declaration. The former, having been adjudged insufficient, this adjudication could be reviewed only on exceptions thereto. *Plaisted* v. *Walker*, 77 Maine, 459; *Bean* v. *Ayers et als.*, 69 Maine, 122. It is not so obvious that the amendments are not material as to warrant us in declining to consider the amended declaration on its merits. The submission states clearly that the matter to be determined was what was "a fair and equitable annual rental" of the premises occupied by the defendant and claimed to be owned by the plaintiff. A valid award would be available to either party seeking to assert his rights in reference to the property involving the question of damages or rental. *Cushing* v. *Babcock*, 38 Maine, 452.

The declaration shows that the arbitrators in determining the question of a fair and equitable annual rental awarded that certain repairs should be made by each party, thus basing their estimate upon the conditions of good repair of the property to be made and to be maintained in the future.

We think that they exceeded their authority in deciding matters not within the scope of the submission which cannot be separated from those which were referred to them, and they omitted to include others which were material to the question in issue between the parties, consequently the award is void. *Wyman* v. *Hammond*,

55 Maine, 534; *Hubbell* v. *Bissell*, 13 Gray, 298; 2 Greenleaf on Evidence, sec. 74; Morse on Arbit. and Award, 599, 600; 3 Cyc. 674.

The declaration is also technically defective because it does not directly allege a promise on the part of the defendant. There is only an inference of law from the terms of the contract set out in the declaration. This is not sufficient. *Brown* v. *Starbird*, 98 Maine, 292; *Bean* v. *Ayers et als.*, 67 Maine, 482.

Exceptions sustained.
Demurrer sustained.

In Equity.

ELIZABETH B. BLISS

vs.

SAMUEL W. JUNKINS, EDWIN A. HOBSON, AND LEWIS W. PENDEXTER, County Commissioners of York County, et als.

York. Opinion November 19, 1909.

Ways. Petitions for Ways. Indefinite Termini. County Commissioners. Jurisdiction of Same. Effect of Acting Without Jurisdiction. Interested County Commissioner. Validity of Proceedings Subject to Collateral Attack. Revised Statutes, chapter 23, section 1.

1. County commissioners have no jurisdiction to lay out a highway under the provisions of Revised Statutes, chapter 23, section 1, unless the petition therefor describes with reasonable definiteness the places where the proposed way is to commence and terminate.
2. Where the highway prayed for is described in the petition to the county commissioners as commencing on some point on a way which is one and one-half miles long and as terminating on another way which is five miles long, the proposed way is not described with such reasonable definiteness

as to comply with the requirements of the statute and the county commissioners are without jurisdiction to commence proceedings thereon and their doings are ineffectual and void.

3. Where a highway as laid out by the county commissioners, passes over the land in which one of the commissioners has an interest, either as sole or part owner, and is directly interested in the location of such way, such interest disqualifies such commissioner, and the board of county commissioners is without jurisdiction and their proceedings in laying out such way are void.

4. The validity of the proceedings of county commissioners, in laying out a highway may be attacked collaterally when it appears that they were without jurisdiction to commence the proceedings.

White v. *County Commissioners*, 70 Maine, 317, examined.

In equity. On exceptions by defendants. Overruled.

Bill in equity against Samuel W. Junkins, Edwin A. Hobson, and Lewis W. Pendexter, County Commissioners of York County, and eight others, to wit, the selectmen of the town of York, a bridge committee of four chosen by the town to act in conjunction with the selectmen, and a contractor alleged to have a contract with the town for the construction of the way hereafter mentioned, praying that the defendants be perpetually enjoined from entering upon, or attempting to take, under proceedings of the county commissioners laying out a way, any part of a lot of land owned by the plaintiff, or from erecting or maintaining in York River adjacent to said land, or on the town road lying along the river or on the plaintiff's land adjacent to the town road certain structures needful or convenient in construction of the way and the bridge to be used in connection therewith.

The defendants demurred generally for want of equity, the demurrers were overruled and the defendants excepted.

The case is stated in the opinion.

Chauncey Hackett, and Arthur E. Sewall, for plaintiff.

William S. Matthews, Fred A. Hobbs, John C. Stewart, James O. Bradbury, Geo. F. & Leroy Haley, for defendants.

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

BIRD, J. The complainant brings this bill in equity asking that defendants be perpetually enjoined from entering upon, or attempt-

ing to take, under proceedings of the county commissioners laying out a way, any part of a lot of land owned by complainant, or from erecting or maintaining in York River adjacent to said land, or on the town road lying along the river or on complainant's land adjacent to the town road certain structures needful or convenient in construction of the way and the bridge to be used in connection therewith. The bill of complaint, among other grounds for the relief prayed, alleges want of jurisdiction in the county commissioners to commence proceedings and a disqualifying interest in one of the commissioners. The defendants demurred generally for want of equity. In support of their exceptions to the overruling of the demurrer, the defendants urge that the remedy of complainant, if any, is by certiorari and not in equity.

Considering the first ground for relief alleged by complainant, we find that the petition to the county commissioners asked the laying out of a highway over York River to extend between some point on the county way which leads from York Village to Norwood Farms by way of York Harbor and another point, southwesterly over tide water, on the county way leading from Seabury Railroad Station to Kittery Point. We are of the opinion that this description of the desired way contained in the petition does not meet the requirement of statute (R. S., c. 23, § 1)—"a written petition *describing the way*": *Hayford* v. *County Commissioners*, 78 Maine, 153, 157. In view of the fact that the county way from York Village to Norwood Farms is more than one-half mile long in York Harbor and that the county way from Seabury Railroad Station to Kittery Point is five miles long, there is nothing here to make the termini reasonably definite as in *Bryant* v. *Co. Commrs.*, 79 Maine, 128, or *Andover* v. *Co. Commrs.*, 86 Maine, 185. See *Pembroke* v. *Co. Commrs.*, 12 Cush. 351.

Unless the petition describes with reasonable definiteness the places where the proposed way is to commence and terminate, the county commissioners have no jurisdiction to lay out a highway under the provisions of R. S., c. 23, § 1; *Hayford* v. *Co. Commrs.*, ubi supra. As stated by the court in *Small* v. *Pennell*, 31 Maine, 267, 270, "unless the commissioners had jurisdiction to authorize the com-

mencement of their proceedings, they would be void. A general jurisdiction merely by law, over the subject matter, is not enough; they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts, which confer it upon them. Their doings are ineffectual unless they have power to commence them, and may in such cases be avoided collaterally. But having jurisdiction, if their subsequent acts are erroneous, they are valid until vacated by certiorari." See also *Hayford* v. *Co. Commrs.*, 78 Maine, page 155.

Complainant further avers in her bill of complaint that the way passed through land in which one of the county commissioners had an interest, either as sole or part owner, and was directly interested in the location of the way and that for this reason the location of the way was illegal. Such interest would disqualify such commissioner, the board of commissioners would be without jurisdiction and the action of the board would be void: *Conant's Appeal*, 102 Maine, 477, 481.

Attention has been called to the case of *White* v. *Co. Commrs.*, 70 Maine, 317, in which, on page 325, it is stated that "Whatever and however great the jurisdictional defects apparent of record, they may all be taken advantage of by this process (certiorari) *and by this alone.*" This conclusion is based upon *Goodwin* v. *Hallowell*, 12 Maine, 271. An examination of this latter case does not, we think, warrant so sweeping a conclusion.

The county commissioners being without jurisdiction in the commencement of proceedings, we cannot say upon demurrer to the bill that the complainant is not entitled to be heard upon the merits of her bill. *Spofford* v. *Railroad*, 66 Maine, 51, 53; *Rockland* v. *Water Co.*, 86 Maine, 55, 58; *Tracy* v. *LeBlanc*, 89 Maine, 304; *Whitmore* v. *Brown*, 102 Maine, 47; *Boynton* v. *Hall*, 100 Maine, 131, 132. See also *Smart* v. *Lumber Co.*, 103 Maine, 37.

Exceptions overruled.

In Equity.

HANNIBAL E. HAMLIN, Attorney General, by Information, THE MAINE BAPTIST MISSIONARY CONVENTION, Relator,

vs.

THE PROPERTY IN WEBSTER, MAINE, formerly occupied by Sabattus Baptist Church, FRANK I. SANBORN, et als.

Androscoggin. Opinion November 23, 1909.

Dedication. Fee. Pious Use. Revised Statutes, chapter 16, section 33.

1. A dedication of land in pais to a pious use does not transfer the fee, but only the use. The legal title, the fee, remains in the dedicator and his heirs or assigns.
2. While the owner of the fee may be even perpetually enjoined from interfering with the pious use to which he dedicated the land, he cannot be deprived of the fee itself unless by eminent domain or other due process of law.
3. While there is an owner of the fee in existence, land dedicated in pais to pious uses is not within the scope of Revised Statutes, chapter 16, section 33, providing for a sale by order of court of property dedicated to pious uses where such property "has no proper or legal custodian," etc.

In equity. On report. Bill dismissed.

Bill in equity in the nature of an information under the provisions of Revised Statutes, chapter 16, section 33, brought by Hannibal E. Hamlin, Attorney General, on relation of The Maine Baptist Missionary Convention, against "the property in Webster, Maine, formerly occupied by the Sabattus Baptist Church," Frank I. Sanborn and six others, praying that trustees be "appointed to care for said property," etc. The defendants demurred to the bill, the demurrer was sustained, exceptions taken, and the cause was then reported to the Law Court.

The case is stated in the opinion.

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

Ralph W. Crockett, for defendants.

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

EMERY, C. J. A demurrer to this bill in equity was sustained and exceptions allowed. The case was then duly reported to the Law Court with the stipulation that if the bill can be sustained upon the allegations therein, with such amendments in form as may be necessary, the exceptions may be sustained and the case remanded for amendments and hearing.

The bill is concerning a quarter of an acre of land in the village of Sabattus in Webster, upon which was built in 1856 a meeting house for religious worship from funds raised by general subscription in the community and from the sale of pews. The house thus built was consecrated by religious ceremonies as a house of worship for the Baptist Church, and for a long time was used "as a place of public worship according to the faith and order of the Baptist denomination." There was not, however, so far as appears, any organized church society to hold and care for the property, and there is no record of ownership of the pews.

Upon the foregoing allegations The Maine Baptist Missionary Convention, as relator, asks in this bill that the court appoint trustees to care for the property, and also authorize them to sell and convey the property and pay the proceeds of such sale into the treasury of The Maine Baptist Missionary Convention "for the purpose of extending the scope, influence and work of the Baptist denomination in Maine in pious uses." The bill admittedly is based on R. S., ch. 16, sec. 33, which provides that "where any property in the State, dedicated and ordained for pious uses has no proper or legal custodian, so that it is becoming wasted and the utility thereof is lost," the court upon application may appoint trustees to care for or sell such property and may direct such disposition of the proceeds as will best serve the purposes for which it was originally intended, etc. There is set out in the bill, however, a warranty deed of the land given in 1856 to three grantees named, "and their heirs and assigns forever" with habendum to them "and their heirs and assigns to their use and behoof forever." In the

deed is no intimation that it was given in trust for any other purpose or use. It is further alleged in the bill that the original grantees are deceased, and that the respondents are their heirs.

It is clear, we think, that with these latter allegations the case is not within the statute cited. There is a legal owner in existence. Admitting that the acts stated constitute a dedication and ordination of the land to pious uses, the legal title alleged to be in the three named grantees was not transferred but remained in those grantees and is now vested in the respondents, their heirs. A dedication in pais of land to pious uses does not transfer the title, the fee, but only the use as an easement. While the holder of the legal title may be restrained from hindering or interfering with that use of the land for which it was so dedicated, the land itself cannot be taken from him except by eminent domain or other due process of law. *Banks* v. *Ogden*, 2 Wall. 57; *Attorney General* v. *Abbott*, 154 Mass. 323; *Cottle* v. *Young*, 59 Maine, 105. In *Beatty* v. *Hurtz*, 2 Peters, 212, the court restrained the owner of the fee from disturbing the possession of the religious society to whose use the lot of land had been dedicated, but did not require him to convey the fee to the society though such a decree was asked for. In the case *The Attorney General* v. *The Perticuler Baptist Meeting House*, 103 Maine, 343, the lot of land on which the meeting house was built was conveyed to two persons as a committee or trustees of "The Perticuler Baptist Church" in Bridgton "and their successors in that office for the time being" with habendum to them "and to their successors in office," etc. The original trustees having died, no successors having been appointed, and the church having become extinct, there was no one with title to the property, and the court held the case to be within the statute. The difference between that case and this at bar is manifest. In the one the defendants had no title. In the other they do have at least the legal title.

The case stated or that could be stated by any amendments in form, not being within the statute, the judgment must be,

Exceptions overruled.

Bill dismissed with costs against the relator.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, MAINE CENTRAL RAILROAD COMPANY, Claimant.

Androscoggin. Opinion November 23, 1909.

Intoxicating Liquors. Evidence. Misbranded and Adulterated Liquors. Same Subject to Seizure. U. S. Pure Food and Drugs Act, June 30, 1906, sections 2, 6, 7.

1. Where eighty half pint bottles of intoxicating liquors are deposited in one lot, the quantity and division into such small bottles are sufficient evidence they were intended for unlawful sale, no other explanation being offered.
2. Where the bottles containing intoxicating liquors are labeled as containing monogram whiskey and are marked "Blend," and the alcoholic contents is less, and the residuum from 100 cubic centimeters is more, than the standard test prescribed by the Act of Congress known as the "Pure Food Act," the liquors are misbranded and adulterated within that Act.
3. Liquors so misbranded or adulterated are by the Pure Food Act forbidden to be introduced into this State from another State, and hence are removed by Congress from the operation of the commerce clause of the federal constitution, and become subject to the laws of the State upon arrival within its territory and before delivery to the consignee.

On report. Judgment for the State.

Search and seizure process issued by the Municipal Court of Lewiston, by virtue of which certain intoxicating liquors transported from Boston, Mass., to Lewiston, Maine, were seized from the freight depot of the Maine Central Railroad Company in said Lewiston, "before delivery to the consignee."

The liquors were duly libeled, a hearing had, and the Maine Central Railroad Company appeared as claimant. After hearing, the Municipal Court declared the liquors forfeited and thereupon the claimant appealed to the Supreme Judicial Court. After hearing in the Supreme Judicial Court, the case was reported to the

Law Court "to determine the rights of the State and the claimant, and to render judgment in accordance with the findings."

The case is stated in the opinion.

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

White & Carter, for claimant.

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

EMERY, C. J. Eighty half pint bottles of intoxicating liquors consigned to J. Johnson were seized at the freight depot of the Maine Central Railroad Company in Lewiston as intended for unlawful sale.

That the liquors were intended for unlawful sale is readily inferable from the quantity and the division into such small bottles, no other explanation being offered.

It is expressly stated in the report, however, that the liquors were transported from Boston, Mass., on a through bill of lading and were seized at the freight depot of the railroad carrier in Lewiston before delivery. These facts would require the return of the liquors to the railroad company (the claimant) if they were lawfully introduced into this State under the laws of the United States. The State, however, claims that the liquors were not thus lawfully introduced because they were adulterated or misbranded and hence their introduction into this State was forbidden by the Act of Congress known as "The Pure Food Act" of 1906.

By the terms of that Act, the Pure Food Act (sec. 2), the introduction into any State from any other State of any article of food or drugs adulterated or misbranded within the meaning of the Act, is prohibited. By sec. 6 of the Act, the term "drug" includes all medicines and preparations recognized in the United States Pharmacopœia or National Formulary, etc., and whiskey is so recognized in both. By sec. 7, a drug is to be deemed adulterated if, when it is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity as determined by the test

laid down in those publications, unless the actual standard of strength, quality and purity be plainly stated on the package containing the drugs.

In the case at bar the bottles were labeled as containing monogram whiskey and were marked "Blend." The alcoholic content was only 36.9 per cent by volume, and the residuum from 100 cubic centimeters was 18 centigrams, while in both the United States Pharmacopœia or National Formulary the standard test for whiskey is from 44 & 55 per cent of alcoholic content, and a residuum of not over 0.5 centigrams. This much lower standard of strength and purity was not at all stated on the bottles, and hence the liquors were plainly adulterated or misbranded within the meaning of the Act, and their introduction into this State was unlawful.

The claimant contends, however, that before the delivery of the liquors from the carrier to the consignee the State has no jurisdiction to inquire into the character of the liquors, or to question the right to have them introduced into this State. This contention was considered and overruled in *State* v. *Intoxicating Liquors*, 104 Maine, 502, upon the ground that the liquors were within the territory of the State and hence subject to its authority except so far as they were protected by congressional action or inaction under the commerce clause of the federal constitution, and that as to adulterated and misbranded liquors that protection had been removed by the "Pure Food Act." In *Wilkinson* v. *Rahrer*, 140 U. S. 545, 565, the Supreme Court of the United States said of the 'Wilson Act'— "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of specific utterance on its part. It imparted no power to the State not then possessed but allowed imported property to fall at once upon its arrival within the local jurisdiction." We think such was the effect of the "Pure Food Act" upon adulterated and misbranded liquors. Whatever the restraint upon the State, and its officers as to unadulterated or properly branded intoxicating liquors in the possession of an interstate carrier within

the State, we think the State can now seize adulterated or misbranded intoxicating liquors wherever it can find them within its territory, even in the possession of an interstate carrier. Such liquors have now no federal protection.

Judgment for forfeiture against the liquors.
Judgment against the claimant for costs of libellant.
Liquors ordered destroyed.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, GRAND TRUNK RAILWAY OF CANADA, Claimant.

Androscoggin. Opinion November 23, 1909.

Interstate Commerce. Intoxicating Liquors. Same Seizable After Delivery to Consignee. Delivery. Quantity of Same May be Sufficient Evidence of Intent to Sell Same Unlawfully.

1. When ten cases containing one hundred and twenty quart bottles of whiskey are deposited in one lot, the quantity alone in the absence of any other explanation is sufficient evidence that the whiskey was intended for unlawful sale.
2. When merchandise has been brought to its place of destination by a common carrier, and the consignee or his agent presents the bill of lading to the carrier and receipts for all the merchandise, there is a delivery to the consignee of all the merchandise though a part of it is left on the premises of the carrier.
3. If such merchandise was brought from another State by an interstate common carrier such delivery subjects it to the laws of the State free from the operation of the commerce clause of the federal constitution.

On report. Judgment for the State.

Search and seizure process issued by the Lewiston Municipal Court whereby certain liquors were seized at the depot of the

Grand Trunk Railway Company in Lewiston. These liquors were duly libelled and the Grand Trunk Railway Company appeared as claimant. The liquors were declared forfeited and the claimant appealed to the Supreme Judicial Court. After the evidence had been taken out in the Supreme Judicial Court, the case was reported to the Law Court for determination. The report states the material facts as follows:

"It is admitted that Charles Sabourin, deputy sheriff, on the 14th day of January, 1909, seized 120 bottles, each containing one quart of whiskey, at the depot of the Grand Trunk Railway Company, on the east side of Oxford Street, in Lewiston.

"It is admitted that these goods came from New York, in the State of New York, on a through bill of lading, under a through rate, consigned to one J. Hume. The goods arrived at Lewiston, on January 1, 1909. On Jan. 8, 1909, a bill of lading covering this shipment was presented to the Grand Trunk Railway Company's office by one of the drivers of the Hoyt's Express Company, of Lewiston, who at that time receipted for the entire 22 cases of whiskey and took with him at the time 12 cases, leaving the remaining cases in the freight shed of the railroad company where they remained until seized by the officer on the morning of Jan. 14."

The case is stated in the opinion.

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

White & Carter, for claimant.

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

EMERY, C. J. Ten cases containing one hundred and twenty quart bottles of whiskey consigned to J. Hume, were seized at the depot of the Grand Trunk Railway Company in Lewiston, and were duly libelled and are claimed by that railroad company.

The first question is whether the whiskey was intended for unlawful sale. Unexplained, we think the quantity is sufficient evidence of such intention, and no explanation is offered.

The next question is whether at the time of seizure the whiskey was so far undelivered and in the custody of the railroad company

as an interstate common carrier as to be within the protection of the commerce clause of the Federal Constitution. Twenty-two cases were shipped from New York and arrived at Lewiston, January 1, 1909. On January 8, 1909, one of the drivers of Hoyt's Express Co. presented the bill of lading and receipted for all the whiskey and took away twelve cases, leaving ten cases in the freight shed of the railroad company where they remained for six more days when they were seized by the officer.

The question is a federal one but we do not find the federal courts to have held that intoxicating liquors are under federal protection so long as they remain upon the premises of the interstate carrier. In *Heyman* v. *Southern Railway Company*, 203 U. S. 270-276, the court was careful to say it did not decide that the federal protection would not be lost where the consignee, after notice, designedly left the liquors in the hands of the carrier for an unreasonable time. The locality of the liquors is not made the test. All that the federal courts seem to require is that the liquors shall once have been turned over to and accepted by the consignee. This may occur without any removal of the liquors themselves from the freight sheds of the carrier, and we think it did occur in this case. In *Knowles* v. *Atlantic & St. L. R. R. Co.*, 38 Maine, 55, the merchandise had not even been unloaded from the cars, but the consignee was notified of its arrival and that it was at his risk. He acknowledged he had received it in good order and requested it be allowed to remain on the cars for a time. Held that the transit was ended and the liability was at an end. In *Whitney Co.* v. *Richmond & Danville R. R. Co.*, (So. Carolina) 17 S. E. Rep. 147, cotton had been transported by the railroad company and the car containing it had been placed upon a side track for the convenience of the consignee, who delivered to the railroad company the way bill as a receipt, and removed part of the cotton. Held that all the cotton had been delivered. In *C. D. Kenny Co.* v. *Atlanta & W. P. R. R. Co.*, 122 Ga. 365 (50 S. E. Rep. 132) the railroad company notified the consignee of the arrival of the merchandise. Before it was unloaded from the car, the consignee's drayman went with the freight clerk to the car and signed a receipt

for all the merchandise, as checked by the clerk. He then hauled some of the merchandise away that day but left some in the car. Held that all the merchandise had been completely delivered at the time of signing the receipt. In *Vaughan* v. *N. Y. N. H. & H. R. R. Co.*, 27 R. I. 235, two cars containing oats, bran and gluten, consigned to the plaintiff, arrived and were placed on a side track near the plaintiff's warehouse. He was duly notified of the arrival, and with the permission of the company's agent opened the cars, examined the contents and removed part of them, leaving the remainder in the cars where it was consumed by fire early the next morning. Held that all the consignment had been delivered. The court said: "But under the testimony we do not find that the defendant (the R. R. Co.) was even a warehouseman. The property had been delivered on the spur track to the plaintiff, he had accepted it, sold and removed some of it, and had assumed full dominion over it, and the mere fact that it still remained in the defendant's cars was a mere matter of convenience to the plaintiff, but did not impose any liability on the defendant."

The facts in the case at bar are manifestly different from those in the cases *State* v. *Intox. Liquors*, 102 Maine, 385, and 104 Maine, 463, and our decision here is not in conflict with those cases rightly read.

Of course the final determination of this question is with the Supreme Court of the United States, but not finding any decision of that court to the contrary upon facts like those in this case, we think for the reasons above given we should hold that the transit was ended, that the liquors had come into the possession of the consignee at the time of the seizure and were then subject to seizure and forfeiture under the State law. We have therefore no occasion to consider questions raised under the "Pure Food Act" of Congress. Having reached the consignee and being intended for unlawful sale, they must be declared forfeited.

Judgment of forfeiture against the liquors.
Judgment against the claimant for costs of libellant.
Liquors to be destroyed.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, MAINE CENTRAL RAILROAD COMPANY, Claimant.

Androscoggin. Opinion November 23, 1909.

Intoxicating Liquors. Forfeiture. "Pure Food Act." Misbranded or Adulterated Liquors. Burden of Proof. U. S. Food and Drugs Act, Approved June 30, 1906.

1. Pure intoxicating liquors brought into this State from another State by an interstate common carrier are not liable to forfeiture under the State laws until they have come into the possession of the consignee.
2. If it be sought to have such liquors declared forfeited before delivery to the consignee, upon the ground that they are misbranded or adulterated within the Act of Congress known as the "Pure Food Act," the burden is on the State to prove such misbranding or adulteration.
3. When there is no evidence of how the liquors were branded, and no evidence of their "strength, quality or purity" except that they were colored and slightly sweetened by burnt sugar, they cannot be held to be misbranded or adulterated. The court cannot take judicial notice that whiskey cannot be colored and sweetened to some slight extent by burnt sugar without exceeding the limits of the standard prescribed by the "Pure Food Act."

On report. Judgment for claimant.

Search and seizure process issued by the Municipal Court of Lewiston whereby four gallons of whiskey which had been shipped from Boston, Mass., to Lewiston, Maine, were seized at the station of the Maine Central Railroad Company in said Lewiston. The liquors were duly libelled and at the hearing on the libel the Maine Central Railroad Company appeared and claimed the liquors. The liquors were declared forfeited and the claimant appealed. After the evidence had been taken out in the appellate court the case was reported to the Law Court for determination.

The report of the evidence states as follows:

"It is admitted that this liquor came on a through way bill from Boston, Mass., consigned to W. N. Bridgham, Lewiston, Maine,

under a through rate. It arrived at Lewiston originally on the third day of January, 1907, and was seized by the officers. It was libelled and a hearing was had before the Lewiston Municipal Court, and the liquors were ordered returned to the railroad company by the court. They were returned to the railroad company on Feb. 14, 1907, and were seized by the officer Feb. 18, 1907. They were declared forfeited by the Lewiston Municipal Court and an appeal was taken. The case went to the Law Court on an agreed statement of facts, and a decision was handed down by the Law Court in December, 1908, ordering the return of the liquors to the railroad company. They were returned to the railroad company on December 10, 1908, and held in the station undelivered until Jan. 7th, 1909, when they were again seized.

"It is further admitted that W. N. Bridgham, or no one representing him, has ever claimed of the railroad or anyone else these liquors, and that so far as the railroad is concerned, at the time of the seizure no owner was known, nor the consignee.

"ERNEST JORDAN, called for state, sworn.

"Direct examination.

"By Mr. Morey.

"Q. What does your analysis show about the liquor?

"A. The liquor was colored, that is all, in that case.

"Q. Colored with what?

"A. Burned sugar.

"Q. In violation of the pure food law?

"(Objected to)

"A. Yes.

"Cross examination.

"By Mr. White.

"Q. You say the liquor was colored with sugar?

"A. Yes sir.

"Q. Otherwise there was nothing to indicate adulteration?

"A. No.

"Q. And this burned sugar slightly sweetened the liquor and colored it?

"A. Yes sir.

"Q. And nothing poisonous about the sugar?

"A. No.

"Q. Nor deleterious?

"A. No.

"Q. And in your opinion was introduced merely for the purpose of coloring?

"A. That is all, yes.

"Re-direct.

"By Mr. Morey.

"And the coloring would materially affect the value, wouldn't it?

"(Objected to)

"A. It would effect the salability.

"Q. And for what reason?

"A. Well, merely because the market demands a liquor that contains some color — a considerable amount of color."

The case appears in the opinion.

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

White & Carter, for claimant.

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

EMERY, C. J. Four gallons of whiskey which came from Boston, Mass., to Lewiston, Maine, consigned to W. N. Bridgham were seized at the station of the Maine Central R. R. Co. (the carrier) in Lewiston, as intended for unlawful sale in this State. The liquors arrived in Lewiston, Jan'y 3, 1907 and were then seized but were returned to the company Feb'y 14. They were again seized Feb'y 18, and held in the custody of the officers until Dec. 10, 1908 when they were again returned to the company. They were again seized upon the process in this case Jan'y 7, 1909. No notice was given Bridgham of the arrival of the liquors, and neither he nor any one for him has ever claimed them. The railroad company, however, did not know the consignee or the owner,

It appears, therefore, that after arrival the liquors were in the actual custody of the railroad company four days in February 1907, and twenty-eight days in December and January 1908-9, or thirty-two days in all. There was admittedly no actual delivery to the consignee, and under the authority of *State* v. *Intoxicating Liquors*, 104 Maine, 463, we must hold there was no constructive delivery. No one for the consignee had called for and receipted for the liquors as in *State* v. *Intoxicating Liquors, the Grand Trunk Railway Company, Claimant*, 106 Maine, page 138, and no facts are stated from which can be inferred any agreement or understanding between the consignee and the carrier for the latter to hold the liquors for the consignee. The liquors must therefore be returned unless it appears that they were adulterated or misbranded and hence unlawfully brought into this State in violation of the Act of Congress known as "The Pure Food Act" of 1906.

The burden is of course upon the State to prove such adulteration or misbranding. There is no evidence at all as to how they were branded, or that they were not branded, nor any evidence as to their "strength, quality or purity" except that the liquors were colored and slightly sweetened by burnt sugar. There was no evidence as to the extent of the coloring, or the quantity or percentage of sugar used, or that it was harmful, and no evidence that it increased the residuum above that permitted by the Pure Food Act. The court is not bound to take judicial notice that liquors cannot be colored to some extent by burnt sugar without thus increasing the residuum. We hold, therefore, that the evidence does not prove the liquors to be within the prohibition of the Pure Food Act; hence they must be returned to the claimant carrier even if they were intended for unlawful sale.

Liquors ordered returned.

VIRGIL C. WILSON *vs.* CITY OF SOUTH PORTLAND.

Cumberland. Opinion November 24, 1909.

Eminent Domain. Land Taken for Public Park. Damages. Title. Statute, 1821, chapter 118, section 2. Statute, 1883, chapter 175, sections 3, 4. Revised Statutes, 1841, chapter 25, section 8; 1857, chapter 18, section 8; 1871, chapter 18, section 8; 1903, chapter 4, section 91; chapter 18, section 8; chapter 23, sections 8, 20.

Revised Statutes, chapter 4, section 91, relating to the taking of land for parks, provides as follows: "Any person aggrieved by the estimate of damages may have them determined by written complaint to the supreme judicial court in the manner provided respecting damages for the establishment of town ways." In proceedings under this section instituted by a person aggrieved by the estimate of damages, *Held:* That the question of the title of the complainant to the land taken may be considered in so far as it respects the question of damages.

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

Complaint for increase of damages brought under the provisions of Revised Statutes, chapter 4, section 91, relating to the taking of land for public parks, and filed in the Supreme Judicial Court, Cumberland County. The defendant city filed an answer denying "that the land and flats so taken for said public park embrace and include any part of the land belonging to said complainant described in his bill of complaint and requires complainant to prove title to the same." The municipal officers of the defendant city did not allow the plaintiff any damages for the land taken but their return gave his name as an owner.

The case was tried to a jury and the verdict was for the plaintiff for $1610.83. The defendant city then filed a general motion for a new trial and also excepted to several rulings made during the trial.

The case is stated in the opinion.

Charles A. Strout, and Virgil C. Wilson, for plaintiff.

Dennis A. Meaher, and Lauren M. Sanborn, for defendant.

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

BIRD, J. This is a complaint for increase of damages brought under the provisions of section ninety-one of chapter four of the Revised Statutes relating to the taking of land for parks. The cause is before this court upon exceptions and motion for new trial. At the trial before the jury the defendant offered evidence attacking the title of petitioner to the land, for the taking of which he claimed damages. The court excluded the evidence offered upon the ground that the return of the municipal officers, while allowing him no damages, gave the name of petitioner as an owner and defendant had exceptions.

It is provided by R. S., c. 4, § 91, that *any* person aggrieved by the estimate of damages may have them determined by written complaint to the Supreme Judicial Court in the manner provided respecting damages for town ways, which by virtue of § 20 of chapter 23, R. S., is that provided in the case of laying out of highways in R. S., c. 23, § 8. This section is based on §§ 3 and 4, c. 175, Public Laws of 1883 which took from the county commissioners the jurisdiction or control of cases of appeal, which they and the court of sessions had had from the establishment of the State and transferred it to the Supreme Judicial Court: *Kennebec Wat. District* v. *Waterville*, 96 Maine, 234, 249. With respect to the former manner of proceeding, it was provided by C. CXVIII, § 2 of the Pub. Laws of 1821, that "If the right or interest of *any* complainant in, or to the real estate alleged to be damaged by the laying out of such highway shall be denied by the town or corporation complained against, the Jury summoned, or committee agreed on as aforesaid, shall have authority to consider such question of right or interest so far only as respects the damages of said complainant." The provision is found in substantially the same words in the revision of 1841: R. S., 1841, c. 25, § 8. In the revision of 1857 it became, "The committee or jury may decide upon the title of any petitioner, so far as it respects damages:" R. S., 1857, c. 18, § 8, and so continued until 1883: R. S., 1871, c. 18, § 8.

In *Minot* v. *Commrs.*, 28 Maine, 121, 125 (1838) upon petition

for certiorari, it is held that "The interest of the petitioner claiming damages, in this land, is one of the questions to be submitted to the jury. It is the foundation of his claim for damages. . . . . It is too plain to need an argument, that one cannot be damnified by the location of a road, over land, in which he has no interest, and if Dwinal [the petitioner] had no such interest in the land, as to entitle him to damages, the proceedings, relating to damages, ought to be quashed." And in *Carpenter* v. *Commrs.*, 21 Pick. 258, 260 (1838) a case involving damages by reason of the location of a railroad, the court said, referring to the statute providing that the damages shall be estimated by the commissioners in the manner provided in the case of laying out highways, "This, by necessary implication, gives to the commissioners authority to inquire whether any damages have been sustained by the applicant, and consequently whether he owned the property, for an injury to which damages were claimed." And again "The estimate, from which the party *is entitled* to appeal, may be fairly construed to import, not only a *valuation of damages*, but also a judgment on the party's *claim for damages*: Id. page 260. At the time of this decision the provisions of the statutes of Massachusetts and of Maine as to appeals in proceedings for laying out highways was and long had been substantially the same.

Thurston v. *Portland*, 63 Maine, 149, (1873) was an appeal from the decision of the city council of defendant, in proceedings under its charter, denying damages to land of appellant in laying out a street. The court, in its opinion says, "It will be noticed that the charter does not expressly authorize 'the committee to decide upon the title of the appellant, so far as it respects damages,' as do the R. S., c. 18, § 8, in the cases of highways and town ways in towns. But we do not perceive any good reason why the committee may not consider that question, so far as it respects damages without any express authority in the charter. Such a power has been in the general statute ever since the organization of the State. It is the foundation of the claim. 'It is too plain to need argument, that one cannot be damnified by the location of a road over land in which he has no interest.'" Id. page 150.

The words "any party" and "any petitioner" as used in the statutes are sufficiently comprehensive to include "owners" named in the return or report as well as those not named.

It is apparent from the authorities cited, we believe, that in confiding appellate proceedings as to damages to the committee or sheriff's jury under the earlier statutes, the question of title was deemed a necessary incident to the determination of damages and that the provisions of § 2 of C.CXVIII of the Public Laws of 1821 permitting the committee or jury to consider title "so far *only* as respects the damages" was not so much a conferring, as a limitation, of such authority.

Such being the case, the omission of a similar provision from R. S., c. 23, § 8, does not indicate that the question of title is not to be submitted to the jury when controverted but that the legislature believed, when the jurisdiction was taken from an inferior into a superior court, that such limitation was unnecessary. Nor is it readily conceivable that the legislature in transferring jurisdiction from the inferior tribunal to the Supreme Judicial Court would at the same time refuse to confide to the latter a jurisdiction as broad as that enjoyed by the former for nearly a century.

Under this construction of the statute, we are unable to perceive how petitioner can invoke the doctrine of estoppel.

Exceptions sustained.

GEORGE F. MISHOU *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion November 24, 1909.

Verdict. Same may be Directed. Negligence. Fellow Servant.

It is the settled law of Maine that when the evidence is insufficient to support a verdict for the plaintiff the court is not required to submit the case to the jury but may direct a verdict for the defendant.

Where at the close of the plaintiff's evidence in an action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, the presiding Justice ordered a nonsuit and the plaintiff excepted, *held* that the nonsuit was rightfully ordered.

Where the plaintiff who was a train conductor in the employ of the defendant railroad, was injured by his train colliding with another train of the defendant, and the proximate cause of the accident was a switch left open by the negligence of the plaintiff's fellow servant, a brakeman, *held* that the defendant was not liable for that negligence.

Where it was contended that the defendant railroad was negligent in putting an engineer in charge of a certain train "who was inexperienced, incompetent, untaught and improperly instructed as to the running of said engine and train over said road," and also that it was negligent in that it "carelessly, negligently and wrongfully maintained" a certain cross-over which "was improperly planned, arranged, defective and unsafe," *held* that the evidence was insufficient to sustain a verdict for the plaintiff upon either proposition.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Plea, the general issue. At the close of the evidence in behalf of the plaintiff, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

George E. Thompson, and Taber D. Bailey, for plaintiff.

Forrest Goodwin, and John Wilson, for defendant.

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

KING, J. Action for damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. At the close of the evidence in behalf of plaintiff the presiding Justice ordered a nonsuit, and the case is before the Law Court on exceptions to that ruling.

October 23, 1906, the plaintiff was conductor of defendant's train No. 401 running eastbound from Bangor to Old Town. There was a double track from Orono to Old Town. At Webster Station, between Orono and Old Town, there was a switch or "crossover" from the westbound to the eastbound track, facing the westbound trains. The plaintiff's train going east was due and on time at Webster Station at 8.55 A. M. Another train of defendant, No. 512, running westbound from Old Town to Bangor, was due at Webster Station at 8.57 A. M. but not scheduled to stop there. The switch at the "crossover" had been left open by a brakeman of a shifting engine operating at Webster Station and just as the eastbound train started out of Webster Station the westbound train passed through the open switch and the engines collided. The plaintiff's injuries resulted from the collision.

Two propositions are relied upon:

First, that the defendant was negligent in putting an engineer in charge of the westbound engine "who was inexperienced, incompetent, untaught and improperly instructed as to the running of said engine and train over said road."

The plaintiff called the engineer of the westbound train who testified that he was 43 years old and had been running locomotives as engineer for 16 years continuously; that before being put in charge of this train he went over this particular track between Oldtown and Bangor (about twelve miles in length) for a week in an engine with a regular engineer on that road for the purpose of learning about the track, the crossings, switches, signals, semaphores and the like, after which he passed an examination required by the defendant company as a test of his qualification for that service.

Another engineer, called by the plaintiff, testified in cross examination, in respect to the time necessary for an experienced and efficient engineer to learn this particular piece of road, that "if they paid strictly to attention he ought to learn it in two or three or four days on it."

It is to be further noted that the accident would not have occurred if the switch had not been open; and the evidence does not show what could have been done by any engineer to avoid this accident the switch being open. The semaphore indicated safety—an invitation to the engineer to come on — but when the open switch was seen the train could not be stopped and the collision was then unavoidable. After a careful examination of the case it is the opinion of the court that the evidence is insufficient to sustain a verdict for plaintiff upon the proposition that the defendant was negligent in its selection of the engineer of the westbound train.

Second, the plaintiff contended that the defendant was negligent in that it "carelessly, negligently and wrongfully maintained" said cross-over which "was improperly planned, arranged, defective and unsafe." His position was that on double tracks a cross-over would be less dangerous if constructed and maintained in the reverse position, with a trailing instead of a facing switch, so that if open it would not face the current of traffic.

It may be true that such construction of a cross-over as plaintiff suggests would be less dangerous than that adopted and used by defendant, but if so no evidence was introduced to establish it, or to show that the cross-over as located and maintained was not reasonably safe, or was not such as is usually and customarily adopted and used in the management and operation of railroads similar to the defendant's. There was, therefore, no sufficient evidence to sustain a verdict for plaintiff on the proposition that the defendant was negligent in the location and method of construction of its cross-over.

Finally: The case clearly shows that the open switch was the proximate cause of the accident which resulted in the plaintiff's injuries.

The switch was left open by the negligence of the plaintiff's fellow-servant, the brakeman of the shifting engine, and for that negligence this defendant is not liable.

It is the settled law of this State that when the evidence presented is insufficient to support a verdict for the plaintiff the court is not required to submit the case to the jury but may direct a verdict for the defendant. The entry in this case must therefore be,

Exceptions overruled.

VITAL OUELLETTE vs. GRAND TRUNK RAILWAY COMPANY.

Androscoggin. Opinion November 24, 1909.

Negligence. Contributory Negligence. Reasonable Care. Burden of Proof. Exceptions.

Negligence on the part of a railroad company is not to be inferred from the mere stopping of its train on a side or passing track, to permit another train to pass, without informing the passengers that the stop is not at a station platform, when no station had been called, and no attendant circumstances existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place.

It is not the act of a reasonably prudent man, accustomed to railroad travel to step from a car into black darkness under a supposition that the car is then at the usual place provided for the landing of passengers. The very darkness itself should be sufficient warning that the station is not there.

Where in an action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, the verdict was for the plaintiff, *held* (1) that the evidence was not sufficient to establish negligence on the part of the defendant; (2) that the plaintiff failed to prove affirmatively that he was in the exercise of reasonable care; (3) that the exceptions to the refusal to direct a verdict for the defendant must be sustained.

In an action to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, it is incumbent upon the plaintiff to affirmatively prove at least two proposi-

tions: 1. That his injuries were caused by the negligence of the defendant. 2. That no failure to exercise reasonable care on his part contributed to bring about his injuries.

Exceptions to the refusal to direct a verdict for the defendant raises the same question as to the sufficiency of the evidence to sustain a verdict for the plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages.

On exceptions by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $4800. Defendant excepted to the refusal of the presiding Justice to direct a verdict for the defendant and also to his refusal to give certain requested instructions.

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

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

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

KING, J. Action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of defendant. Verdict for plaintiff for $4800. The case comes to the Law Court on defendant's exceptions to the refusal of the presiding Justice to direct a verdict for the defendant, and his refusal to give certain requested instructions. The exceptions to the refusal to direct a verdict for defendant raises here the same question as to the sufficiency of the evidence to sustain a verdict for plaintiff as would be raised by the usual motion for a new trial, except as to the amount of damages. To entitle the plaintiff to a verdict it was incumbent upon him to affirmatively prove at least two propositions:

(1) That his injuries were caused by the negligence of the defendant, and (2) that no failure to exercise reasonable care on his part contributed to bring about his injuries.

There is but little conflict in the testimony so far as it relates to those propositions.

On February 6, 1908, the plaintiff was a passenger on defendant's train from Lewiston, Maine, to Berlin, New Hampshire. At

Gorham, an intermediate station, this train crossed another train from Montreal to Portland. There were at the time at least two parallel tracks at this station extending practically east and west, with the station platform on the north. The Portland train was on the main track next to the platform heading east. The plaintiff's train on approaching Gorham took the first passing track next to the main track and stopped at a point overlapping somewhat the easterly end of the other train. The plaintiff was seated in the forward end of the "smoker" facing the rear of the car. He testified that he was "kind of half asleep" or "dozing" and just as his train was coming to a stop on the passing track he heard some one call "Berlin Station" when he immediately took his grip and coat, left the car by the forward platform, stepped down and off the steps on the right hand side, supposing, as he put it, "I was getting off on the station platform," and was instantly struck by something and rendered unconscious. No one saw the accident. After the Portland train passed on east, and the plaintiff's train had backed over the switch on to the main track and pulled up to the platform, the plaintiff was found unconscious and severely injured lying in a hole in the snow at the switch two or three hundred yards east from the platform in front of the station.

The plaintiff did not see any person who called "Berlin Station" and could not say it was a train man, nor was there any other evidence that such a call was made, and there was no reason for such a call to be made, as Berlin Station had not been reached. But whether the plaintiff heard such call in fact, or in dream, he undertook to alight from the train while it was on the passing track and in so doing was injured and carried to the place where found by one or the other train.

The distance between the outside rail of the main track and the inside rail of the passing track was 7 feet 10 inches, and the space between cars standing abreast on those tracks about 4 feet. It is not made certain by the evidence if the forward end of the smoker had passed by the engine of the Portland train. The plaintiff gave no testimony as to this. In his declaration, however, he alleged that it had not, and "that the plaintiff, alighting as aforesaid, . . .

started across said tracks to said station platform and was then and there struck by said "Portland train" leaving said station, hurled a great distance through the air, thrown violently upon the ground, and left unconscious with a broken leg," etc.

Mr. Leader, a passenger for Gorham on the Berlin train, passed through the smoker to a rear car just before the train stopped and saw the plaintiff "apparently dozing in the seat as I went by, and I kind of slapped him like that (indicating), and said good-bye." Plaintiff knew Mr. Leader was to stop at Gorham. Leader alighted from the rear platform of the rear car and crossed the main track in front of the engine of the Portland train. The headlight of that engine was burning. He was not certain if there was more than one car in the rear of the smoker, but the rear end of the Berlin train was "surely a car length if not better" east of the pilot of the engine of the Portland train. It had been storming during the day and was snowing some when the train reached Gorham at 5:26 P. M.

The plaintiff thus described in testimony what he did in getting off the train: "A. I took hold of my grip and coat and started out. Q. Describe where you went and how you went? A. I can't very well describe. All I can say I just had time to put hardly my face out when I was struck. Q. You went out on the platform? A. Yes, I went out on the platform. Q. Then what did you do? A. I was struck by the car. Q. When you were on the platform, or did you step down? A. No, I stepped down. . . . . Q. And was it dark or light? A. Dark."

On cross-examination plaintiff was asked "Q. Did you get your feet on the ground? A. Yes sir. Q. Did you take a step forward? A. No sir, I didn't have a chance to take it. I didn't know there was anything there. Q. Do you know whether you did take a step forward or not? A. I know I didn't."

There was no evidence that Gorham station had been called or announced in any way before or at the time the train stopped on the passing track.

The gist of the plaintiff's alleged cause of action is that the defendant did not inform him that the train had not stopped at

the station platform, and did not warn him of the dangers incident to alighting from the train where it then was.

If it was not reasonably to be expected in the actual course of events that the plaintiff might attempt to alight from the train when it stopped on the passing track, then there was no duty imposed upon the defendant to warn him not to alight. Was his act of alighting there reasonably to be expected under the facts and circumstances as disclosed? We think not. The train had not reached his destination, Berlin, and nothing had been done by defendant to cause him to think so; neither had the train reached the place provided for passengers to alight at the intermediate station, Gorham, and no call or announcement of that station had been made, and nothing appears to have been done by defendant which might cause the plaintiff to think the stop was at the station, other than the actual stopping of the train; nor was the stop at a place where, so far as it appears, passengers were even known by defendant to leave the train, or ever did leave the train, as was the fact in *Boss* v. *Providence & W. R. R. Co.*, 15 R. I. 149.

The only ground, then, upon which it can be contended that the plaintiff's act in leaving the train as he did was reasonably to be expected is the fact that the train did stop without notice to him that it was not at a station platform.

There are many cases which hold that where, after a station had been called, and the train either stopped short or over ran, and a passenger in the exercise of due care was injured in alighting in a dangerous place, the company may be found negligent, and for the reason that the calling the station as the next stop, and then stopping the train without giving warning that the station is not reached, are acts of the company from which in the light of attendant circumstances negligence may be found.

But no authority has been called to our attention, and we have found none, in support of the proposition that negligence on the part of a railroad company may be inferred from the mere stopping of its train on a side or passing track without informing the passengers that the stop is not at a station platform, when no station had been called or announced, and no attendant circumstances

existed calculated to induce a passenger to conclude that the stop was at the usual and proper landing place.

Moreover, it is important to be noted in this case that the fact that the plaintiff had fallen asleep was undoubtedly the real cause of his misfortune. Disturbed in his dreamy slumber he erroneously concluded that the train had reached his destination, Berlin Station. He was familiar with the route, and knew that his friend Leader, who bade him "Good-bye" as the train was stopping, was to leave the train at Gorham. It is manifest that if he had not been sleeping he would not have concluded that this stop was at Berlin, instead of on the passing track at Gorham, but would have known and appreciated where the train was. It was not the duty of the defendant to keep him awake. Though a passenger, he was, nevertheless, free to indulge in sleep if he desired, but if that indulgence was the cause of the damage for which this action is brought, and we think it was, he must bear it and not the defendant.

Again, the plaintiff failed to prove affirmatively that he exercised reasonable care in leaving the train. Such care required him to look where he was alighting, and to observe the situation so far as it could be observed, and to control his actions accordingly. If it be true, as alleged in his writ, that his car was stopped at a point east of the engine of the Portland train, and that he was struck by that train in crossing the main track, then he alighted in the face of the headlight of that engine, which must have revealed to him, if he looked, the situation, and that his train was not at the station. If without looking, and heedless of the obvious danger, he undertook to cross in front of the engine, his act was not only negligent but reckless.

If on the other hand, as his testimony indicates, he stepped from the car into utter darkness, then certainly he must be charged with a lack of reasonable care, for the darkness was apparent, and observed by him. He said: "I couldn't see anything before me."

It is not the act of a reasonably prudent man accustomed to railroad travel to step from a car into black darkness under a supposition that the car is then at the usual place provided for the

landing of passengers. The very darkness itself should be sufficient warning that the station is not there.

It is, therefore, the opinion of the court that the evidence was not sufficient to sustain a verdict for the plaintiff, and that the defendant's exceptions to the refusal to direct a verdict in its favor must be sustained.

The other exceptions are not considered. The entry will be,

Exceptions to refusal to direct a verdict for defendant sustained.
New trial granted.

SOPHIA E. RODERICK *vs.* PARKER M. SANBORN.

Somerset. Opinion November 26, 1909.

Fixtures. Chattels. Annexation. Intention. Storm Windows and Doors.

It is well settled now that whether a chattel has become a part of the realty is a mixed question of law and fact.

It is now generally conceded that the old tests of physical character of annexation are discarded, and the modern trend of authority is adverse to any arbitrary or fixed rule, by which it may be determined whether a chattel is or is not a fixture.

A chattel is not merged in the realty unless (1) it is physically annexed, at least by juxtaposition to the realty or some appurtenances thereof: (2) it is adapted to and usable with that part of the realty to which it is annexed and (3) it was annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty.

In order to be merged in the realty, it is not necessary that a chattel should be physically fastened to the realty at all times. There may be constructive as well as physical annexation.

The most important element to be established tending to prove that a chattel has been merged into a fixture is the intention with which the party provided its use.

The intention with which a chattel is annexed to the realty is the intention which the law deduces from all the circumstances of the annexation.

A chattel need not be absolutely necessary to the completeness of a dwelling if obviously adapted and intended to be used with it.

Where the plaintiff brought an action of trover to recover the value of certain outside windows and outside doors, commonly known as storm windows and storm doors, alleged to have been converted by the defendant, and which said windows and doors were fitted to and used upon a dwelling house on the premises owned by the plaintiff, and the plaintiff mortgaged the premises to the defendant at a time when the windows and doors were actually attached to the house, and afterwards at a time when the windows and doors were on the premises in the stable chamber, the plaintiff conveyed the premises to the defendant by deed of warranty, *held* that the windows and doors had become a part of the realty and the title thereto was vested in the defendant.

On report. Judgment for defendant.

Trover to recover the value of certain outside windows and doors, commonly known as storm windows and storm doors, alleged to have been converted by the defendant. Plea, the general issue. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

E. O. Greenleaf, for plaintiff.

George W. Gower, for defendant.

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

SPEAR, J. This is an action of trover to recover the value of certain outside windows and outside doors, commonly known as storm windows and storm doors, alleged to have been converted by the defendant. The plaintiff claims them as her own personal property and the defendant claims that they passed to him by virtue of a mortgage and final deed to him from the plaintiff. The case is reported upon the agreed statement in which it appears that the plaintiff's husband purchased the premises in question in 1904, and conveyed them to his wife in 1908 in which sale the doors and windows were included but not mentioned in the deed. The title to the real estate is not further involved. That part of the agreed statement pertinent to the issue is as follows:

"Said Joseph A. and Sophia E. Roderick immediately took possession of the premises with the intention of making it their home and lived thereon until on or about October 8, 1908.

"Said Joseph with the purpose of making the place more comfortable for use, procured the outside windows and doors to be made for the house and specially fitted to it, the doors and windows being prepared in the usual manner for fastening to the house by means of screws passing through hinges on the doors and into the frame of the door casing, and by means of screws passing through the double window-frames and into the window casings of the house. Each window-frame was fitted to a particular window casing on the building, and the window casings were numbered consecutively from 1 upwards, and the double windows were numbered to correspond, so that it might be readily determined to which window casing each outside or double window was designed to be attached and used.

"Said outside doors and windows were attached by means of screws as aforesaid and used on the house during each winter that it was occupied by said Roderick, and up to October 8, 1908. In the spring of each year they were removed and stored in the stable on the premises where they remained until attached to the house the next winter, when they would be replaced in their respective places on the building until the following spring."

It also appears that in February, 1907, when the plaintiff mortgaged the premises to the defendant, the doors and windows were then actually attached to the house; and that in October 1908, when the plaintiff conveyed the premises to the defendant by warranty deed, the doors and windows were then upon the premises in the stable chamber.

The only question involved is whether the windows and doors under this statement of facts became a part of the realty so that the title vested in the defendant under his deed of the premises, or remained personal property, the title to which did not pass with the deed.

Whatever the early understanding, it is well settled now that whether a chattel has become a part of the realty is a mixed ques-

tion of law and fact. In the case before us the facts are admitted and from these facts is to be inferred the legal character of these doors and windows. It is now generally conceded that the old tests of physical character of annexation are discarded, and the modern trend of authority is adverse to any arbitrary or fixed rule, by which it may be determined whether a chattel is or is not a fixture. It is now, however, held that a chattel is not merged in the realty unless, in the language of *Hayford* v. *Wentworth*, 97 Maine, 347, (1) it is physically annexed, at least by juxtaposition to the realty or some appurtenances thereof; (2) it is adapted to and usable with that part of the realty to which it is annexed and (3) it was annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty. See also Cyc. 19, 1036. In order to meet the first of these conditions it is not necessary that the chattel should be physically fastened to the realty at all times. There may be constructive as well as actual annexation. It was said in *Farrar et al.* v. *Stackpole*, 6 Maine, 154, "Although the being fastened or fixed to a freehold is the leading principle in many of the cases in regard to fixtures it has not been the only one. Windows, doors and window shutters are often hung not fastened to a building; yet they are properly part of the real estate and pass with it; because it is not the mere fixing or fastening, which is regarded, but the use, nature and intention." The controversy in this case was whether a chain used in a saw mill passed with a deed of the mill as a part of the realty. It was decided in the affirmative although the chain was not necessarily fastened to any part of the mill. "The civil law allows movable property to be made immovable by destination. Corresponding to this is the annexation by intention of the recent common law. Where such annexation is allowed it is sufficient that the owner intends to make the chattel a part of the realty. It is not necessary to use force; it is enough to exercise the will; if this is duly manifested the article is dedicated to the realty and its status as personalty has ceased. These two methods of annexation are sometimes called actual and constructive annexation." In the note under the section is cited the English rule. "In the leading English case it is said that what

constitutes annexation sufficient to make the chattel a part of the realty must depend upon the circumstances of each case and mainly on the circumstances as indicating the intention, viz: the degree of annexation and the object of annexation." A reference to the statement of facts leaves little doubt that the manner in which the doors and windows were actually and intended to be fastened to the house for use satisfies the degree and kind of annexation required by the law.

To establish the requirements of the second condition it is necessary to show that the doors and windows were adapted to and used with that part of the realty to which they were annexed. Discussion upon this proposition would be superfluous. The agreed statement is conclusive. It conceded that "Said Joseph with the purpose of making the place more comfortable for use, procured outside windows and doors to be made for the house and specially fitted to it." The rest of the paragraph emphasizes the proof of adaptability but this is sufficient.

The third and most important element to be established tending to prove that a chattel has been merged into a fixture is the intention with which the party provided its use. This principle has been very recently stated in *Portland* v. *New Eng. T. & T. Co.*, 103 Maine, 240, in this language: "The intention with which an article is annexed to the freehold has come to be recognized as the cardinal rule and most important criterion by which to determine its character as a fixture, and the attendant facts and circumstances are chiefly valuable as evidence. 'This controlling intention is not the initial intention at the time of procuring the article in question, nor the secret intention with which it is affixed, but the intention which the law deduces from all the circumstances of the annexation.'" The same idea is stated in *Hayford* v. *Wentworth*, supra, in this language: "As to the intention, of course it is not the unrevealed, secret intention that controls; it is the intention indicated by the proven facts and circumstances, including the relation, the conduct and language of the parties; the intention that should be inferred from all these." We think the inference from the agreed facts is conclusive upon this point. Joseph A. Roderick

who procured the windows and doors, with his wife "took possession of the premises with the intention of making it their home," and lived there over four years using these windows and doors as they were designed to be used, during the whole period. They were "made for the house and especially fitted to it." "Each window frame was fitted to a particular window casing on the building and the window casings were numbered consecutively." They were procured "with the purpose of making the place more comfortable for use." A chattel need not be absolutely necessary to the completeness of the dwelling house if obviously adapted and intended to be used with it. *Bainway* v. *Cobb*, 99 Mass. 457. The last phrase quoted from the agreed statement seems to bring the case within the doctrine of *Bainway* v. *Cobb*. The ordinary meaning of the language of this statement shows that these doors and windows were obtained for the house and not for the occupants; to make the place more comfortable for use, not for A or B, but for any one who might have occasion to occupy it.

We cannot avoid the conclusion that these doors and windows were procured for permanent use with the house, added to the value of its use and enured to the benefit of the estate.

Judgment for the defendant.

In Equity.

ROSY POTTER *vs.* WILLIAM H. FRANK et als.

Cumberland. Opinion November 27, 1909.

Reformation of Instruments. Burden of Proof. Mutual Mistake. Evidence. Revised Statutes, chapter 82, sections 4, 14, 65.

The burden is on one suing to reform an instrument to show that, when altered, it will correctly show the actual intention of both parties.

Evidence in a suit to reform a constable's bond for omission of seals from the signatures *held* insufficient to show that the seals were omitted through mutual mistake.

To constitute a "mutual mistake" so as to authorize reformation of an instrument, the minds of the parties must meet in a common intent.

In equity. On appeal and exceptions by plaintiff. Appeal dismissed. Exceptions not considered.

Bill in equity brought by the plaintiff, Rosy Potter, against William H. Frank, Winfield R. Frank and John Massure, and the Inhabitants of the City of Portland, praying that "a certain written and printed instrument purporting to be a constable's bond of the said William H. Frank to the Inhabitants of the City of Portland, for the municipal year 1907, be completed and reformed in accordance with the mutual intent of the parties thereto by seals being affixed upon said written and printed instrument, and at the right of and opposite the signatures of the said William H. Frank, Winfield R. Frank and John Massure, the said William H. Frank being described in said written and printed instrument as the principal, and the said Winfield R. Frank and John Massure as sureties," and that "the court order the said William H. Frank, Winfield R. Frank and John Massure, and each of them, to affix to said written and printed instrument, at the right of and opposite their respective signatures their respective seals."

The cause was heard on bill, answers with demurrer inserted therein, and evidence, by the Justice of the first instance who, after

hearing, filed a decree dismissing the bill and thereupon the plaintiff appealed to the Law Court and also excepted to several rulings made during the hearing.

The case is stated in the opinion.

Frank H. Haskell, and Charles E. Perkins, for plaintiff.

John B. Kehoe, Robert Treat Whitehouse, and Emery G. Wilson, for defendants.

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

SPEAR, J. This is a bill in equity by the plaintiff, as a judgment creditor of William H. Frank, for an erroneous attachment and seizure made by him, while acting as constable of the city of Portland, of certain goods and chattels as the property of the planitiff's husband, but claimed to be the property of the plaintiff, herself, brought against William H. Frank, Winfield R. Frank, John Massure, and the inhabitants of the city of Portland, seeking to reform a certain written instrument purporting to be a constable's bond given by the defendant William H. Frank to the city of Portland, for the municipal year 1907, by compelling the defendant William H. Frank as principal and Winfield R. Frank and John Massure as sureties upon said instrument, to affix seals thereto opposite their signatures, which seals it is alleged were omitted by mutual mistake between the defendant William H. Frank and his sureties on the one hand and the city of Portland on the other; such reformation being desired by the plaintiff in order to render the instrument a technical, statutory bond and to enable her to bring suit upon it against the defendant William H. Frank and his sureties under the provisions of Revised Statutes, chapter 82, sections 14 and 65, for the purpose of satisfying the amount due on her said judgment.

The defendant, William H. Frank, was in December, 1906, elected constable of the city of Portland for the municipal year 1907. The principal duties, however, performed by him were the collection of taxes, and the service of warrants for that purpose. After his election he received from the city treasurer and collector's

office an instrument in writing purporting to be a constable's bond conditioned that, "whereas the said William H. Frank had been chosen constable for the city of Portland for the year 1907, if said William H. Frank shall well and faithfully perform all the duties of said office as to all processes by him served or executed, then this obligation shall be void." For the purpose of qualifying himself for the performance of his duties he took the instrument to Winfield R. Frank and John Massure and requested them to sign it as sureties to enable him to collect taxes. They agreed to do so as they state for the purpose of enabling him to collect taxes which they understood to be his business. But it is immaterial in this case for what purpose they thought the bond was executed. No seals were ever affixed to the instrument by them or any one else, and it bears no seal at the present time. Neither the principal nor the sureties noticed the fact that there were no seals upon the instrument though it contained the printed words "Signed, sealed and delivered in the presence of" upon it. They stated, however, that they did not read these words nor were they aware of their existence on the document and that they would have signed the instrument just the same, whether sealed or unsealed, as they did not know that seals were required upon a bond executed for the purpose of qualifying him to perform the duties of a tax collector.

The bond thus prepared was presented to the aldermen of the city of Portland for approval as prescribed by R. S., chapter 82, section 4. Nine aldermen therefore endorsed the instrument under the words, "We hereby approve the sum and sureties of the within bond." None of the aldermen when they affixed their names to the instrument observed the absence of seals upon it, but six of them state they would not have endorsed it had they noticed it was not sealed while two of them said they should have signed their names just the same, since they had no knowledge as to whether seals were required or not.

A careful consideration of the evidence in this case impels the conclusion that its decision turns upon the question of fact, "Was there a mutual mistake?" The plaintiff does not seek a rescinding of the contract nor an enforcement of it for any purpose, but for the

altering of its terms. In order to prevail, it is incumbent upon her to prove by convincing evidence that the instrument when altered will correctly speak the actual intention of both parties to it and thereby perfect and establish their real agreement. In other words, she must clearly show that both the sureties upon this bond, and the municipal officers in approving the sureties, actually intended as a matter of fact and a matter of law to execute and approve the precise instrument that this bond would have been, if it had impressed upon it the required seals. The sitting Justice found that the evidence did not establish a mutual mistake of the parties and ruled as a matter of law that the plaintiff was not entitled to the relief sought in her bill. We think the finding of the sitting Justice must be sustained. The evidence tending to prove a mutual mistake does not meet the requirements of that high degree of proof necessary to establish the facts in this class of cases.

Not only is the evidence insufficient to overcome the finding of the sitting Justice but seems to us rather preponderates in favor of his conclusions. Whatever seven of the nine aldermen may have thought, the testimony of the respondents clearly indicate that they neither knew nor cared, whether the law required the instrument which they signed, in order to make it effective, should be sealed or not. They were entirely ignorant of the law. It therefore does not appear that they ever intended to sign a sealed instrument. They undoubtedly thought they were signing a document that would qualify the defendant, William H. Frank, for the discharge of his duties, but whether that document should be sealed or unsealed, as a matter of law, they had no knowledge. The mistake then could not be mutual, as the minds of the parties to the instrument did not meet in a common intent.

This decision of the case renders it unnecessary to consider the exceptions and the other points raised.

Appeal dismissed. Decree of sitting Justice affirmed with one bill of costs.

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

Knox. Opinion November 27, 1909.

Aliens. Naturalization. Judgment. Record. Courts. Jurisdiction. U. S. Constitution, Art. I, sec. 8. U. S. Statutes, 1802, chapter 28, sections 1, 3, 2 Stat. 153, 155. Revised Statutes, U. S., section 2165.

Under Revised Statutes of the United States, section 2165 (U. S. Comp. Stat. 1901, page 1329), requiring a declaration of intention two years before admission to citizenship, an oath when application for admission is made, and a showing to the court of certain residence in the United States and the particular State, and of good moral character, etc., such prerequisites are matters of proof, and not of jurisdiction, and hence a record of naturalization need not show residence in the State for the required time.

In a naturalization proceeding under Revised Statutes of the United States, section 2165 (U. S. Comp. Stat. 1901, page 1329), the court has power to admit to citizenship or not, depending upon whether the essential facts are proved, and, in either event, the judgment should be recorded.

A record of naturalization must be given the same reasonable intendment of construction that is given records in ordinary cases, and hence such record presupposes proof of the residence required by Revised Statutes of the United States, section 2165 (U. S. Comp. Stat. 1901, page 1329).

Jurisdiction is the right to adjudicate concerning the subject matter in a given case, which depends upon the court's cognizance of the class of cases to which the one to be adjudicated belongs, presence of the proper parties and the point decided being in substance and effect within the issue.

On report. Judgment for plaintiff.

Action by the plaintiff city to recover of the defendant town the sum of $58.80 for pauper supplies furnished Daniel O'Neil, a naturalized citizen, a short time prior to bringing the action. When the 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.

Edward K. Gould, for plaintiff.

Arthur S. Littlefield, for defendant.

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

CORNISH, J. The sole question involved in this case is the sufficiency of the record of naturalization of one Daniel O'Neil, the alleged pauper. Having resided in the defendant town more than five years immediately preceding the date alleged in the writ, his pauper settlement is conceded to be in that town if during said time he was a citizen of the United States.

To prove such citizenship the plaintiff introduced the records of the Supreme Judicial Court for Knox County, Maine, embracing the declaration of intention filed March 28, 1896, also the petition for admission, the oath taken in open court and the judgment of the court all at the December term 1899, the latter reciting that "the said Daniel O'Neil was admitted to become a citizen of the United States of America," and ordering that record thereof be made accordingly.

The defendants attack the sufficiency of this record because it nowhere in terms states that the applicant had resided in this State one year prior to the application, the defendant's legal position being that such residence is requisite in order to give this court any jurisdiction over the cause, and as in naturalization proceedings this court has only a special jurisdiction, not in the course of the common law, but conferred by federal statute, the record must on its face show the existence of all the facts necessary to confer such jurisdiction or it is void.

It is true that the record allegation of one year's residence is wanting but the legal conclusion, pressed by the defendants, by no means follows.

The Federal Constitution confers upon Congress the power "to establish an uniform rule of naturalization." In the exercise of this authority Congress enacted the statute of April 14, 1802, prescribing the conditions of naturalization and conferring jurisdiction upon certain courts among which is unquestionably included the Supreme Judicial Court of Maine. U. S. Rev. Statutes, sec. 2165, provide the method, by which an alien might be admitted to citizenship at the time of the proceedings in question. First, he must make and

file his declaration of intention two years at least prior to his admission. Second, he must at the time of application for admission take the required oath. Third, "It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

In the case at bar all the required steps were taken but the record fails to show the fact of one year's residence in the State of Maine. It is not necessary, however, that that fact should be recorded. The statute does not require it although it does require a record of the proceedings with reference to the oath. Nor does any rule of law require it. Before an alien can be admitted to citizenship each of the five prerequisites before specified must be proved to the satisfaction of the court. But it is simply a matter of proof and in no way connected with jurisdiction. Jurisdiction of the subject matter is conferred by a statute of the United States and does not depend upon the facts of each particular case, and when an applicant presents himself in court asking for admission, the court then has jurisdiction over the party and over the cause. If the essential facts are proved the court has power to confer citizenship, if not, to deny it and in either event the judgment is valid and should be recorded, *U. S.* v. *Walsh*, 22 Fed. Rep. 644; *In re Bodek*, 33 Fed. 813-817; *State* v. *MacDonald*, 24 Minn. 48-59, and the record of the judgment whether favorable or unfavorable need not recite the facts.

The authorities sustain this position. In *McDaniel* v. *Richards*, 1 McCord. (S. C.) 187, objection was made because the record did not show that the applicant had ever filed his declaration of intention. Held, that the objection was without merit and the court say: "The words that it appeared that the said Richards was duly admissible to the rights of citizenship presuppose that the court was satisfied, first, that he had taken the preliminary oath, second, that he had resided five years in the United States and one year in this

state, third, that he was of good moral character," etc. In *Campbell* v. *Gordon*, 6 Cranch, 176, the record did not show that the applicant was a man of good moral character. Held, unnecessary, as "it must be presumed that the court before whom the oath was taken was satisfied as to the character of the applicant." But this fact is of the same nature as the one year's residence and is made a prerequisite to naturalization. In *Stark* v. *Chesapeake Ins. Co.*, 7 Cranch, 420, the record did not show any previous declaration of intention, held record admissible. In *Ritchie* v. *Putnam*, 13 Wend. 524, the record stated that on reading and filing the petition of John Ritchie and certain accompanying affidavits the court made an order admitting Ritchie a citizen of the United States in pursuance of the Acts of Congress, and it was objected that the record failed to state the preliminary steps. Held, that the judgment of the court admitting the alien to become a citizen is conclusive evidence on that point.

The conclusion reached in these cases is based not only upon sound reason but also upon wise public policy. Every reasonable intendment of construction should be applied to give effect to a record of naturalization that would be allowed to sustain a record in ordinary cases, and an alien who has complied with all the requirements of law and obtained a certificate of naturalization ought not to be deprived of his privileges on account of some immaterial omission or the inadvertence of a clerk in making up the records. *Com.* v. *Towle*, 5 Leigh, (Va.) 743.

The fallacy in the defendant's argument is in the misuse of the words, jurisdiction and jurisdictional facts. It confounds facts giving jurisdiction with evidentiary facts after jurisdiction has been conferred. As well might a defendant town claim that our court has no jurisdiction in a highway damage suit when the plaintiff is unable to prove the statutory requirement of written notice to the proper officers within fourteen days after the injury. The court has jurisdiction, but if the plaintiff fails to produce the requisite evidence that this requirement has been complied with, his case fails. The same distinction applies here. In every judicial proceeding there are one or more facts which are strictly jurisdictional, the existence of

which is necessary to the validity of the proceedings and without which the act of the court is a mere nullity, as for instance the service of process within the State upon the defendant as in *Prentiss* v. *Parks*, 65 Maine, 559; *Com.* v. *Blood*, 97 Mass. 538; *Morse* v. *Presby*, 25 N. H. 299, all cited by defendants; or a publication in strict conformity with the statute where the property of an absent defendant is sought to be charged, as in *Galpin* v. *Page*, 18 Wall. 350, also cited by the defendants. In such cases the action of the court fails for want of jurisdiction over the person or subject matter. The proceeding is a mere nullity.

But in the case at bar the court had jurisdiction over both the subject matter and the party, the former by Act of Congress, the latter by the presence of the party in court, asking the court to act. "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials; First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; Second, the proper parties must be present; Third, the point decided must be in substance and effect, within the issue." Words and Phrases, Vol. 4, page 3878, and cases cited. "To have jurisdiction" says Chief Justice Shaw in *Hopkins* v. *Commonwealth*, 3 Met. 460-462, speaking of criminal procedure, "is to have power to inquire into the fact, to apply the law, and to declare the punishment in a regular course of judicial proceeding."

There can be no doubt that the Supreme Judicial Court sitting in Knox County, had jurisdiction of this naturalization petition, inquired into the facts, applied the law and rendered its judgment in a regular course of judicial proceeding.

That judgment stands, and its validity cannot be questioned in the case at bar.

Judgment for plaintiff for $58.80, with interest from March 2, 1909.

EDWIN R. ROBERTS *vs.* MARY A. MOULTON.

York. Opinion November 29, 1909.

Taxation. Tax Sales. Validity. Notice. Non-residents. Curative Statute. Revised Statutes, chapter 10, sections 28, 73-81.

1. To establish a valid title under a sale of real estate for the non-payment of taxes it must be proved that the provisions of law preparatory to, and authorizing, such sales, were strictly complied with.
2. In the case at bar, the court is of opinion that the person against whom the tax was assessed was a non-resident of the town at the time it was assessed. But the collector in giving notice of the sale gave the notices which the statute, R. S., chapter 10, sections 73 and 75, requires shall be given in the case of real estate of resident owners, and did not give the notices required in the case of real estate of non-resident owners.
3. The curative provision in Revised Statutes, chapter 10, section 73, "that no irregularity, informality or omission in giving the notices required by this section shall render such sale invalid, but such sale shall be deemed to be valid, if made at the time and place herein provided and in other respects according to law, except as to the matter of notice," does not apply to irregularities or omissions in giving the notices required by Revised Statutes, chapter 10, section 75.
4. When the real estate of a non-resident owner is sold by a collector for non-payment of taxes, without having given the notices required by Revised Statutes, chapter 10, section 75, for non-resident owners, the sale is void.

On report. Judgment for defendant.

Writ of entry to recover a certain parcel of land situate in the town of Lyman, York County. The plaintiff's title depended upon the validity of a tax sale of the demanded premises. At the conclusion of the evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

Natt T. Abbott, and Hiram Willard, for defendant.

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

SAVAGE, J. This is a real action, and the plaintiff's title depends upon the validity of a tax collector's deed. Various objections have been urged against the legality of the assessment and sale, only one of which shall we have any occasion to notice.

The land was taxed and sold as the real estate of an owner, resident in the town. The defendant contends that the person against whom the tax was assessed was at the time a non-resident, and therefore, that the sale was invalid. This contention involves a question of fact and a question of law.

The case comes up on report. We have carefully studied the evidence reported, and deciding as well as we can, upon the face of the record, without the aid of seeing and hearing the witnesses, we think that the evidence strongly preponderates in favor of the defendant's contention. Accordingly we find that the party assessed was in fact a non-resident at the time of the assessment.

In view of the fact thus found, was the sale valid? We think it was not. The statutes nowhere require the assessors to classify landowners assessed as "resident" and "non-resident," although that was done in this case. But in the provisions of statute regulating sales by collectors, R. S., ch. 10, sects. 73 to 81, such a classification is made. Different provisions are made for the sale of the real estate of a resident owner, than for the sale of the real estate of a non-resident owner. The difference relates to manner of giving notice of the sale, the time for delivering the deeds, and the time and prerequisites for redemption. As to the sale itself, and the certificates of notice and sale, the same provisions apply to both cases.

Under section 73, in the case of the real estate of resident owners, the collector is required to give notice of his intention to sell, by posting notices thereof in the same manner and places as warrants for town meetings are required to be posted, six weeks before the time of sale; and in the case of the real estate of non-resident owners, by causing such notices to be published in a newspaper published in the county, if any, if not, in the State paper, three

weeks successively, the first publication to be at least six weeks before the sale. It may be that the failure to publish notice as required by this section would not be fatal to the validity of a collector's sale of the real estate of a non-resident owner, for it is further provided in the same section that "no irregularity, informality or omission in giving the notices required by this section . . . . shall render such sale invalid, but such sale shall be deemed to be legal and valid, if made at the time and place herein provided, and in other respects according to law, except as to the matter of notice." It is not to be understood by this provision that the legislature meant that a sale without notice of any kind whatever would be valid. But since this same section established both the place of sale, and the time of sale, even to the hour, it is the legislative meaning that the statute itself is notice to all persons, residents or non-residents. Every taxpayer is held to know that if he does not pay the taxes assessed upon his real estate, it will be sold by the collector for non-payment of the tax, at the time and place fixed by statute. By the enactment of the statute fixing the time and place of sale, with the curative provisions for irregularities, informalities or omissions, it was apparently sought to avoid some of the stumbling blocks which have lain in the way of towns in enforcing the collection of taxes, and to make the validity of tax sales and deeds more certain. But whatever may be the effect of the omission to give the statutory notice required by section 73, there is another requirement as to notice which presents an insuperable difficulty.

By section 75, the collector, in the case of the real estate of a resident owner, or occupant, is required to notify the owner, if resident, or the occupant, if any, by delivering to him in person, or leaving at his last and usual place of abode, a notice of the sale. In the case of non-resident owners, such notice is to be sent by mail to the last and usual address, if known to the collector. These requirements are absolute. There is no saving clause as the one in section 73 which we have quoted. The requirement as to the non-resident owners was not complied with in this case.

It is too well settled to require the citation of authorities that to establish a valid title under a sale of real estate, for the non-

payment of taxes, which is a proceeding essentially ex parte and in invitum, great strictness is required. Inasmuch as it involves a forfeiture, the provisions of law preparatory to, and authorizing, such sales must have been strictly complied with, or the sale must be held invalid.

The case shows that the collector returned that he left notice of the sale at "the last and usual place of abode" of the person assessed. But we find that that person lived in another town. Therefore he had no "last and usual place of abode" in this town. The real difficulty, however, lies deeper. The legislature has made notice of a specific kind to non-residents a prerequisite to a legal sale. The collector did not give that notice, nor did he attempt to. On the other hand, he attempted to give another kind of notice, which had been provided for another class of assessed persons. In a case of this kind an unauthorized notice is not notice. It is no better than if no notice at all had been given. As between the collector and the town, perhaps he was justified by the form of the assessment, but that cannot affect the landowner. Since the collector failed to comply with the statute requirement in section 75 for notice, the sale must be held invalid.

While it is not necessary at this time to particularize at length, it may be added that the differing provisions, with respect to resident owners on the one hand and non-residents on the other, concerning the time of delivery of a deed to the purchaser, and the time and prerequisites of redemption, only emphasize this conclusion. The conditions and burdens placed upon the two classes of owners are not alike, and are not equally onerous, though the last is not important.

It is proper to say also that the strictness of the rule which we have necessarily applied in this case need work no real hardship on towns and collectors in similar cases. If the tax be legally assessed, the collector has an ample remedy for the enforcement of the lien by suit at law, under R. S., ch. 10, sect. 28, and need not take the risk of a sale.

Judgment for the defendant.

WILLIAM T. COBB AND JOSEPH E. MOORE, Receivers,

vs.

CAMDEN SAVINGS BANK.

Knox. Opinion November 29, 1909.

Insolvent Corporation. Receiver. Attachment. Judgment. Levy and Sale. Property in Custodia Legis. Revised Statutes, chapter 47, sections 77, 78, 79, 80, 81; chapter 79, section 49.

A bill in equity was filed against a corporation under the provisions of the Revised Statutes, chapter 47, sections 80 and 81, which provides expressly or by reference to other sections that when the stockholders of a corporation vote to dissolve it, a bill therefor may be filed against it by any officer, stockholder or creditor; that upon proceedings had according to the usual course in equity the corporation shall be dissolved and terminated; that the court may appoint receivers, issue injunctions, and pass interlocutory decrees and orders; that the court shall, upon dissolving the corporation, appoint one or more trustees; that notwithstanding the appointment of trustees, the court may superintend the collection and distribution of the assets, and may retain the bill for that purpose; and that the debts of the corporation shall be paid in full when the funds are sufficient; and when not, ratably to those creditors who prove their debts. Notice was ordered by the court returnable on a day certain and served, as ordered, and after the return day a decree was made dissolving the corporation and appointing the plaintiffs as trustees and receivers. In the meantime, after the service of notice in the bill, but before the return day, and before the appointment of the receivers, real estate of the corporation was seized on execution by a judgment creditor having an existing valid attachment, which antedated the bill in equity, and after regular proceedings had, was sold on execution sale to the defendant. In an action by the receivers to recover possession of the real estate so sold, *Held:*

1. The prior attachment was not dissolved by the filing of the bill in equity and the proceedings thereunder.
2. In proceedings under the statute for the sequestration and winding up of corporate estates and the distribution of their proceeds, the property is in custodia legis, for the purpose of being administered according to the statute, at least, from the time of the service of process, if not from the filing of the bill.

3. The title to the demanded premises, by relation back, vested in the receivers, in legal effect, prior to the seizure on the execution.
4. Property in custodia legis cannot be levied upon and sold, without leave of court first obtained. If so sold, the sale is void.
5. The denial of a motion for an order to restrain the execution sale is not a granting of leave to sell.
6. While attachment liens are not destroyed by proceedings under the statute, R. S., chapter 47, sections 80 and 81, the right to enforce them in the usual way is suspended, and lien creditors must apply to the court in the sequestration proceedings to have their priority of right determined and enforced, either out of the property itself, or out of the proceeds thereof, as may be adjudged.

On report. Judgment for plaintiffs.

Writ of entry by the plaintiffs as receivers and trustees of the Mt. Battie Mfg. Co., for the purpose of determining the title to certain real estate in Camden, formerly the property of said company. The plaintiffs claimed the same as receivers and trustees duly appointed, while the defendant claimed under an execution sale of the same as the property of said company.

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

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Reuel Robinson, for defendant.

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

SAVAGE, J. Real action. The plaintiffs are the receivers and trustees appointed under the provisions of sections 80 and 81 of chapter 47 of the Revised Statutes, of the Mount Battie Manufacturing Company, which prior to the proceedings hereinafter mentioned was the owner of the demanded premises. The defendant is the purchaser of the same under an execution sale, the validity of which is presented for the determination of the court.

On December 26, 1905, Brown & Adams, of Boston, creditors of the corporation, brought suit against it, and on the same day caused its real estate to be attached on their writ. Questions of

law having arisen, they were argued in the Law Court, and the case was continued on the docket until November 28, 1908, when a certificate of decision was received from the Law Court. Thereupon, as provided in R. S., chap. 79, sect. 49, judgment for the plaintiffs was entered as of the preceding September term of the court. Execution issued December 3, 1908. On this execution the officer returned that he took the lands in question in execution on the same day. After due notice, they were sold on the execution, January 4, 1909, to the defendant, and a sheriff's deed thereof was given.

In the meantime, in accordance with a vote of the stockholders of the Mount Battie Manufacturing Company, a bill in equity was filed, prior to November 16, 1908, by its treasurer, under the provisions of R. S., ch. 47, sects. 80 and 81, praying for a dissolution of the corporation, and the appointment of trustees. Notice was ordered returnable January 5, 1909, and was served on the corporation November 16, 1908. Public notice was likewise ordered and given. Notice of the pendency of the bill was also ordered and given to all known creditors of the corporation by mail, postage prepaid. Such notice was mailed to Brown & Adams and the Camden Savings Bank, December 2, 1908, the day before the execution in question issued. On January 11, 1909, a decree was entered, by which the corporation was dissolved, and the plaintiffs appointed trustees and receivers. On the same day a deed of the premises to the plaintiffs was executed and delivered in the name of the corporation, by its treasurer.

It also appears that prior to the Brown & Adams attachment, the lands had been attached in the suit of S. Rawitzer & Co. against the corporation. That suit was continued on the docket until January 6, 1909, when a special judgment for the plaintiff was rendered, and execution issued January 11, 1909. And it appears that a portion of the surplus of proceeds of the sale on the Brown & Adams execution has been applied by the officer to the Rawitzer execution.

It is contended by the plaintiffs that inasmuch as the corporation was dissolved, the sale was void because of the non-existence of a corporation defendant, that the statute, under which the bill in

equity was brought, R. S., ch. 47, sects. 77-81, contemplates and provides for a ratable distribution of assets among all the creditors, and that because of the dissolution of the corporation, all attachment liens were dissolved. We do not adopt this view. In the first place, the levy and sale in this case took place before the dissolution of the corporation. But further than that we do not think that a proper interpretation of the statute warrants the view that existing liens by attachment are dissolved by statutory proceedings ending in a dissolution of the corporation, although the method of enforcement may be affected, as will be noticed later. The statute, R. S., ch. 47, sect. 77, provides that when the charter of a corporation expires or is terminated otherwise it shall have a corporate existence for three years for winding up its affairs. Section 78 provides that in such case a creditor or stockholder may apply to the court which may appoint one or more trustees to take charge of its estate and effects with power to collect its debts, and defend suits at law, and to sell and convey its real estate. The court has jurisdiction in equity of all proceedings therein. Section 79 provides that the debts shall be paid in full when the funds are sufficient; and when not, ratably to those creditors who prove their debts. By section 80, stockholders may vote to dissolve a corporation, and when they do so, a bill in equity may be filed against it for dissolution by any officer, stockholder or creditor. Such notice thereon as is ordered by the court must be given, and then such proceedings may be had according to the usual course in suits in equity, that the corporation shall be dissolved and terminated. Section 81 reads as follows: — "Said court has jurisdiction in said cause to appoint receivers, issue injunctions, and pass interlocutory decrees and orders, according to the usual course of proceedings in equity; and shall, moreover, upon dissolving said corporation, or upon terminating its charter, appoint one or more trustees, who shall have all the powers conferred upon similar trustees by sections seventy seven, seventy eight, seventy nine and eighty nine, or by any other law of the State, with such special powers as may be given them by the court. But notwithstanding the appointment of such trustees, said court may superintend the collection and distribution of the

assets of said corporation, and may retain said bill for that purpose."

It has already been seen that the bill in the present case was brought under the provisions of section eighty. But the purpose and effect of the statute must be sought by examining all of the sections which relate to the same subject matter, and which are interwoven by reference. The statute, we think, contemplates that in winding up a corporation under its provisions, the existing rights of priority of all creditors are to be preserved. To be sure, creditors who have proved their claims are to be paid ratably out of the funds, but the funds out of which they are to be paid are those remaining after payment of secured claims, claims having priority by reason of mortgage, attachments or otherwise. So we conclude that the bill in equity and the proceedings under it did not ipso facto work a dissolution of the Brown & Adams attachment.

The next question is whether, after a bill in equity for dissolution is filed under this statute, and notice is ordered and served, but before the appointment of receivers or trustees, a creditor with notice, having a pre-existing valid attachment, may lawfully levy his execution upon the real estate of the corporation and sell it, or whether such a sale will be illegal and void.

The plaintiffs contend that the property was in custodia legis, both at the time of the seizure by the sheriff and at the time of the sale, although they were not appointed receivers until after the sale. In the very recent case of *Chalmers* v. *Littlefield*, 103 Maine, 271, it was held, in accordance with practically universal authority, that property in custodia legis is not subject to seizure and sale on execution, and that such a sale, without leave of the court first obtained, is wholly illegal and void. In view of this rule, the question to be answered in the case is, whether this property, under the circumstances, was in custodia legis.

First, what is the custody which the law intends? The oft repeated expression is that the custody of the receiver is the custody of the court, and that is custodia legis. But when can it be said that the receiver has custody? Must he take actual, physical possession? Does his title date from the time of his appointment, or does it relate back to the beginning of the proceedings? Or to

the time when the court took cognizance of the bill by issuing process? Or to the time when the process was served? Does he take title by the decree of appointment, or is a conveyance to him necessary? All these questions are more or less involved in the present inquiry, and upon all of these there is more or less diversity, and even contrariety, of judicial expression in the reported cases. But we think a careful analysis of the cases will show that some, though not all, of this diversity is due to the varied kinds of receivership proceedings to which the rules have been applied. In attempting to answer these questions, while due regard must be paid to established rules of equity procedure in general, we must not lose sight of the purpose of the statute, which is judicial sequestration and distribution of the entire corporate estate, nor of the equitable principles applicable to such a statute.

It should be remembered that the proceedings under which these receivers are acting are statutory in their origin and character. It is not a creditor's bill. It is not a proceeding at common law. It is not a supplementary proceeding to a suit, like those in many of the cases in other jurisdictions. And, too, we may in a measure eliminate a line of cases in which receivers sought to invalidate execution sales of personal property which had been levied upon and was in the lawful possession of the sheriff prior to the appointment of receivers, for this case relates to real estate. See *Varnum* v. *Hart*, 119 N. Y. 101; *In re Hall & Stilson Co.*, 73 Fed. R. 527; Alderson on Receivers, 229.

In former days, in common law proceedings, it was generally held that the appointment of a receiver did not operate to convey to him the title to real estate, but in modern times, the doctrine has grown up, and appears to be well established, that at least in statutory proceedings for the dissolution of corporations, the decree of appointment, ipso facto, vests the title to the real estate in the receiver. *Attorney General* v. *Atlantic Mut. L. Ins. Co.*, 100 N. Y. 279. See also *Tillinghast* v. *Champlin*, 4 R. I. 173. The statute in this case makes no mention of a deed, but gives the trustee an absolute power to sell the real estate. And having the title, we think he should be deemed to have possession, as against

those merely having liens, but who are not in possession, even though a technical "seizure" on execution has been made, for that is not possession, so as to prevent a receiver from taking possession. *Wiswall* v. *Sampson*, 14 How. (U. S.) 52; *Oldham* v. *Scrivener*, 3 B. Mon. (Ky.) 579; *Ensworth* v. *King*, 50 Mo. 482; *In re Hall & Stilson Co.*, 73 Fed. R. 527; Alderson on Receivers, 200. It is sufficient if the receiver's possession be either actual or constructive. *Pelletier* v. *Greenville Lumber Co.*, 68 Am. St. Rep., 837.

The next question is, from what time does the receiver's title to real estate, and consequent possession, date? There are many cases which hold that he takes title from the time of his appointment. Most of these are cases at common law, in creditors' bills, or supplementary or other proceedings in which one creditor seeks to enforce a specific claim upon the debtor's estate. 4 Pomeroy's Eq. Jurisprudence, sects. 1333, 1334. If successful, this necessarily works a preference. And in a race between creditors, equity does not take sides. Until the court appoints a receiver, the first one who comes is served. And in some cases, this rule has been applied in statutory proceedings. But a later, and we think a better, rule is, that in statutory proceedings for the sequestration and winding up of corporate estates and the distribution of their proceeds, the title of the receiver relates back, either to the filing of the bill, or the issuing of process by the court, or to the service of process, (and it is immaterial which, in this case) and that from that time on the property is considered to have been in the custody and protection of the court for the purpose of being administered according to the statute. *Fogg* v. *Order of the Golden Lion*, 159 Mass. 9; *Jones* v. *Arena Publishing Co.*, 171 Mass. 22; *Stevens* v. *Shenango Glass Co.*, 166 Mass. 238; *Merrill* v. *Commonwealth Fire Ins. Co.*, 171 Mass. 81; *Illinois Steel Co.* v. *Putnam*, 68 Fed. R. 515; *Hutchinson* v. *American Palace Car Co.*, 104 Fed. R. 182; *Farmer's Loan & Trust Co.* v. *Lake St. Elevated R. R. Co.*, 177 U. S. 51; *Wiswall* v. *Sampson*, 14 How. 52; *Doane* v. *Milville Mut. Ins. Co.*, 43 N. J. Eq. 522; *Miller* v. *Sherry*, 2 Wall. 249; *Reisner* v. *Gulf, Colorado & Santa Fe Railway Co.*, 89 Tex.

656; 59 Am. St. Rep. 84; Alderson on Receivers, 219. And the property is sequestrated as of that time. And the reason for this rule is obvious. If it were otherwise the entire purpose of the statute might be frustrated. That purpose is a ratable distribution of the corporate funds, after payment of priorities, among the creditors. If after the bill is filed and before the receiver is appointed, the property is not within the protection of the court, creditors may create new liens by attachment, may levy executions, and thus may entirely dissipate the fund, before the arm of the court can reach it. Since the beginning of proceedings is likely to awaken creditors to the enforcement of their claims, if they could attach or levy meanwhile, the statute might in many instances prove self-destructive. It is declared in *Pelletier* v. *Greenville Lumber Co.*, supra, that the practical effect of such a rule "would be either to permit outside parties to stop all further proceedings of a court of equity by disposing of the subject matter in controversy, or else to put that court in the position of holding simply the naked possession of property, and gravely proceeding to determine who would have been entitled to the property if the property had not been sold." We are led therefore, by reason as well as by authority, to hold that by relation back, the title to the demanded premises, in the eye of the law, vested in the receivers, prior to the issuing of the Brown & Adams execution. After that time the property was in custodia legis. It could not be attached, it could not be levied upon and sold, without leave of court first obtained. If sold, the sale would be void.

It must be conceded that this is not the universal rule. In some cases the distinction which we have pointed out has been disregarded, and the rule in common law cases followed. In others, a different rule has been applied, growing out of statutory provisions. As, for instance, in *Squires* v. *Princeton Lighting Co.*, 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, the New Jersey Court held, under the statute of that State, that the property was in custodia legis from and after an adjudication of insolvency but not before. Our statute contains no such provision.

But the statutory proceedings did not destroy the statutory lien by previous attachment. It merely suspended the enforcement of

it in the usual way. The receiver took only such estate as the corporation had,—and subject to all liens. *Kittredge* v. *Osgood*, 161 Mass. 384; *Gorham* v. *Mutual Aid Society*, 161 Mass. 357; *Dann Mfg. Co.* v. *Parkhurst*, 125 Ind. 317; *Hoffman* v. *Schoyer*, 143 Ill. 598; *Kneeland* v. *American Loan Co.*, 136 U. S. 89. But while the property is in the custody of the law, the right to enforce liens, without leave of court, is suspended. Lien creditors must apply to the court, which is bound to give effect to liens which existed when the property passed into the custody of the law. *Duryee* v. *U. S. Credit System Co.*, 55 N. J. Eq. 311; *Oakes* v. *Myers*, 68 Fed. R. 807; Alderson on Receivers, 198.

The equitable proceedings in this case placed the property in the possession of the court to be administered in a way so as to protect the priority of the attachment lien, and not to destroy it. Brown & Adams had no vested right to enforce their attachment in a particular manner, for their attachment was made subject to all of the laws of the State, including the statute in question.

And there were various ways in which their priority could be preserved. By leave of court they could sell on execution in the statutory way. *Walling* v. *Miller*, 108 N. Y. 173; *Wiswall* v. *Sampson*, 14 How. 52. This leave is discretionary. Alderson on Receivers, 229. Or, the court could order a sale subject to their lien, and leave them to enforce it. *Wheeler* v. *Walton & Whann Co.*, 65 Fed. R. 720; Alderson on Receivers, 228. Or, they could intervene in the proceedings, and the court in making distribution of the fund could declare and enforce their priority, by causing the fruit of their lien to be paid to them. *Wiswall* v. *Sampson*, supra; *Walling* v. *Miller*, supra; *Cass* v. *Sutherland*, 98 Wis. 551; *Albany City Bank* v. *Schermerhorn*, 10 Paige, N. Y. 263. At any rate, it was for the court, having possession of the estate, to adjudicate upon the validity of their lien, and its amount, and its stage of priority.

It has been said that the filing of the bill in such a case creates an equitable levy upon the property. *Storm* v. *Waddell*, 2 Sand., ch. 494; *Miller* v. *Sherry*, 2 Wall. 249; *Illinois Steel Co.* v. *Putnam*, supra. The estate is to be administered upon equitable

principles. Since the property is deemed to be in custodia legis from the commencement of the proceedings, and since from that time the lienors are powerless, of their own motion, to protect themselves, it would seem to be equitable that distribution should be made in such cases according to the status of the liens at the time the bill was filed, without regard to what is or is not done afterward, that is to say, that the lien should not be lost thereafter by failure to pursue statutory, but futile, methods of enforcement, but that equity should impress the lien upon the fund. It has been held that after the appointment of a receiver, it is unnecessary for the sheriff to maintain keepers over the property in order to continue the lien. Alderson on Receivers, 222. But it is not necessary to decide this question now, nor whether nor when a lienor by his conduct may become equitably estopped from claiming a priority of payment. We merely decide now that if the execution sale upon which the defendant's title is based was without leave of court, it was void, and the defendant has no title.

It is claimed by the defendant that leave was granted, inferentially, at least. It appears that prior to the sale, the plaintiff in the bill in equity prayed the court for a restraining order to prevent the sale until further order of court. Upon this petition, the court made a decree as follows: "Motion for restraining order denied." By this decree, it is claimed that the court virtually gave leave for the sale. We do not think this conclusion necessarily follows. The granting of a restraining order was discretionary. The order may have been refused upon any one of several grounds which fall short of giving even an implied leave to sell. It does not appear that the attaching creditors were parties to the bill before the court; nor that the sheriff was a party. The sitting Justice may have considered that the right of the plaintiffs was not so clear as to warrant a restraining order, or that irreparable injury would not follow, or that the remedy at law was adequate. None of these propositions would go to the merits. They would leave the attaching creditors to proceed at their own risk. As they now claim that leave of court was given, the burden is on them to show it affirmatively. This they have not done.

Whether the execution sale was void by reason of prior attachments, as is claimed, we have no occasion to consider.

Judgment for the plaintiffs.

ALICE M. TOOTHAKER *vs.* APPIA C. PENNELL.

Cumberland. Opinion November 29, 1909.

Trespass. Removing Buildings. Courts. Equity. Transfer of Causes. Waiver. Judicial Discretion. Revised Statutes, chapter 84, sections 16, 18.

Verdict was properly directed for one suing for the value of a building removed from land to which she had the legal title, where the issue was title to the building.

Revised Statutes, chapter 84, section 18, authorizing transfers of causes from Superior Courts on pleas of equitable defenses, contemplates transfers on facts developed on the trials, new facts, appearing after the close of the evidence not being a proper basis for a transfer.

By chancing verdict in her favor in the Superior Court, defendant lost her right to have the cause transferred under Revised Statutes, chapter 84, section 18, which authorizes transfers to the Supreme Judicial Court on pleas of equitable defenses.

Revised Statutes, chapter 84, section 16, authorizing the Supreme Judicial Court to transfer to the equity term, a cause commenced in the Superior Court, where it appears that the rights can be better determined, does not authorize a transfer after verdict has been recorded and after refusal to set it aside.

Denial of a motion to set aside a verdict is discretionary, and not subject to exceptions.

Under Revised Statutes, chapter 84, section 16, authorizing transfer of a cause from the Superior Court to the equity term of the Supreme Judicial Court, on the pleading of equitable defenses, supported by affidavit that the matter pleaded is true, a motion for a transfer is insufficient unless supported by such affidavit.

A motion to transfer a cause from the Superior Court to the equity side of the Supreme Judicial Court is addressed to the court's discretion, the exercise of which is not subject to exception.

On motion and exceptions by defendant. One exception overruled and the other dismissed.

Action of trespass quare clausum brought in the Superior Court, Cumberland County, for breaking and entering the plaintiff's close and severing and carrying away therefrom a certain frame building.

Plea, the general issue. At the conclusion of the evidence, the presiding Justice directed a verdict for the plaintiff and the defendant excepted and also filed a special motion for a new trial and also excepted to other rulings.

The case is stated in the opinion.

Wheeler & Howe, for plaintiff.

Dennis A. Meaher, for defendant.

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

SPEAR, J. This case comes up on exceptions from the Superior Court for Cumberland County. The admitted facts show that the plaintiff had a legal title to a certain lot of land on Great Island in the town of Harpswell with the building standing upon it, but erected after the land was purchased. The defendant claims that the building was built with funds furnished by her and was therefore personal property held in trust by the plaintiff for her benefit. The defendant without the knowledge or consent of the plaintiff removed the building from the plaintiff's lot to a lot of her own across the way. The plaintiff brought an action to recover the value of the building. The issue was the title to the building. As the legal title was in the plaintiff the court instructed the jury to render a verdict for the plaintiff. To this instruction the defendant excepted. We think the instruction must be sustained.

After the verdict by the jury the defendant filed the following special motion:

"And the defendant further asks that the verdict of the jury may be set aside in said case and a new trial granted because the rights of the parties may be better determined and enforced by judgment and decree in equity and asks the court on reasonable terms to allow the pleadings struck out at law and that defendant may plead in

equity and the cause may be heard and determined as a cause in equity." The motion was overruled and exceptions taken.

The motion asks first that the verdict be set aside and a new trial granted, and second that the pleadings at law be struck out and those in equity be substituted. R. S., chapter 84, section 18, provides that in the Superior Courts equitable defenses may be pleaded and the case transferred to the docket of the Supreme Judicial Court to be heard and determined in that court. It therefore appears that the defendant could as well have filed her motion before the verdict as after. The statute providing for the transfer from law to equity, contemplated only those facts developed upon the trial. No new facts could appear after the close of the testimony as a basis for the motion. But the defendant instead of filing her motion during, or at the close of, the taking of the testimony, chose to risk the chances of a verdict in her favor. Having voluntarily chosen this course she must abide by the result. It would be a loose and burdensome practice calculated to produce delay rather than dispatch to allow judicial proceedings to be thus trifled with.

Nor was R. S., chapter 84, sec. 16, intended to apply to a procedure like the one before us. The attempted application would at once meet with insurmountable difficulties. A verdict of the jury had been recorded. The defendant filed a motion to the presiding Judge to set it aside. The motion was denied. The action of the court was discretionary. To it no exceptions lie. The verdict was undisturbed. No motion could now be made to the Law Court to set the verdict aside. None was made. The verdict now stands of record.

The result that would follow the application of this section of the statute clearly show the absurdity of attempting to apply it. There would appear on the part of the Law Court the assumption of the authority (1) of striking a verdict from the record of the Superior Court for Cumberland County without any motion so to do and (2) of then transferring the case to the equity side of the court. As the first could not be done, the second could not follow. We know of no method of procedure which will allow, in the same case, a verdict of the jury to stand unimpeached in one court, and the

decree of a Justice in equity to have full force in another. If the legislature had intended to confer such anomalous and summary power upon the Law Court they would more fully and unequivocally have expressed the authority.

A further examination of the statute upon equitable defenses would seem to indicate that the defendant did not in her motion bring herself within the purview of the statute. Section 18 provides "In actions at law in the Superior Courts, equitable defenses and equitable replies to matters of defense, may be pleaded by filing a brief statement thereof supported by affidavit that the matters so pleaded are true in fact." The defendant's motion neither states that the matters so pleaded are true in fact nor is it supported by affidavit. No statutory motion for removal of the case was therefore presented to the Superior Court. No common law motion was authorized. In addition to the foregoing insurmountable difficulties both the motion to set aside the verdict and to transfer the case from the Superior Court to the equity side of the Supreme Judicial Court were matters addressed to the discretion of the court and to his decision no exceptions lie. Therefore the entry must be,

First exception overruled.
Second exception dismissed.

STATE OF MAINE *vs.* BENOIT ARSENAULT.

Kennebec. Opinion November 30, 1909.

Nuisance. Common Nuisances. Intoxicating Liquors. Indictment. Conviction. Revised Statutes, chapter 22, section 1.

Under Revised Statutes, chapter 22, section 1, declaring places used as houses of ill fame or for the illegal sale or keeping of intoxicants, etc., to be common nuisances, all the prohibited acts need not be alleged or proved to constitute a nuisance; it being sufficient to allege one.

An indictment charging that accused unlawfully used his dwelling house for the illegal keeping and sale of intoxicants, and that the place was one where intoxicants were unlawfully kept, sold, given away, drank, and dispensed, charges one offense only, under Revised Statutes, chapter 22, section 1, declaring places used for the illegal sale or keeping of intoxicants and places where intoxicants are illegally kept, sold, given away, or dispensed; the latter allegations respecting the place being properly disregarded as surplusage, if indefinite.

Under Revised Statutes, chapter 22, section 1, declaring certain places to be common nuisances, a conviction for keeping a place bars other prosecutions, under the same section for the period covered by the indictment.

An indictment under Revised Statutes, chapter 22, section 1, charging that accused's dwelling house was a place where intoxicants were illegally kept, sold, given away, etc., need not allege in terms that he did, knew of, or consented to the prohibited acts.

On exceptions by defendant. Overruled.

The defendant was indicted in the Superior Court, Kennebec County, for keeping and maintaining a common nuisance as defined by Revised Statutes, chapter 22, section 1. The indictment, omitting formal parts, is as follows:

"The Jurors for said State, upon their oath present, that Benoit Arsenault of Augusta in said County of Kennebec, on the first day of October in the year of our Lord one thousand nine hundred and seven and on divers other days between said day and the day of the finding of this indictment, at Augusta, in said County of Kennebec, a certain tenement, occupied by the said Benoit Arsenault, as a dwelling house, situate in Augusta, aforesaid, unlawfully did use

for the illegal keeping and illegal sale of intoxicating liquors, and where on that day, and on divers other days, between said day and the day of the finding of this indictment, intoxicating liquors were sold for tippling purposes, and which said tenement was on said day, and on divers other days, between said day and the day of the finding of this indictment, then and there a place of resort where intoxicating liquors then and on said divers other days, were unlawfully kept, sold, given away, drank, and dispensed. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said Benoit Arsenault at said Augusta in said County of Kennebec on said day and on said divers other days, unlawfully did keep and maintain a common nuisance, against the peace of the State and contrary to the form of the statute in such case made and provided."

The defendant demurred to the indictment, the demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

Fred Emery Beane, County Attorney, for the State.

Williamson & Burleigh, for defendant.

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

PEABODY, J. The offense charged against the respondent is keeping a common nuisance defined by R. S., chapter 22, section 1, based upon certain distinct acts and conditions relied upon by the State as constituting the nuisance.

The respondent filed a demurrer to the indictment which was overruled by the presiding Judge, and the question is before the Law Court on his exceptions.

He contends that the indictment is defective because it does not allege that he kept a certain place and that the place was used for illegal purposes. The statute declares that all places used for certain purposes or where certain acts are done and conditions exist, are common nuisances. All mala prohibita specified in the statute need not be alleged or proved to constitute a nuisance. If the

indictment alleges any one of these causes, and charges the respondent with keeping and maintaining such a place, it is sufficient.

It is here charged (among other things) that Benoit Arsenault, a certain tenement occupied by the said Benoit Arsenault as a dwelling house, unlawfully did use for the illegal keeping and the illegal sale of intoxicating liquors. These words are unambiguous and distinctly allege that he used the tenement which he occupied for a dwelling house, for the illegal keeping and the illegal sale of intoxicating liquors.

Only one offense is charged in the indictment, that of keeping a statutory nuisance, although several causes constituting it are set out. If the respondent kept a place used for the illegal sale of intoxicating liquors, a place used for the illegal keeping of intoxicating liquors, or if he kept a place affected by all the prohibited acts and conditions mentioned in the indictment, he kept a common nuisance. The penalty is no less for keeping a place for one of these illegal purposes than for all. A conviction for keeping the place created a public nuisance by any one of these causes, would be a bar to any other indictment for any or all others specified in the statute for the period of time covered by the indictment. *State* v. *Lang*, 63 Maine, 215; *State* v. *Stanley*, 84 Maine, 555; *Commonwealth* v. *Kimball*, 7 Gray, 328.

These terms charge him with customarily doing acts in connection with his dwelling house prohibited by law. No words can more clearly express the keeping and maintaining of a place for unlawful purposes than the words "did use." "'Whoever keeps or maintains' will apply therefore either to the one who controls the occupation and procures or permits the illegal use; or to one who engages in the illegal use and thus maintains or aids in maintaining the public nuisance." *Commonwealth* v. *Kimball*, 105 Mass. 465.

If this definite expression of the respondent's use of the place might be considered as excluding or leaving indefinite the charge of his keeping or maintaining the dwelling house for the other things predicated of the place, they may be rejected as surplusage. *Commonwealth* v. *Pray*, 13 Pick. 359. But we think these matters are well pleaded. The indictment states that the dwelling house occu-

pied by the respondent was a place where other illegal practices were carried on, which by statute constitute a common nuisance, and thereupon alleges that he kept and maintained such a nuisance. This is sufficient it being unnecessary to allege in terms that he did, knew of, or consented to the acts and conditions prohibited. *State* v. *Stanley*, supra; *State* v. *Ryan*, 81 Maine, 107.

Exceptions overruled.

ALLEN R. BURTON et als.

vs.

FREDERICK E. MAYO et als. and Trustees.

Somerset. Opinion December 2, 1909.

Logs and Lumber. Scaling. Evidence.

Where parties agree upon a surveyor to scale logs, they are bound by his scale, in the absence of fraud or mathematical mistake.

In an action for the price of logs sold under an agreement that the scale of the surveyor should be final, defendants could not show a contract with third persons requiring defendants to furnish boards of lengths the same as those specified for the logs, and providing that if a board fell even slightly short it must be scaled as of the next lesser specified length, nor that that fact was communicated to plaintiffs, with the fact that the logs were to be used under the contract; nor could defendants show, by surveys of the logs by other surveyors that the particular survey was not such as was contemplated by the agreement under which the surveyor was appointed, though the contract of sale required a strict scaling, such provision meaning that the logs should be scaled as strictly according to the contract as was practicable by using the ordinary method of scaling logs when run out of a boom.

Chase v. *Bradley*, 17 Maine, 89, distinguished.

On exceptions by defendants. Overruled.

Assumpsit on account annexed to recover the price of certain logs sold by the plaintiffs to the defendants under a written contract. Plea, the general issue. At the conclusion of the evidence, the presiding Justice ordered a verdict for the plaintiffs for the amount claimed in the writ. To this ruling and certain other rulings made during the trial the defendants excepted.

The case is stated in the opinion.

J. Howard Haley, and Augustine Simmons, for plaintiffs.

Merrill & Merrill, for defendants.

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

WHITEHOUSE, J. This is an action of assumpsit to recover the price of certain logs sold by the plaintiffs to the defendants under a written contract. This contract provided that the lumber should be "surveyed on the yards in the woods by some surveyor satisfactory to both parties interested, and in case of dissatisfaction with the first scaler the same parties may have the right to put on other scalers." It appears that no scale or survey was made under that contract but that later under date of May 26, 1908, a second agreement was made by the parties as follows:

"We the undersigned do hereby agree to abide by the scale and count of A. B. Heald as final, we furthermore agree that the expense of said scale shall be shared equally between Walker & Mayo and the Burton & Thompson Lumber Co.

The said A. B. Heald shall scale said logs strictly according to a contract between the Burton & Thompson Lumber Co. and Walker & Mayo.

Said A. B. Heald shall not be dictated or instructed by either party to this contract."

The logs were thereupon surveyed by Mr. Heald, the scaler named in this agreement, and according to his scale bills introduced in evidence, the plaintiffs were entitled to recover the sum of $2050.06. Mr. Heald was a scaler of thirty-five years experience in all "manner of scaling" and neither his integrity nor his competency was brought

in question. The defendants disclaimed any purpose to attempt to impeach his scale of the logs on the ground of fraud or mathematical error, but they offered to prove a contract between themselves and third parties under which the defendants were to furnish boards of certain specified lengths, being the same as those specified for the logs in their contract with the plaintiffs and that this contract with third parties expressly provided that if a board fell short of a specified length by no more than one-fourth of an inch that board must be scaled as of the next lesser specified length. The defendants then offered to prove that this fact was communicated to the plaintiffs together with the fact that the lumber in question purchased from the plaintiffs, was to fill this contract with third parties and that this fact was also communicated to the plaintiffs before the original contract was reduced to writing.

The defendants further offered to show that after the plaintiffs commenced to cut the lumber here in question the above facts were again communicated to the plaintiffs by the defendants, for the purpose of showing the meaning and construction of the two contracts between the plaintiffs and defendants. This evidence was excluded.

The defendant also offered evidence of other surveys of the logs in question made by other scalers than Mr. Heald for the purpose of showing that the survey made by Mr. Heald was not such as was contemplated in the agreement under which he was appointed and not strictly according to the contract referred to in that agreement and that therefore his survey was not final and conclusive upon the parties. This evidence was also excluded. The presiding Justice thereupon ordered a verdict for the plaintiffs for the sum of $2050.06. The case comes to the Law Court on exceptions to this order of the presiding Justice and also to the rulings excluding the evidence above specified.

The contract between the parties contains a provision that the logs shall "be cut 16 feet long whenever they can be cut said length to advantage and some may be cut 18-12 and 14 feet long;" and the defendants claim that this provision of their contract with the plaintiffs should be construed with reference to their contract with third parties offered in evidence and excluded in which it was

expressly provided that if a board fell short of a specified length by no more than a fourth of an inch that board must be scaled as of the next lesser specified length, so that if a log fell short of a specified length by a fourth of an inch in the scale made by Mr. Heald it should be classified as of the next lesser length. They claim that the provision in the contract under which Mr. Heald was appointed that he should scale the logs strictly according to the contract between the parties was designed to secure the same accuracy of measurement.

But the defendant's contract with third parties was not made a part of their contract with the plaintiffs and it does not appear that they ever assented to a rule so rigorous and exacting as to require the length of logs to be measured to a quarter of an inch. They say that in scaling logs by the ordinary method as they are run out of the boom such a requirement would be absolutely unreasonable and impracticable.

Recognizing the well established and familiar rule of law in this State that when parties have agreed upon a surveyor to scale logs they will in the absence of fraud or mathematical mistake be bound by his scale, these parties expressly agreed "to abide by the scale and count of A. D. Heald as final." It is true that this contract contains the further provision that Mr. Heald should scale the logs strictly according to their contract but this must be construed to signify that they should be scaled as strictly according to the contract as was practicable by pursuing the usual and ordinary method of scaling logs when run out of a boom. Whether the logs should be scaled as 18 feet or fourteen feet or twelve feet in length was to be determined by the scaler and the parties expressly agreed to abide by his scale. The case of *Chase* v. *Bradley*, 17 Maine, 89, cited by the defendant, is clearly distinguishable from the case at bar. In that case it was agreed that the timber should be scaled according to the usual Kennebec survey by a person to be appointed, etc. This provision clearly had reference to a special method as definite as that of a specified kind of a scaler's rule. For instance, it is a matter of common knowledge that the method employed at one time in the Kennebec survey was so widely at variance with that

which prevailed in the Penobscot survey that the difference in the results of the two scales was nearly twenty-five per cent. In such a case it would be obviously unjust to permit a scaler to adopt the Penobscot survey instead of the Kennebec in violation of the express stipulation in the agreement of the parties. In the case at bar, however, it is a satisfaction to observe that it clearly appears from a careful examination of the undisputed testimony of Mr. Heald and his assistants that the scale actually made by him was a fair and just one as strictly in accordance with the contract as was practicable. It was undoubtedly sufficiently favorable to the defendant.

It is accordingly the opinion of the court that the rulings of the presiding Justice were correct and that the certificate must be,

Exceptions overruled.

CHARLES B. FURBER et al. *vs.* MRS. LEVI C. WADE.

Sagadahoc. Opinion December 2, 1909.

Sales. Evidence. Sufficiency.

Evidence in an action to recover for fishing tackle, guns, revolvers, ammunition and materials for bicycle repairs furnished to the defendant's minor sons, *held* sufficient to sustain a recovery by plaintiff, on the theory that defendant authorized delivery to her sons.

On motion by defendant. Overruled.

Assumpsit on account annexed to recover for fishing tackle, guns, revolvers, ammunition, etc., furnished to the defendant's minor sons. Verdict for plaintiffs for $82.28. The defendant then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

Staples & Glidden, for plaintiffs.

Edward C. Plummer, for defendant.

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

WHITEHOUSE, J. The plaintiffs recovered a verdict against the defendant of $82.28 for fishing tackle, guns, revolvers, ammunition and materials for bicycle repairs furnished to the defendant's minor sons in the year 1898. The case comes to the Law Court on a motion to set aside the verdict as against the law and the evidence.

It is not in controversy that the goods sued for were furnished as claimed and the plaintiffs contend that they sold and delivered them on the credit and responsibility of the defendant. They further contend that they were warranted in so doing first, because as they say, the defendant's father, William Rogers of Bath, with whom the defendant and her sons were living in the spring and summer of 1898, introduced one of the boys to the plaintiffs as his grandson, and acting as agent of the defendant, assured them that "whatever they let the boys have would be all right;" and second, because the defendant herself came to the store and stated that whatever the boys got there "would be paid for—that she would pay for it."

The defendant denies the authority of her father to make the statement to the plaintiffs attributed to him, denies that she ever stated to the plaintiffs that she would pay for the goods which the boys might obtain at their store and testifies that on the contrary, she went to the plaintiffs' store in person before the delivery of the goods sued for and told them not to deliver any more goods to her sons without a written order from her.

There was a conflict of testimony relating to these issues of fact, but it was not in controversy that before the goods were delivered, the defendant had paid one bill for goods similar to those in question obtained by the boys after the introduction by Mr. Rogers, and it is contended by the plaintiffs that this bill was contracted in 1897. The plaintiffs admit that after the bill sued for had been contracted, they received a letter from the defendant, which was lost after the dissolution of the firm, requesting them not to furnish any more goods to the boys without an order from her, but deny that any such notice either written or oral, was ever given to them before the delivery of the goods in question. Neither the

defendant nor her private secretary was able to state the year or the season when the alleged oral notice was given to the plaintiffs and the plaintiffs insist that the defendant and her witness made a mistake in regard both to the character of the notice and the time when it was given.

It is not denied that Mr. Rogers introduced his grandson with the statement attributed to him, and it is admitted that the bill of goods thereafter presented was paid by check by the defendant without objection or complaint. The testimony of the plaintiffs that the defendant herself especially authorized them to furnish goods to the boys is not shown to be so improbable and is not so overborne by other evidence as to justify the court in declaring it absolutely incredible. There was sufficient evidence if believed, to support the verdict of the jury in favor of the plaintiffs, and the court therefore would not be warranted in setting it aside.

Motion overruled.

WILLIAM L. O'DONNELL *vs.* PORTLAND RAILROAD COMPANY.

Cumberland. Opinion December 3, 1909.

Exceptions. Review. Harmless Error. Exclusion of Evidence. Exceptions not Argued.

Exceptions will not be sustained, unless they show that the exceptant was aggrieved by the ruling complained of.

In a personal injury case, defendant's exception to the exclusion of evidence that plaintiff was frequently intoxicated after the accident, offered on the question of damages, cannot be sustained against a verdict for plaintiff on sufficient evidence, where it fails to point out the acts done or omitted by plaintiff tending to increase the injuries or retard their recovery

Exclusion of evidence that one "staggered" is not reversible error, where evidence as to how he walked was admitted.

An exception to an instruction will not be reviewed when not argued.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant in so operating one of its street cars that it collided with the plaintiff's team whereby the plaintiff was injured. Plea, the general issue. Verdict for plaintiff for $1540.67. The defendant filed a general motion for a new trial and also excepted to several rulings during the trial.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

Libby, Robinson & Ives, for defendant.

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

SPEAR, J. This case comes up on motion and exceptions. It is an action upon the case against the Portland Railroad Company for the recovery of damages for injuries received by the plaintiff through the alleged negligence of the defendant in operating one of its cars so that it collided with the plaintiff's team. The plaintiff on the night of February 1st, 1908, was driving a milk wagon along Ocean Avenue, a public highway in South Portland, in a northerly direction on the right hand side of the street, and while so driving his wagon was struck by a car of the defendant which was proceeding also in a northerly direction and on the same side of the street. For a considerable distance on the easterly side of the street, both northerly and southerly of the point where the collision occurred, large trees were growing just outside the curbing of the sidewalk so that there was not sufficient room between these trees and the easterly car track to enable a car to pass a wagon driven on the side next the trees. The plaintiff when struck was driving close to these trees with the left hand wheels partly in the easterly car track over which the car was approaching him from behind. The plaintiff was first aware that the car was approaching him when they were about forty or fifty yards distant. At this time he was driving past the trees and was unable to turn out sufficiently to let the car pass him. He was aware that from 75 to

100 yards ahead was a cross street at the junction of which he could turn out for the car to pass. When he discovered the car he urged on his horse for the purpose of reaching the street ahead. He had proceeded about fifteen yards after he first discovered the car, when it struck the rear end of his wagon. It is very clear from the evidence that the motorman or conductor operating the car did see or ought to have seen the plaintiff in sufficient time to have checked its car and have avoided the collision. The defendant concedes this and admits negligence. It knew it was impossible for him to turn to the right, and while it claims it was his duty to turn to the left and drive across the track, the court is of the opinion that he would have been chargeable with negligence had he attempted to do so.

The defendant's exceptions are to the exclusion of evidence offered to show that, at different times during the following summer, the plaintiff was intoxicated.

The ground upon which the evidence was presented is stated in the exceptions as follows: "The evidence was offered as bearing upon the question of damages, first, for the purpose of showing that the plaintiff had neglected to pursue the course of conduct with reference to the care of his foot prescribed by his physician and that he had, by such use of intoxicating liquors and especially by the effect of using his ankle while intoxicated, aggravated or prejudiced his condition and prolonged his own recovery; second, to show in view of Dr. Abbott's testimony as outlined above that the plaintiff's condition as to his injured ankle was not in July or August what the plaintiff and Dr. Abbott in their testimony both represented it to have been at the time." This evidence was excluded by the court subject to defendant's exceptions, the court saying "that the defendant might put in evidence of the way the plaintiff undertook to walk or did walk without a cane or with a cane, and the distance he walked." It is a well settled rule that exceptions will not be sustained unless they show that the excepting party was aggrieved by the ruling of the court. The defendant in its exceptions does not undertake to point out any particular respect in which the plaintiff if intoxicated had aggravated the injury to his ankle. As far as the exceptions show the state of intoxication might or might

not have prejudiced the plaintiff's recovery. But exceptions, to be sustained against a verdict based upon sufficient evidence, should clearly point out the acts done or omitted tending to produce an increase of the injuries or to retard their recovery. This was not done.

The exceptions also show that defendant's counsel then asked the court if evidence of staggering could be introduced and the court ruled in the negative. The court then admitted evidence of "the way the plaintiff undertook to walk or did walk." We think the admission of the evidence as to the way the "plaintiff undertook to walk or did walk" sufficiently covers the question as to whether the plaintiff staggered. "The way the plaintiff walked," may not have been described by the word "staggering" but the way of walking, as described, may have fully met the requirements of the definition.

This conclusion also answers the argument that the testimony was relevant upon another issue as tending to show that the plaintiff may have been shamming as to the condition of his ankle. The exception to the instruction given by the court with respect to the duty of the driver of a street car has not been argued and will therefore not be discussed in this opinion.

Motion overruled.
Exceptions overruled.

In Equity.

LOUIE E. GREENLAW, Executrix, *vs.* EASTPORT SAVINGS BANK et als.

Washington. Opinion December 7, 1909.

Mortgages. Merger.

While a mortgagor cannot change the mortgage into an absolute conveyance or release or embarrass his equity of redemption by any agreement made part of the mortgage transaction, he can by a subsequent voluntary agreement convey his interest to the mortgagee, if such agreement is bona fide, for an adequate consideration, and is not procured by the mortgagee by fraud, oppression, or undue influence.

In equity. On report. Bill dismissed.

Bill in equity against the defendant bank, and seven other defendants, to redeem certain real estate from an alleged equitable mortgage. The defendant bank filed an answer and the cause was then sent to a referee who heard the matter and found the facts. The cause was then reported to the Law Court on "bill and answer of the Eastport Savings Bank and the report of the referee."

The case is stated in the opinion.

J. H. McFaul, and Curran & Curran, for plaintiff.

L. H. Newcomb, and E. W. Pike, for defendants.

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

KING, J. Bill in equity to redeem certain real estate from an alleged equitable mortgage. The case is before this court on report for the determination of the question submitted by the referee, whose report, so far as material to the question presented, is as follows: "Mary S. Kenney on March 14th, 1887, conveyed to Samuel D. Leavitt by warranty deed absolute in form the real estate described in paragraph one of the bill and in the copy of deed, Exhibit 'A', annexed to the bill. This conveyance, though

absolute in form, was in fact only for security for loans then made and to be made to Mary S. Kenney to enable her to build a hotel on the land conveyed. These loans were made by the bank, and Mr. Leavitt subsequently conveyed the same land to the bank to hold as security for the loans made by the bank or himself to Mrs. Kenney.

"The hotel cost more than was anticipated and the business did not prove profitable. Mrs. Kenney and her husband, who was running the hotel with a partner, left the hotel, and it was afterwards verbally arranged between them and Leavitt and the bank that the bank should retain the land in full payment for the loans. A bond for reconveyance given by Mr. Leavitt to Mrs. Kenney at the time of her deed, but which had never been recorded, was given back to Mr. Leavitt in pursuance of the arrangement thus made. This was in 1894. Since that time until this proceeding was begun, August 1907, neither Mrs. Kenney nor any one claiming under her has made to the bank any claim of any right to redeem the land as from a mortgage, nor has the bank or Leavitt made any claim for repayment of the loans, and there was no evidence that they held any notes or other evidence of indebtedness for such loans. The bank upon its books transferred the matter from its loan account to its real estate account after the death of Mrs. Kenney in 1895. There does not appear to have been any written release of any equity of redemption, nor was there any statutory foreclosure of such right, if any. The plaintiff has succeeded to all rights of redemption, if any.

"I submit to the court the question whether upon the above statement of facts there is a subsisting right of redemption from the deed of Mary S. Kenney of March 14, 1887. If the court should hold the right to have been extinguished, then the bill is to be dismissed without costs. If the court holds the right to still exist, then the bill is to be sustained against the bank for redemption of the land described in paragraph one, and in the copy of deed, Exhibit 'A', annexed to the bill, but no other land, and a master is to be appointed to state the account."

While it is a well settled principle that a mortgagor will not be

permitted to change the character of the mortgage to that of an absolute conveyance, or release, surrender or embarrass his right of redemption by any agreement made at the same time and as a part of the mortgage transaction, it is also a well settled doctrine that a mortgagor by a subsequent voluntary agreement may sell and convey to the mortgagee his equity of redemption and all his right and interest in the mortgaged premises, provided such subsequent agreement is bona fide, for an adequate consideration, and not procured by fraud, oppression or undue influence on the part of the mortgagee. The following are some of the cases in which this doctrine is affirmed. *Trull* v. *Skinner*, 17 Pick. 213; *Watson* v. *Edwards*, 105 Cal. 70, 38 Pac. 527; *Wynkoop* v. *Cowing*, 21 Ill. 570, 583; *West* v. *Reed*, 55 Ill. 242; *Richmond* v. *Richmond*, 20 Fed. Cases, 11, 801; *Shaw* v. *Walbridge*, 33 Ohio St. 1; *Seymour* v. *Mackay*, 126 Ill. 341, 18 N. E. 552; *Ferguson* v. *Boyd*, (1907) 169 Ind. 537, 81 N. E. 71, 74; Jones on Mort., sec. 252 and 1046; *Sears* v. *Gilman*, 199 Mass. 384, 393. A brief reference to some of these cases will show the applicability of the doctrine to the case at bar. In *Trull* v. *Skinner*, supra, Shaw, C. J. said: "The court are of opinion, that where an absolute deed is given, accompanied by a simultaneous instrument, operating by way of defeasance, and afterwards the parties, by fair mutual stipulations, agree that the defeasance shall be surrendered and cancelled, with an intent to vest the estate unconditionally in the grantee, by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee. The original conveyance stands unaffected in form and legal effect; it conveys an estate in fee; the only party who could claim a right to deny it that operation, by engrafting a condition upon it, has voluntarily surrendered the only legal evidence by which that claim could be supported, and is thereby estopped, from setting it up."

In *Watson* v. *Edwards*, supra, it is said: "Appellant contends that he should have had judgment because the original transaction between Sullivan and Clark was, in law, a mortgage, and that its character as a mortgage was not changed, and could not have been changed, by the subsequent acts, of a surrender of the defeasance,

the yielding up of the note, the discharge of the debt, etc; and that in order to make such a transfer valid there must be some new consideration from the mortgagee to the mortgagor. This contention, in our opinion, cannot be successfully maintained. A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract. The doctrine 'once a mortgage, always a mortgage,' does not refer to future contracts." Again it is said:

"The old and oft-quoted legal maxim, 'once a mortgage always a mortgage,' is undoubtedly to be read and considered with this limitation, 'Once a mortgage always a mortgage until the parties agree to treat it differently.' But when they agree to treat it differently and do so treat it, it loses its character as a mortgage." *Richmond* v. *Richmond*, supra. In the quite recent case of *Ferguson* v. *Boyd*, supra, the court said: "When the legal title is in the mortgagee, so that it becomes necessary for the mortgagor to assert his claim of redemption on the equity side of the court, it does not admit of doubt that he must submit his claim to the testing of equity principles. His right of redemption may subsequently be lost to him by a fair contract which he has voluntarily entered into for the surrender of such right, or it may be defeated by other facts, which upon a consideration of the equities of the whole case, render it inequitable to accord to him the privilege he seeks."

In the case before us the referee has found as a fact, that after seven years from the time of the original transaction, which was in effect a mortgage, the parties mutually agreed that the bank should retain the land "as full payment for the loans," and in pursuance of that agreement the bond for reconveyance was surrendered.

It must be assumed, from the referee's finding, that this subsequent agreement was made, and the bond surrendered, with the intent to vest the estate unconditionally in the grantee of the original deed; that the agreement was voluntary on the part of the mortgagor, and was fair, honest, and not procured by fraud or

undue influence on the part of the mortgagee. It is of significance, too, that from the time of that subsequent agreement in 1894 until this proceeding was begun, a period of 13 years, the conduct of the parties and those claiming under them has been in accord with that new agreement.

Applying the well established doctrine hereinbefore mentioned to the facts as found by the referee and the conclusion necessarily follows, we think, that the right of redemption from the deed of Mary S. Kenney of March 14, 1887 was extinguished by the subsequent agreement of the parties, and is no longer a subsisting right.

Therefore in accordance with the provision of the referee's report the entry must be,

Bill dismissed without costs.

FLORA E. HAMMOND, Administratrix,

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec. Opinion December 7, 1909.

Death. Wrongful Death. Liability. Effect of Statute. Process. Writ. Statute, 1891, chapter 124. Revised Statutes, chapter 89, sections 9, 10.

At common law and independent of statute no right of action exists for loss of life.

Revised Statutes, chapter 89, sections 9, 10, giving a right of action for wrongful death for the benefit of specified relatives, to be sued on within two years, create a single cause of action which vests immediately and finally at the time of the death in the statutory beneficiary, and not when suit is brought or recovery is had, and hence, on the death of decedent without children, the cause of action vested in his widow, and could not be transferred to any other beneficiary by her death or failure to sue.

A writ must show for whose benefit suit is brought.

On report. Plaintiff nonsuit.

Action under Revised Statutes, chapter 89, sections 9 and 10, relating to the death of a person caused by "wrongful act, neglect or default." The plaintiff's declaration is as follows:

"In a plea of the case for that the said defendant on the fifteenth day of October, 1908, at said Winthrop, was a Street Railway Company engaged in operating its passenger cars on its tracks through the town of Winthrop, crossing at grade the highway from Augusta to Winthrop at a point several hundred feet east of the junction of the Baileyville Road, so called, with said Augusta and Winthrop highway, and the plaintiff's intestate was then and there, in the exercise of due care, driving easterly along said Augusta and Winthrop highway and crossing the track of the defendant; yet the defendant so carelessly and negligently operated one of its said cars that said car struck the said plaintiff's intestate and the carriage in which he was driving and ran over him and immediately killed him; and the plaintiff avers that the death of said Harold E. Martin was caused solely by the wrongful act, neglect or default of said defendant, and that said act, neglect of default was such as would, if death had not ensued, have entitled said Harold E. Martin to maintain an action against said defendant and recover damages in respect thereof; and the plaintiff further avers that there is living no widow or child of said Harold E. Martin and that this action is brought for the benefit of Flora E. Hammond aforesaid, who is the only heir-at-law of said Harold E. Martin." Writ dated January 30, 1909.

The defendant demurred and also filed a motion to dismiss and also a motion to abate, each of said motions being based on the following reasons:

"1. That on said fifteenth day of October, A. D. 1908, the said Harold E. Martin then had a widow living and no child.

"2. That said widow has since deceased and was not living at the date of the writ.

"3. That said alleged cause of action did not survive for the benefit of said Flora E. Hammond."

By agreement of the parties the case was reported to the Law Court "to determine whether the action shall stand for trial or entry be made 'Plaintiff nonsuit.'"

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Heath & Andrews, for defendant.

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

CORNISH, J. This is an action brought under R. S., ch. 89, sections 9 and 10, by the administratrix of the estate of Harold E. Martin for the benefit of herself as his sole heir at law at the date of the writ. Plaintiff's intestate was instantaneously killed by being struck by a car of the defendant at the date alleged in the declaration. He left a widow but no children. Subsequently the widow died, no administration then having been taken out upon her husband's estate and no suit having been brought for her benefit. After the death of the widow, the plaintiff, the sister of said Martin and his sole heir at law, was appointed administratrix of his estate and began this action. The case comes to the Law Court on report and the single question presented is whether on the foregoing facts, this action, if maintainable on the merits, can be maintained for the benefit of the plaintiff as such sole heir. If it can be maintained the action is to stand for trial, if not, the entry of plaintiff nonsuit is to be made.

The language of R. S., ch. 89, secs. 9 and 10, which is the basis of this action, is as follows:

Sec. 9. "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony.

Sec. 10. "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and, if neither, of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, provided, that such action shall be commenced within two years after the death of such person."

It is conceded that at common law no remedy by action existed for loss of life. The right of action set up by the plaintiff is a pure creature of statute and upon the fair construction of that statute this action stands or falls. The plaintiff's contention is that section 9, creates a new right and therefore should be construed strictly, as this court has heretofore interpreted it, limiting its scope to cases of immediate death, including cases of both instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death. *Perkins* v. *Paper Co.*, 104 Maine, 109. But the plaintiff further contends that section 10, determining in whose name and for whose benefit, the action should be brought, should be construed liberally, and that, applying such liberal construction, it may be said to have been the intention of the legislature in this section first to vest a right of action in the administrator of the deceased absolutely, and secondly and of less importance to provide for the distribution of the damages so recovered. In other words the plaintiff's position is that the administrator is given a right of action in any event and the beneficiaries should be determined, not as of the date of the death but of the recovery. Such a construction cannot be adopted as it strains the language of the statute beyond its tensile strength. Sections 9 and 10 are not independent acts of the legislature but allied sections of one and the same act, passed originally as chap. 124 of the Public Laws of 1891. One is not to be construed strictly and the other liberally, but both are to be construed together and as they create a liability

unknown to the common law, their effect is to be limited to cases clearly within the terms of the act. No right of action is to be inferred and no remedy is to be given except as specified in the statute. "It is a general principle of construction that where a right is given by statute and a remedy provided in the same act, the right can be pursued in no other mode." *Flatley* v. *R. R. Co.*, 9 Heisk (Tenn.) 230; *Loague* v. *R. R. Co.*, 91 Tenn. 458, 19 S. W. 430.

The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the deceased, otherwise no right of action arises. The suit is not for the benefit of the estate and creditors have no interest in it. True, such suit is brought in the name of the administrator but he is merely the nominal party and acts as trustee. The legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the legislatures of some States have done. But if none of the beneficiaries exist at the time of death, no right of action is created. *Ea. Tenn. R. R. Co.* v. *Lilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 44 At. 633; *Topping* v. *St. Lawrence*, 86 Wis. 526, 57 N. W. 365.

Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left, and four different conditions are provided for, widow without children, children without widow, widow and children, heirs at law. But in any event the immediate, absolute and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. If there is a widow as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband and could not be transferred to any other beneficiary either by her death or failure to bring suit. The statute provides for several possible claimants but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at

law. One action is granted, not several. When the husband died the sister had no cause of action and the death of the widow has not given her one. It is well settled that the writ must show for whose benefit the action is brought. *Oulighan* v. *Butler*, 189 Mass. 287; *Louisville R. R. Co.* v. *Pitt*, 91 Tenn. 86, 18 S. W. 118. The same was true of an indictment when that was the statutory remedy. *State* v. *Grand Trunk Ry. Co.*, 60 Maine, 145, because the judgment must follow the writ in the one case and the indictment in the other and the amount recovered passes to the beneficiary named, the administrator in the one form of procedure and the State in the other acting merely as a trustee or conduit.

Again the cause of action accrues at death by the very terms of the statute. The last clause of section 10 makes the two years limitation, within which suit can be brought, begin at that time. Whoever has a cause of action under this statute has two years within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action but only one month in which to enforce it. The absolute vesting of the right in some beneficiary at the time of death is further apparent from the fact that the damages vary according to the relationship of the deceased to the beneficiary and the dependence of the latter upon the former. "The injury for which damages can be recovered must be wholly to the beneficiaries themselves and it is limited to the pecuniary effect of the death upon them." *McKay* v. *Dredging Co.*, 92 Maine, 454. The pecuniary effect of the death of a husband upon his widow and therefore the damages recoverable in an action for her benefit would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them.

Authorities from other States are helpful only as they are based on statutes similar to ours, but the principle of the exclusive right in the first taker, is followed under analogous statutes in *Woodward* v. *N. W. Ry. Co.*, 23 Wis. 400; *Schmidt* v. *Menasha Wooden Ware Co.*, 99 Wis. 300, 74 N. W. 797; *Loague* v. *Memphis, etc., R. R.*, 91 Tenn. 458, 19 S. W. 430; *Bean* v. *Louisville R. R.*, 94 Tenn. 388, 29 S. W. 370; *Sanders* v. *Louisville*

R. R., 111 Fed. 708, in all of which it was held that a pending action for the benefit of the widow abated at her death, under the statutes of those States governing survival of actions; and in *Cooper* v. *Shore Electric Co.*, 63 N. J. L. 558, 44 At. 633, where it was held that such action did not abate but the injury sustained would be limited in duration and extent to the lifetime of the beneficiary. The question of survival or abatement, however, is not under consideration at this time.

Under the peculiar provisions of Lord Campbell's Act in England which, in its general scope, is the foundation of the legislation in the various states of this country, the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered and may be maintained so long as any one of such persons survives, the amount recovered being apportioned among the various parties "in such shares as the jury by their verdict may direct." *Blake* v. *Midland Ry.*, 18 Q. B. 543; *Woodward* v. *Chicago & N. W. Ry. Co.*, 23 Wis. 400. In the case last cited, which arose under a statute providing that the amount recovered should be paid over to the husband or widow, if such relative survived, if not, then to lineal descendants, and if none then to lineal ancestors, the deceased left a husband and a child. The court notes the clear distinction between actions under that statute and the statute of Wisconsin which in this respect is similar to the statute in Maine as follows:

"While it is apparent, under the English and New York statutes, that the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our statute, that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors. The language of the statute is so plain, that there seems to be no room for argument as to its meaning. In this case, the deceased, who was a married woman,

left a husband, who survived until some time after this action was commenced. Upon her death, therefore, the right of action, by the statute, vested solely and exclusively for the benefit of her husband. He alone was entitled to the amount to be recovered, and could hold and dispose of the same at pleasure. The lineal descendants and ancestors of the deceased had no interest whatever in the action, and the damages to be recovered could not be estimated with reference to the pecuniary injury, if any, resulting to them, or any of them."

The statutes of New York and Pennsylvania and some other States follow Lord Campbell's act closely in the same respect. In some of the States, as in North Dakota and Colorado, the statute provides that if the beneficiary first entitled does not exercise the right of action within a given time, the next class after due notice to the former, may be substituted. *Harshman* v. *No. Pac. Ry. Co.*, 14 N. D. 69, 103 N. W. 412; *Hooper* v. *Denver R. G. R. R.*, 155 Fed. 273. This emphasizes the necessity of a positive statute in order to effect such substitution.

Our attention has been called to only one case as sustaining the contention of the plaintiff. *Morris* v. *Spartanburg Ry.*, 70 S. C. 279, 49 S. E. 854. That case was based upon a statute more nearly resembling that of England, New York and Pennsylvania, above referred to and suit having been brought for the benefit of all the beneficiaries, the court held that the action did not abate because of the death of the father, pendente lite, although had he survived he would have been the sole beneficiary. It may therefore properly be distinguished from the case at bar.

Further discussion is unnecessary. The construction contended for by the plaintiff wrenches too violently the plain language of the statute, while that adopted follows its natural and reasonable meaning. It is therefore the opinion of the court that this action cannot be maintained and according to the stipulation, the entry must be,

Plaintiff nonsuit.

FRANCES E. POWERS *vs.* IDA E. HAMBLETON.

Cumberland. Opinion December 9, 1909.

Real Action. Ejectment. Title. Burden of Proof. Mortgages. Mortgagee's Right to Enter. Effect of Lease. Harmless Error. Evidence. Mortgage for Support. Breach by Mortgagor. Revised Statutes, chapter 106, sections 5, 8.

Under the general issue in an action to recover land, the burden is on plaintiff to show the title alleged in his writ; defendant being entitled to rebut the evidence by showing title in himself or in another, or by merely showing that plaintiff has none.

One must recover land, if at all, upon the strength of his own title, and not upon the weakness of the defendant's.

Under Revised Statutes, chapter 106, sections 5, 8, in an action to recover land, proof of both the right of entry at the time suit is brought and of such an estate as the plaintiff alleges, is necessary, though defendant shows no title.

By joining in a lease for a term of years, a mortgagee debarred herself of the right of entry upon the premises under a mortgage to secure support, during the term of the lease.

In an action to recover land, an allegation that plaintiff barred her right of entry by making a lease, being superfluous in view of the general issue, the overruling of a demurrer to it was not prejudicial error.

The burden of proving a breach of the condition of a mortgage given for support on the premises, is on the mortgagee, and unless a breach is shown, the mortgagee is not entitled to possession.

In a suit by a mortgagee in a mortgage to secure her support in consideration of a conveyance of the mortgaged land, to recover possession of the land for an alleged breach of the condition, evidence *held* insufficient to show a breach by the defendant.

On exceptions by plaintiff. Overruled.

Real action to recover possession of the home farm of the parties in Brunswick, and of a certain wood-lot on Great Island in Harpswell. Plea, the general issue with brief statement alleging that the plaintiff had barred herself from the right of entry into and possession of the premises by making and executing a written

lease thereof which was still in force. The plaintiff filed a demurrer to the brief statement which was overruled and the plaintiff excepted. The plaintiff also excepted to the admission of certain evidence during the trial and to the order of the presiding Justice directing a nonsuit.

The case is stated in the opinion.

Clarence E. Sawyer, for plaintiff.

Emery G. Wilson, for defendant.

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

WHITEHOUSE, J. This is a real action to recover possession of certain parcels of land comprising the home farm of the parties in Brunswick, and of a wood-lot situated on Great Island in Harpswell.

In 1901 the plaintiff conveyed the demanded premises to the defendant, her daughter, in consideration of a bond for her support secured by a mortgage to the plaintiff of the same property. In 1906, the plaintiff joined in a written lease of the homestead farm, not including the wood-lot, to George Y. Walker for the term of five years at a rental of $150 per year, "reserving the parlor sleeping room and the parlor chamber in the house, with right of access to the same." This lease was under seal and was in full force from its date to the time of the commencement of this action and to the time of the trial, and by virtue of it, Walker, the lessee, was in uninterrupted possession of the premises during the same time.

The defendant pleaded the general issue with a brief statement alleging that the plaintiff had barred herself from the right of entry into and possession of the premises by making and executing a written lease thereof which was still in force. The plaintiff demurred to the brief statement contending that it set up matter which should have been pleaded in abatement. But the presiding Justice overruled the demurrer, subject to the plaintiff's exceptions, and this ruling was manifestly correct. Under the general issue in a real action the burden is on the plaintiff to show the title he has alleged in his writ, and it is obvious that the defendant may rebut the plaintiff's evidence by showing title in himself or in another, or by

merely showing that the plaintiff has none. It is a familiar rule that the plaintiff must recover if at all upon the strength of his own title and not upon the weakness of that of the defendant. *Chaplin* v. *Barker*, 53 Maine, 275. Proof of both the right of entry at the time of the commencement of the action and of such an estate in the premises as the plaintiff has alleged is necessary before he can recover although the defendant shows no title in himself. R. S., chap. 106, sects. 5 and 8. *Stetson* v. *Grant*, 102 Maine, 222. "One may retain his title to real estate while debarring himself from the right of entry and possession." *Hurd* v. *Chase*, 100 Maine, 562. "And all this is determinable under the general issue." *Brown* v. *Webber*, 103 Maine, 60.

In the case at bar the plaintiff was mortgagee of the demanded premises and upon proof of a breach of the condition of the mortgage, she might have been entitled to judgment for possession of the premises, if she had not joined in the execution of the lease to Walker for the term of five years. By force of that instrument she was clearly debarred from the right of entry and possession of the premises, with the exception of the rooms reserved during the term of the lease.

The brief statement was superfluous. It added nothing to the general issue and was in no way prejudicial.

The ruling of the presiding Justice admitting in evidence the lease to Walker above described signed by the plaintiff to which the defendant's second exception was taken, was also undoubtedly correct for the reasons already suggested.

The parties lived on the home farm and the defendant remained single until the spring of 1906 when she married Mr. Hambleton who had become proprietor of a hotel in Princeton, Maine, and it was then amicably arranged between the parties that they should all go to Princeton. Preparatory to this change of residence a written agreement under seal was signed by the parties and delivered to the plaintiff, on the fourteenth day of February 1906. In that agreement after reciting that October 16th, 1901, the defendant had given to the plaintiff a bond for her support on the premises in Brunswick, it was stipulated that the defendant might rent or lease

the premises and remove therefrom at any time without being charged with any violation of the terms of the bond; provided that the defendant should support and maintain the plaintiff "at some other suitable and convenient home within the state of Maine." Although the plaintiff seeks to give the impression that she was over-persuaded by her daughter to go to Princeton, she appears to have cheerfully acquiesced in the proposition and admits that she told her daughter she had worked hard enough on the farm to go to Princeton and retire. She further testifies that as a further consideration for signing this "agreement to go to Princeton," the defendant agreed to give her and did give her a "mortgage of all she had on earth." Thereupon, on the 16th of March following, the lease of the farm in Brunswick was executed and delivered to Mr. Walker and the parties soon after removed to Princeton.

The plaintiff's third exception is to the ruling of the presiding Justice admitting in evidence this agreement of February 14, 1906, identified by the plaintiff as the paper which she "signed to go to Princeton."

It is contended that there was no consideration for this agreement, releasing the defendants from the obligation to furnish the support on the homestead farm in Brunswick. But according to the testimony of the plaintiff herself there was ample consideration, both good and valuable. At all events there were reasons and considerations as above suggested, which were satisfactory to the plaintiff and sufficient to induce a cheerful acquiescence on her part in the proposition to lease the farm and accompany her daughter and son-in-law in the Princeton enterprise. On the strength of her consent, the agreement and lease were executed, possession of the farm surrendered to Mr. Walker for five years, and the removal to Princeton soon followed. There is no evidence that the plaintiff's consent or signature either to the agreement of February 14, or to the lease to Walker, was obtained by any fraudulent means. By the conduct of the plaintiff in thus joining in the lease and the proposition for a change of residence, the defendant was induced to take a course of action which she otherwise would not have taken, and

the plaintiff is now estopped from taking a different position to the detriment of the defendant. The agreement of February 14 was clearly admissible in evidence.

It thus appears that by force of the lease the plaintiff had debarred herself of the right of entry upon the homestead for the term of five years, and thereupon was not entitled to judgment for possession, even if there had been a breach of the defendant's contract for her support. But the lease to Walker did not comprise the wood-lot situated on Great Island and hence the plaintiff's right to the possession of that lot was not affected by the lease. As to that parcel the action could still be maintained by proof of a breach of the condition of the mortgage given to her by the defendant to secure the bond for support. But the burden of proving a breach of the condition of such a mortgage is on the mortgagee, and unless a breach is shown, the mortgagee is not entitled to possession. *Davis* v. *Poland*, 99 Maine, 345. The plaintiff testified as a witness and gave a somewhat detailed history of her manner of life from the time she left the Brunswick homestead and went to Princeton to the time of the trial. Her counsel argues that it has some tendency to show a breach of the contract. The defendant did not deem it necessary, however, to introduce any evidence in explanation or denial of the plaintiff's testimony, but at the conclusion of it moved for a nonsuit. This motion was granted by the presiding Justice and a nonsuit was ordered. To this order also the plaintiff has exceptions.

When the plaintiff's testimony is carefully examined and considered in connection with all the other evidence, the circumstances and situation of the parties and the conduct of the plaintiff from the time she conveyed the homestead to her daughter in consideration of the bond for her support to the time of the trial, it is the opinion of the court that it fails to show a breach of the defendant's contract in any substantial particular, and that there is not sufficient evidence to support a verdict in favor of the plaintiff on that ground. As might have been anticipated she did not easily become accustomed to the continual din and bustle of hotel life at Princeton. Her thoughts continually reverted to the peaceful seclusion and

tranquility of her country home, and on the 29th of May, 1906, after an absence of two or three months, she returned to Brunswick where she has been boarded and maintained at the expense of the defendant at "suitable and convenient homes" from the time of her return to the time of the trial. There is no evidence that during the entire period since her return she has ever complained that she did not have a suitable boarding place, and sufficient money from the defendant to procure the clothing and other necessities incident to the style of life to which she had been accustomed. Under the direction of the defendant the entire rental of the homestead has been appropriated to the plaintiff's use and benefit by the tenant Mr. Walker, and sums of money frequently sent to her for her relief in sickness and her comfort in both sickness and in health. In moments of irritation an ungracious remark may sometimes have been made by the defendant during her experience in the Princeton hotel, and she may not always have given the soft answer which turneth away wrath; but it does not appear that she ever subjected the plaintiff to such unkind treatment or was otherwise so unmindful of her duty towards the plaintiff as to warrant the conclusion that there has been a breach of the conditions of her bond and mortgage.

Exceptions overruled.

WILLIAM F. BEVERAGE *vs.* INHABITANTS OF ROCKPORT.

Knox. Opinion December 9, 1909.

Highways. Injuries. Notice. Construction. Evidence. New Trial. Personal Injuries. Damages. Revised Statutes, chapter 23, section 76.

Revised Statutes, chapter 23, section 76, requiring written notice to town officers, of a claim for injuries from a defective highway, specifying the injuries and the defect causing them, is designed to give such officers an opportunity to examine the place and ascertain the facts while they are fresh, determine the defendant's liability, and prepare any defense.

In view of the limited time within which notices under Revised Statutes, chapter 23, section 76, must be served, and the fact that they are often necessarily prepared without the aid of a professional draughtsman, their construction should not be "strangled by technicalities nor distorted by captious criticism," but full effect should be given to their natural and obvious meaning.

Under Revised Statutes, chapter 23, section 76, requiring a written notice to town officers of an accident, stating a claim for damages, and specifying the nature of the injuries and the nature and location of the defect causing them, a notice that plaintiff was injured on a highway leading from one specified point to another at a point near a specified point, by being thrown from a carriage by contact with a guy wire supporting a derrick, that the injury consisted of facial bruises and internal injuries the extent of which could not be then ascertained, and that a claim would be made against the town, was not insufficient as failing to show that plaintiff was injured by a defect in the highway, nor as making no present claim, nor as failing to specify the nature and location of the defect, nor as insufficiently specifying the injuries.

A notice to a town under Revised Statutes, chapter 23, section 76, of a claim for injuries received on a highway, consisting of "facial bruises and internal injuries," was sufficient to authorize recovery for the injuries therein alleged, and if the town would defeat recovery for other distinct injuries not specified but caused by the same fall, it was bound to object to proof of them.

Evidence in an action against a town for injuries received by driving along a highway caused by contact with a guy wire, *held* to support a verdict for plaintiff.

A new trial will not be granted for newly discovered evidence, which probably would not have changed the result, and which could have been discovered before the trial closed by using reasonable diligence.

$988 *held* not excessive damages for facial injuries, three broken ribs, dislocated shoulder, and hemorrhages, caused by internal injuries attended by suffering.

On motions and exceptions by defendants. Overruled.

Special action on the case under Revised Statutes, chapter 23, section 76, to recover damages for personal injuries sustained by the plaintiff while riding in the evening along a highway in the defendant town, and caused by a collision of his wagon with a guy wire employed by the defendant town to support a certain derrick in the highway and which was unguarded by a light or other warning. Plea, the general issue. Verdict for the plaintiff for $988. The defendant town excepted to certain rulings made during the trial, and filed a general motion for a new trial and also a special motion for the same purpose on the ground of newly discovered evidence.

The case is stated in the opinion.

C. T. Smalley, for plaintiff.

Arthur S. Littlefield, and G. H. M. Barrett, for defendants.

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

WHITEHOUSE, J. In this action the plaintiff obtained a verdict of $988 for personal injuries received by him on the evening of August 18, 1907, while he was traveling along the highway leading from Rockport Village to Simonton's Corner in the town of Rockport. He claims that the injuries were caused by a collision of his wagon with a guy wire employed by the defendant to support a derrick which was in use at that point in the highway but unguarded by a light or other warning.

The plaintiff was required by section 76 of chapter 23, R. S., to give the municipal officers a written notice of the accident within fourteen days thereafter "stating his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

For the purpose of complying with this requirement of the statute, the plaintiff caused the following notice to be seasonably given to the municipal officers of the defendant town, viz.

"Camden, Maine, August 20, 1907.

"To the Selectmen of the Town of Rockport:

"You are hereby notified that William F. Beverage of Camden was injured on the highway leading from Rockport to Simonton's Corner, on the night of August 18th about nine o'clock at a point near the turn on the eastern side of Melvin Bridge so-called. That said injury was caused by his being thrown from his carriage by contact with a guy wire there used to support a derrick there being used in the repair of said bridge. That no suitable light was placed on or near said guy wire. That said injury consisted of facial bruises and internal injuries, the extent of which cannot be ascertained at this time. That a claim for damage will be made against said town."

The defendant's counsel seasonably objected to this notice on the ground of its insufficiency and contended that it was defective with respect to all of the purposes for which such a notice is required. The presiding Justice admitted the notice subject to the objection and the case comes to this court on exceptions to this ruling and upon a motion to set aside the verdict as against the evidence and on account of newly discovered evidence relating to the question of damages. As stated by this court in *Marcotte* v. *Lewiston*, 94 Maine, 233, the manifest purpose of this requirement of a fourteen days' notice "is to afford opportunity to the town officers to examine the place, ascertain from persons having knowledge of the facts, while the recollection is fresh, all the attending circumstances, and determine as to the liability of the town, and prepare its defense if the town decides to defend." In view of the limited time within which these notices must be served and the fact that they are often necessarily prepared without the aid of a professional draftsman their construction should not be "strangled by technicalities nor distorted by captious criticism," but full effect should be given to their natural and obvious meaning.

In the case at bar the defendant's first criticism of the notice is that it contains no distinct averment that the plaintiff was injured by reason of a defect in the highway, and makes no claim for damages expressed in the present tense but announces that a claim will be made at some time in the future. True, the notice does not expressly characterize the alleged obstruction as a defect, but it plainly states that the plaintiff was injured on the highway by reason of a collision of his team with a derrick guy then in use and unguarded. It describes a condition which the jury might find to be dangerous and defective. It stated the facts and gave the town officers the information required to enable them to perform their duty with respect to that feature of the case. The obstruction described in the notice was duly alleged to be a defect in the plaintiff's declaration, and the jury so found.

Neither can it reasonably be doubted that the notice would easily be understood as a statement of an existing claim which would be subsequently prosecuted if not adjusted.

It is further objected that the notice fails to specify the nature and location of the defect. It states that the plaintiff was injured "on the highway leading from Rockport to Simonton's Corner . . . at a point near the turn on the eastern side of Melvin bridge," and that the injury was caused by a collision with the guy wire of a derrick there being used in the repair of the bridge. It is true that there were two highways either of which might be used in traveling from Rockport to Simonton's Corner, but reference to the standing derrick definitely fixed the location of the defect, there being no other derrick on either road. It distinguished the highway on which the obstruction was located as clearly as in *Hignett* v. *Norridgewock*, 105 Maine, 189, the large "hole in the traveled part of the road" distinguished the middle culvert from the northerly culvert.

With respect to the nature of the plaintiff's injury, the notice states that it "consisted of facial bruises, and internal injuries, the extent of which cannot be ascertained at this time." This notice was prepared and served the second day after the accident, but in the plaintiff's declaration drawn six months later it is alleged that two of his ribs

were broken and his body greatly bruised and injured, and that he was injured internally and "still suffers great pain and frequently spits large quantities of blood." In *Low* v. *Windham*, 75 Maine, 116, it is said in the opinion, "Full and exact details of the personal injury are not required, and the plaintiff is not precluded from recovering for injuries which are not known, and, therefore, cannot be specified at the date of the notice, but which manifest themselves later. The object of the notice in this respect is not to limit the plaintiff's right of recovery, but to give information to the town, by a general statement such as it is practicable for the plaintiff to make at the time, of the nature of the injuries for which he claims to recover damages." In *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79, it was alleged in the notice that the plaintiff was injured in his thigh and right lung "and otherwise injured by being violently shaken up and jarred in his fall to the ground;" and he was permitted to show a specific injury not mentioned in the notice, resulting from his being shaken up and jarred in his fall to the ground. In *Spear* v. *Westbrook*, 104 Maine, 496, the notice was held insufficient for the reason that it failed to specify upon what part of the body the bruises were received, or to state in what manner or to what extent the bruises affected her; but in the opinion it is observed that "the sufferer can recover damages arising from such injuries as are specified in the notice and for the results actually flowing from such injuries, although those results may not be anticipated or described in the notice."

In the case at bar the notice states that the "injury consisted of facial bruises and internal injuries, the extent of which cannot be ascertained at this time." The surgeon who was called between ten and twelve o'clock on the night of the injury testifies that he found a gash in the plaintiff's chin which penetrated through the lower lip and into the gum in the lower jaw; that he found three ribs broken and the right shoulder dislocated and severely injured "so that he couldn't move or control the movements of his right arm at all." He also states that he was suffering from internal hemorrhages, which came from the internal organs, but he could not "diagnose the injury" and had never satisfactorily done so; but adds that at the

last examination of the plaintiff, two weeks before the trial, he had not recovered from the "indefinite internal injuries but still had hemorrhages," nor had he then recovered from the injury to the shoulder.

It thus appears that in addition to the "facial bruises" and "internal injuries" specified in the plaintiff's fourteen days' notice, there existed two separate and distinct injuries, and sources of suffering and damage, namely, the fracture of the ribs and the severe injury to the right shoulder. These specific injuries were not the results arising from the "indefinite internal injuries" and should therefore have been specified in the notice to authorize the plaintiff to introduce evidence to prove them and to entitle him to recover damages for them. But the evidence relating to the fracture of the ribs and injury to the shoulder was all introduced without objection by the defendant's counsel. It is true that objection had been made to the admission of the notice "as not being sufficient to comply with the statute as not entitling the plaintiff to recover for the alleged injuries." But it has been seen that the notice was sufficient compliance with the statute to entitle him to recover for the injuries therein alleged, and if the defendant would prevent a recovery for other distinct injuries not specified but caused by the same fall, it was its duty to object to the introduction of evidence to prove them. As the notice was admissible for the purpose above stated, the defendant's exceptions must be overruled.

With respect to the motion to set aside the verdict as against the evidence, it would serve no useful purpose to analyze and discuss the testimony and it is only necessary to state that after a careful examination of all the evidence introduced at the trial, it is the opinion of the court that there was sufficient evidence to support the verdict returned by the jury in favor of the plaintiff. And with respect to the motion for a new trial on the ground of newly discovered evidence relating to the question of damages, it is sufficient to say that in the opinion of the court, by the exercise of reasonable diligence the evidence might have been discovered before the close of the trial, but that, if it had been, it probably would not have changed the result. In view of the suffering and disability

resulting from the plaintiff's injuries and the testimony of the surgeon respecting the permanency of the injury to the right shoulder and the persistent hemorrhages from the injuries to the internal organs, the damages awarded by the jury must be considered moderate rather than excessive.

Motions and exceptions overruled.

MAURICE L. ROSEN et al.

vs.

GERMAN ALLIANCE INSURANCE COMPANY.

Penobscot. Opinion December 13, 1909.

Exceptions. Fire Insurance. Policies. Cancellation. Notice. Waiver. Burden of Proof. Evidence.

On exceptions to a verdict directed for defendant, with stipulation for judgment for plaintiffs if the order was erroneous, the test is whether a verdict could be sustained by the Law Court on the evidence.

Under the provision of the Maine standard policy of fire insurance entitling the insurance company after giving written notice to the insured to cancel the policy as to all risks subsequent to the expiration of ten days from such notice, *held* that such policy can be cancelled by the insurance company only at the expiration of ten days after such written notice unless such notice is waived by the insured.

The burden of proof is on the defendant insurance company to show a waiver by the insured of the provision of the Maine standard policy requiring ten days' written notice before the cancellation of such policy.

In the case at bar, *held* that the evidence was not sufficient to show that the plaintiffs waived the ten days' written notice of cancellation of their policy.

A waiver is a voluntary relinquishment of some known right, benefit, or advantage which, except for such waiver, the party would have enjoyed. A party cannot be deemed to waive by word or act a right which he does not know that he possesses.

Where the plaintiffs were insured under a Maine standard policy of fire insurance, *held* that the evidence showed that the plaintiffs were ignorant of the provision in such policy requiring ten days' written notice by the insurance company before cancellation of the policy.

Where an insurance company issued a fire insurance policy of the Maine standard form and attempted to cancel the same in violation of the provision therein requiring ten days' written notice of cancellation, and the insured were ignorant of such provision, and a loss occurred after such attempted cancellation, *held* that the insured did not waive the ten days' written notice of cancellation and that the insurance company was liable on the policy.

On exceptions by plaintiffs. Sustained.

Assumpsit upon a policy of fire insurance issued to the plaintiffs by the defendant company. Plea, the general issue, with brief statement as follows: "That the insurance policy described and declared upon in plaintiff's writ was cancelled and surrendered by mutual agreement long before the fire mentioned in said writ and causing the loss complained of occurred."

At the conclusion of the evidence, the presiding Justice ordered a verdict for the defendant and the plaintiffs excepted. It was also agreed that if the order was erroneous, judgment should be entered for the amount claimed.

The case is stated in the opinion.

Martin & Cook, for plaintiffs.

E. C. Ryder, for defendant.

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

CORNISH, J. This is an action of assumpsit upon a policy of insurance issued by the defendant company through its agent Charles M. Stewart, May 28, 1908. The policy was never delivered to the plaintiffs, neither was any premium paid, but it is not claimed by the defendant that these facts affected the validity of the contract. The defense is cancellation by agreement, and the facts on which the defendant relies to prove such cancellation are these. On the afternoon of June 11, or the morning of June 12, 1908, the agent received notice from the home office of the company in New York to cancel this policy for the reason, as he testifies that

the company had all the insurance in that locality which it felt justified in carrying. About nine o'clock on the morning of June 12, the agent notified Mr. Rosen, the senior partner, that the company had requested him to cancel the policy immediately and informed him that his protection under the policy would terminate at noon of that day. Thereupon Rosen said "What am I going to do?" And the agent replied "You want to get busy and go to some other agent, you have got three hours." Rosen then asked the agent if he couldn't place the risk in another of his companies, but the agent said that he could not, and he would have to go elsewhere. Thereupon Rosen said "Well Charles you can do better than I can. Won't you do it for me? and the agent said "I will try if you want me to, I can't say that I can but I can try — I will do it if I can." This is the conversation as given by the agent, but Rosen testified that the agent simply said the company wrote him to cancel the policy without stating the time of cancellation, and the reason given was the nearness of a paint shop to the premises insured, that Rosen then said "I suppose you will put it in another company" and the agent replied "I will" and then Rosen said "All right." Mr. Stewart at once entered into negotiations with another agent and the latter wrote to New York for authority to take the risk, and on the same day Mr. Stewart returned the Rosen policy to the home office in New York. At four o'clock on the morning of June 13, 1908, and before other insurance was procured, the fire occurred.

At the conclusion of the testimony the presiding Justice ordered a verdict for the defendant and the case comes to this court on exceptions by plaintiffs with the stipulation that if the order was erroneous, judgment is to be entered for the plaintiffs for the amount claimed. As the case is presented the test is whether a verdict for the plaintiffs could be sustained by this court on the evidence. *Bank* v. *Sargent*, 85 Maine, 349; *Young* v. *Chandler*, 102 Maine, 251. It is the opinion of the court that such a verdict could be sustained.

It must be conceded at the outset that except by agreement or waiver, this policy which was of the Maine Standard Form, could

not be cancelled by the company until the expiration of ten days after written notice to the assured. The policy so provides: "The Company also reserves the right after giving written notice to the insured . . . . to cancel this policy as to all risks subsequent to the expiration of ten days from such notice." The obvious purpose of this provision is to protect the assured from the possible results of immediate cancellation and to allow him ample time in which to procure other insurance. It must be further conceded that the parties had a right to cancel the policy at once by mutual agreement, that is that the plaintiffs had a right to waive this provision if they saw fit to do so, but on this point the burden of proof is on the defendant.

The evidence in this case does not sustain that burden. A waiver is a voluntary relinquishment of some known right, benefit or advantage, which except for such waiver, the party would have enjoyed. *Peabody* v. *MaGuire*, 79 Maine, 572; *Stewart* v. *Leonard*, 103 Maine, 128. It follows that there can be no waiver in pais without knowledge. A party cannot be deemed to waive by word or act a right which he does not know that he possesses. *Marcoux* v. *Soc. of St. John Baptist*, 91 Maine, 250. The preponderance of the evidence in the case at bar is in favor of the plaintiffs' ignorance of the ten days provision before referred to. True, Mr. Rosen when called in rebuttal testified that he knew about this provision prior to the fire, but the facts that occurred at the time show conclusively that in this he must have been mistaken and that he knew nothing of it until informed of the fact by another agent. Nothing was said by either party in regard to this ten days' limit when the conversation was had on June 12, in regard to the cancellation, but the agent testified that in the afternoon of June 13, after the fire, the following conversation took place.

"Mr. Rosen came to my office and said that another insurance agent in Bangor had told him that under the conditions of every policy he was entitled to have that policy remain in force for ten days to enable him to procure other insurance. I told him I didn't so understand it, unless the property was mortgaged. That in reading the policies that was the understanding I had always had of it.

I went to the same company's office and got out a blank policy, and we read it together there in the office, and I says, "Well, it may be possible that the law intends it to be construed as you say, but I didn't realize it up to this time," and he says, "Nor I either. I didn't know I was entitled to it, but another insurance agent has told me I was."

Immediately after this interview the agent wrote the home office a full report of all that had taken place between Rosen and himself both before the fire and after, and in the course of the letter says: "Mr. Rosen supposed, as he was ignorant of the law in the matter, that he had no claim after 12 o'clock yesterday on our company, another agent with whom he was discussing the feature this morning told him he was entitled to ten days' notice. Mr. Rosen thereupon called upon me and stated that he was until now unaware that the Maine Standard Policy contained a clause giving the assured ten days' notice, and if he is legally entitled to reimbursement by the German Alliance for loss sustained he shall expect them to meet him fairly and pay him."

On cross examination the agent admitted that up to the time of this interview, he himself, although he had been engaged in the business for seven years had no knowledge that this ten days' clause covered all holders of policies. The fact is that neither the agent was aware of its effect nor the plaintiffs of its existence at the time of the attempted cancellation, and all that was said and done at that time rested upon the mutual assumption of the right of immediate oral cancellation. Why should the plaintiffs relinquish this right, if known, and run the possible hazard which within twenty-four hours became an unfortunate fact? They say that the agent promised to procure other insurance and that it was at most only a conditional cancellation. The agent denies that he ever made an absolute promise but only agreed to try to place the risk which he did and failed. He denies the conditional cancellation and in his letter before referred to virtually negatives the waiver of an absolute one. Both parties labored under a misapprehension of the facts.

Were the issue as made by the defendant that of unconditional cancellation the defendant has failed to substantiate it. There is

at best a conflict of testimony with the probabilities on the side of the plaintiffs. The agent, thinking he had the right, notified Rosen of immediate cancellation, and Rosen ignorant of the protecting provision in his policy made no resistance. He passively received the notice and asked the agent to procure other insurance. It is difficult in this to find that evidence of intent to cancel on the part of the plaintiffs which the defendant admits is always necessary.

To surrender a policy of insurance is to surrender all rights under that policy and the right to have ten days' written notice of cancellation is one of the most important therein contained. This court is reluctant to hold that the assured can be deemed to have intentionally waived or surrendered a right of which they were wholly ignorant and to thus have deprived themselves of the protection which the policy under the command of the legislature has given them.

Exceptions sustained.
Judgment for plaintiffs for $883.31 with interest from August 25, 1908.

JOHN P. SQUIRE & COMPANY, Appellant, *vs.* CITY OF PORTLAND.

Cumberland. Opinion December 13, 1909.

Taxation. Assessment. Abatement. Foreign Corporation. Corporate Residence. Fixtures. Trade Fixtures. Right to Remove. Statute, 1895, chapter 122, section 3; Revised Statutes, 1883, chapter 6, section 93; 1903, chapter 1, section 6, paragraph VII; chapter 9, sections 73, 74.

Revised Statutes, chapter 9, section 74, barring "resident owners" who do not "make and bring in true and perfect lists of their polls and all their estates and personalty not by law exempt from taxation," from the right to make application to the assessors for an abatement of taxes, applies to "resident owners" only, and does not apply to a corporation which is a resident of another State, and such corporation may maintain an appeal from the refusal of the assessors to abate its taxes because it did not furnish a list of its taxable property.

The residence of a corporation is in the State of its creation, although it may carry on business in another State.

A cold storage refrigerator installed by the lessee of a building is not taxable to the lessee as personalty, where it was so annexed to the building that it could not be removed without material injury to the realty, and would then be a worthless mass; it being presumed to have been intended to become part of the realty, and not a trade fixture.

Trade fixtures substituted for essential parts of the leased premises, and not additions thereto, are not removable and are presumed to be permanent additions.

"Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased, and may, as against the lessor and those claiming under him, be removed at the end of the tenant's term.

A fixture can be removed by a tenant only when it will cause no material injury to the estate.

On report. Appeal by plaintiff. Sustained.

Appeal to the Supreme Judicial Court, Cumberland County, by the plaintiff from the decision of the assessors of the city of Portland refusing to abate a tax for the year 1908, and brought under the provisions of Revised Statutes, chapter 9, section 79. A motion to dismiss the appeal was filed, and the case was then reported to the Law Court on an agreed statement of facts.

The case is stated in the opinion.

Chase Eastman, for plaintiff.

Emery G. Wilson, for defendant.

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

CORNISH, J. This is an appeal from the decision of the assessors of the city of Portland refusing to abate a tax levied upon the appellant for the year 1908. Under the agreed statement of facts two questions are involved, first, whether the appellant can mantain this appeal not having furnished to the assessors a list of its taxable property. Second, whether the property in question was taxable to the appellant on April 1, 1908, as personal property.

1. The appeal is clearly maintainable. R. S., ch. 9, sec. 73, provides that "before making an assessment, the assessors shall give seasonable notice in writing to the inhabitants," etc., to make and

bring in true and perfect lists of their polls and all their estates real and personal, not by law exempt from taxation. Under R. S., chap. 1, sec. 6, par. VII, "the word inhabitant means a person having an established residence in a place." R. S., chap. 9, sec. 74, provides that "if any resident owner, after such notice does not bring in such list" he is barred of his right to make application for abatement, unless he offers such list with his application and satisfies the assessors that he was unable to offer it at the time appointed. The only persons barred from making the application for abatement are "resident owners." Prior to 1895 this last section read "if any person," etc., but in section 3 of chapter 122 of the Public Laws of 1895 it was provided that "any non-resident against whom a tax has been assessed shall not be debarred of his right to make application to the assessors for an abatement of his taxes nor to appeal from their decision according to the provisions of this Act, by his failure to bring in a list of his estate to the assessors, but in such case no costs shall be allowed to the appellant." In the revision of 1903, therefore, the words "any person" in R. S., 1883, chap. 6, section 93, were changed to "any resident owner." The cases cited by the defendant on this point, *Boothbay* v. *Race*, 68 Maine, 351 (1878) and *Orland* v. *Co. Comm'rs*, 76 Maine, 462 (1884), were decided prior to this amendment, while in *Edwards Mfg. Co.* v. *Farrington*, 102 Maine, 140, (1906) it expressly appeared that the plaintiff was a Maine corporation and an inhabitant of Augusta for taxing purposes, page 143.

In the case at bar the appellant on the contrary, is a corporation organized under the laws of and is a resident of New Jersey, as the residence of a corporation is in the State of its creation, although it may carry on business in another State. *Bank of Augusta* v. *Earl*, 13 Pet. 519, 588; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Hammond Beef Co.* v. *Best*, 91 Maine, 431.

It follows therefore that the appellant being neither an "inhabitant" under section 73, nor a "resident owner" under section 74, was not obliged to furnish the assessors with a list of its taxable property and the objection to the maintenance of the appeal is not well taken.

2. Was the property in question legally taxable to the appellant on April 1, 1908? In the opinion of the court it was not. This property which was assessed as personal property is called a refrigerator; but from the description given it really consisted of several cold storage rooms forming a part of a leased building. If taxable at all to the appellant it must be on the ground that it was a trade fixture, removable by the tenant during the lease and therefore owned by it during that time as personal property. From the agreed statement it appears that the appellant has occupied a store in Portland since 1901 under a written lease, the terms or conditions of which, however, are not given; that a refrigerator or receptacle for the storage of meats and provisions has been constructed by the appellant during its occupancy; that "said refrigerator is constructed of wood and occupies the whole width of the building aforesaid at one end from wall to wall, a distance of about twenty-three feet and is in length about thirty feet. It occupies the basement and the five floors immediately above the same and is constructed by sheathing the interior walls of the building with wood, and packing between this wood and said interior walls, shavings to the thickness of some six or eight inches. A double wall of wood similarly packed with shavings constitutes the front of the refrigerator, extending from side wall to side wall, and extends from the basement to the roof of the building, six stories in all. The basement of the refrigerator is separated from the story immediately above, as is that story from the next succeeding story, and so on, up to and including the third story above the basement, by a double wooden floor, filled with wood shavings, of some eighteen inches in thickness, which floors replace the original floors of the building which were torn out by the petitioner with the consent of the lessor in the construction of the refrigerator. It is admitted that said refrigerator could be removed from the said premises only after having been taken to pieces."

Did this constitute a trade fixture or was it a part of the real estate at the time of the assessment?

There is authority for holding that even granting this to be a trade fixture, it became a part of the realty when annexed and

remained so until actually severed. Ewell on Fixtures, 2nd Ed. page 122, states the doctrine in this language:

"The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty; and this seems to apply as well to trade fixtures as to other fixtures." See also *Preston* v. *Briggs*, 16 Vt. 124; *Bliss* v. *Whitney*, 9 Allen, 114; *Stockwell* v. *Marks*, 17 Maine, 455; *Davis* v. *Buffum*, 51 Maine, 160; *Sawyer* v. *Long*, 86 Maine, 541. Under these authorities, the assessment being laid while the annexation continued it was invalid.

But the property in the case at bar never constituted a fixture. It is undoubtedly true that the rules of law defining fixtures have grown less rigid in later years and especially is this true of trade fixtures as between lessor and lessee. It is also true that as to such fixtures the intention of the party making the annexation is given special prominence in applying the rule and that the burden of showing the existence of the requisites for a merger is upon the party claiming such merger. *Hayford* v. *Wentworth*, 97 Maine, 347. The three requisites specified in the case last cited are physical annexation, adaptability or usableness, and intention. The first two of these requirements are fully met in the case at bar, as the description before given clearly shows. As to the third, the intention of the lessee, that must be proved not by the unrevealed and secret intention of the party which would be well nigh impossi-

ble, but by the facts and circumstances including the relations and the conduct. It is more a matter of inference than of declaration. Were it a question of intention as expressed subsequently, the attitude of the appellant in this suit, resisting the claim of a fixture and insisting upon the merger would have great force, because it would be extremely difficult for the lessee to hereafter sustain such a claim in view of the position taken here. But the alteration made in this building by the lessee do not possess the elements of a trade fixture. "Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased and may as against the lessor and those claiming under him, be removed at the end of the tenants term. Words & Phrases, Vol. 8, page 7042; Ewell on Fixtures, page 129. This definition embraces a large variety of additions and erections, of which the books are full, as the temporrary partition in *Hanson* v. *News Pub. Co.*, 97 Maine, 99; a wash down, syphon water closet in *Hayford* v. *Wentworth*, 97 Maine, 347; an ice chest, consisting of a large and heavy wooden box lined with zinc, in *Park* v. *Baker*, 7 Allen, 78; bowling alleys nailed to the floor, in *Hanrahan* v. *O'Reilly*, 102 Mass. 201; boilers, engines, shafting, etc., removable without material injury to the building, in *Bergh* v. *Herring-Hall-Marvin Co.*, 136 Fed. 368; bakers' ovens and boilers, in *Baker* v. *McClurg*, 198 Ill. 28, 64 N. E. 701; temporary sheathing, partitions and a cold storage box, attached by strips and nails to the wall and floor, in *Ward* v. *Earl*, 86 Ill. App. 635. But all these cases differ from the case at bar in two essential particulars; first, they involved addition and not substitution, and second, the fixtures could be removed without substantial injury to the realty.

It is a well recognized principle that trade fixtures which are in substitution for essential parts of the leased premises and not additions thereto are not removable but are presumed to be permanent additions. Cyc. 1066; Ewell on Fixtures, page 146, note. This is but another way of stating that this fact when proved has great and possibly controlling weight upon the question of intention. In

Felcher v. *McMillan*, 103 Mich. 494, 61 N. W. 791, the tenant removed the pillars, the partitions, sewers and floors in the building occupied by him replacing them by others, more expensive but better suited to his business; held that the latter became a part of the realty and could not be removed as trade fixtures. The court say:

"The lessees chose to remove the pillars, the partitions, the sewers, the cement floor, and to replace them by others which they considered better suited to their business. If they chose to replace wooden pillars with iron ones, plate-glass fronts and partitions with refrigerators and mirrors solidly built in the partition walls, and to take up the sewers and floors, and replace them with others better and more expensive, the new ones do not thereby become trade fixtures, subject to removal by the tenant. The law does not permit tenants to remove fixtures which are built into the building and become a part of it." In *Bovet* v. *Holzgraft*, 5 Texas, Civ. App. 141, 23 S. W. 1014, a new stairway was substituted for an old one. Held that the former became a part of the realty and irremovable by the tenant. See also *Ashby* v. *Ashby*, 59 N. J. Eq. 536, 46 Atl. 528.

The tenant in the case at bar tore out the original floors in the rear thirty feet of the building and replaced them with double wooden floors eighteen inches thick filled with wood shavings. When completed the new floor simply took the place of the old and became a part of the building. They could no more be removed by the tenant than the original.

Another principle equally well settled is that the right of removal can only be exercised when it causes no material injury to the estate. The value of this principle also is its bearing upon the question of intention. But it is a rule universally recognized and nowhere more carefully than in the cases first cited where the right of removal was granted, it being proved that no substantial injury would ensue. In *Collamore* v. *Gillis*, 149 Mass. 578, a baker's oven, built of bricks and mortar, and so united with the building that the two were inseparable without the destruction of the oven

and a substantial injury to the building, was held not to be a removable trade fixture.

"Where the chattel is so annexed that it cannot be removed without material injury to the realty it would ordinarily be a necessary inference that the intention was not to remove it," says this court in *Hayford* v. *Wentworth*, 97 Maine, at page 350, supra. That necessary inference must be drawn here. The appellant did not place any fixture in the building that it intended to remove. A part of the structure itself was changed and remodelled. It was for the most part a case not of construction but of reconstruction, not of addition but of substitution. Floors were removed and thicker floors were substituted. The walls were doubled with a thickness of six inches of shavings between, and a similar double wall was constructed to separate these several rooms from the rest of the building. To remove all this would be to leave the building with thirty feet in the rear without floors and open from basement to roof. And after removing what was put in, the tenant would have not a structure or machine the parts of which could fit into one another and be reassembled and set up in some other place, but a worthless mass of old lumber, hardware and shavings. The burden of proof as to merger is fully sustained here, by the character of the changes made, by the fact of substitution, by the material injury to the building consequent upon removal, and by the valueless condition of the so-called fixture when removed. The inference is irresistible that the property became a part of the building itself and that the appellant is correct in its contention that it had no ownership therein.

Appeal sustained with costs and case remanded to the court at nisi prius for the determination of the question of over-valuation in accordance with the stipulation of the parties.

So ordered.

INHABITANTS OF THOMASTON *vs.* INHABITANTS OF GREENBUSH.

Knox. Opinion December 13, 1909.

Paupers. Settlement. Minors. Emancipation. Parent and Child. Married Women. Husband and Wife. Statute, 1893, chapter 269. Revised Statutes, 1883, chapter 24, section 3; 1903, chapter 27, section 1, paragraphs II, VI, 3, 4.

Minor children have the same pauper settlement as their father under Revised Statutes, chapter 27, section 1, paragraph II, which provides that "legitimate children have the settlement of their father, if he has any in the state."

Emancipated minor children take the pauper settlement which their father had at the time of emancipation and this settlement continues until they gain a new one for themselves.

An emancipated minor child cannot gain a pauper settlement in a town during minority by having his home therein for five successive years, as under Revised Statutes, chapter 27, section 1, paragraph VI, it is only a "person of age" who can acquire such settlement by having his home in a town for the required length of time.

Emancipation of minors by their father is shown by his abandonment of them and his silent assent to their care and custody being given to the mother on divorce obtained by the mother.

Supplies furnished minor paupers after emancipation by their father cannot be regarded as supplies furnished to him.

Under Revised Statutes, chapter 27, section 1, paragraph II, it is only when the father has no pauper settlement in this State that the children follow the settlement of the mother, and if she marries a second time her newly acquired settlement then becomes theirs also.

The statute of 1893, chapter 269 (R. S., chapter 27, sections 3, 4) providing that, when one having a pauper settlement shall live for five years outside the state without receiving supplies, he and those deriving their settlement from him lose their settlement, does not affect the settlement of minors emancipated by their father after deriving a settlement through him.

A wife's pauper settlement derived from her husband continues until divorce or his death, and is not affected by his desertion or abandonment of her.

A husband may abandon or desert his wife but he cannot emancipate her.

Portland v. *Auburn*, 96 Maine, 501, distinguished.

On report. Judgment for plaintiffs.

Action to recover for pauper supplies furnished by the plaintiff town to three minor children of one Alden B. Partridge. An agreed statement of facts was filed and the case was then reported to the Law Court for determination. By leave of court, the Attorney General was permitted to appear for the State.

Joseph E. Moore, for plaintiffs.

Charles A. Bailey, for defendants.

Warren C. Philbrook, Attorney General, for the State.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

CORNISH, J. Action of assumpsit for pauper supplies furnished three minor children of Alden B. Partridge. From the agreed statement of facts it appears that Partridge, having a pauper settlement in Greenbush, moved with his wife and children to Thomaston and was living there with his family in 1899, when, not having acquired a pauper settlement in Thomaston, he abandoned his family and went to Massachusetts where he has since resided. His wife obtained a divorce from him on March 20, 1901, and the care and custody of all the children including the three involved here were decreed to her and they have ever since remained in her custody and control. Shortly after this, Partridge married again in Massachusetts and has resided and kept house there with his new family ever since. His divorced wife was also married on May 18, 1901 to one George A. Stone whose pauper settlement was then and continued to be in Friendship until his death November 11, 1905. The town of Thomaston provided pauper supplies for Mrs. Partridge and the children, beginning soon after the father left them in 1899 and continuing to the date of this suit. Friendship paid for those furnished the mother, after she became Mrs. Stone, and Greenbush for those furnished the children up to March 21, 1906, when they declined to pay longer, claiming that they were released by the provisions of R. S., ch. 27, secs. 3 and 4, and that the State should reimburse Thomaston after that date. The State did reimburse Thomaston until the fall of 1908, when it refused to make further

payment, claiming that the desertion of his family by Partridge, the divorce proceedings and the decree concerning custody of the children had emancipated them, so that they were and still are chargeable to Greenbush, the statute referred to being inapplicable.

This state of facts calls for a construction of so much of R. S., ch. 27, sects. 3 and 4 as was added by chap. 269 of the Public Laws of 1893, viz: "Whenever a person having a pauper settlement in any town in this state shall hereafter live for five consecutive years beyond the limits of this state, without receiving pauper supplies from any source within this state, he and those who derive their settlement from him lose their settlement in such town."

Let us consider the situation step by step without regard to this statute and ascertain the legal status of the minors in question.

1. In 1899 when Partridge abandoned his family, his pauper settlement was in Greenbush, and these minor children had the same settlement under ch. 27, sec. 1, par. 1, which provides that "legitimate children have the settlement of their father if he has any in the state."

2. The legal effect of the father's conduct was an emancipation of the children in 1899. The general scope of that term has been variously defined by this court as "the destruction of the parental and filial relations," *Sanford* v. *Lebanon*, 31 Maine, 124; "the voluntary acts of the parent in surrendering the rights and renouncing the duties of his position, or, in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them," *Monroe* v. *Jackson*, 55 Maine, 59; "An absolute and entire surrender, on the part of the parent, of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position. It leaves the child, so far as the parent is concerned, free to act upon its own responsibility and in accordance with its own will and pleasure, with the same independence as though it were twenty-one years of age. Indeed the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties, which the law ordinarily bestows at the age of majority." *Lowell* v. *Newport*, 66 Maine, 78.

The application of these legal rules to the admitted facts of this case leaves no room for doubt that these minors were emancipated when the father abandoned them in 1899. The tie that had previously bound parent and children together, so far as pauper settlement was concerned, was then absolutely and irretrievably severed. After that time they were as completely separated as if by a written instrument he had, as it is colloquially called, "given them their time," or they had on that day become twenty-one years of age. If there were need of proof of his intention additional to that shown by his desertion it is to be found in his silent assent to their care and custody being given to the mother when she obtained her divorce in 1901. The proof of emancipation is ample. *Carthage* v. *Canton*, 97 Maine, 473.

3. Being emancipated these minors took at the time of emancipation the pauper settlement which their father then had, and that was in the town of Greenbush, and this settlement continues until they gain a new one for themselves. *Lowell* v. *Stetson*, 66 Maine, 78; *Orneville* v. *Glenburn*, 70 Maine, 353. Supplies furnished them after emancipation could not even constructively be held to be regarded as supplies furnished the father. *Liberty* v. *Palermo*, 79 Maine, 473.

4. Nor can they gain a new settlement during minority, because an emancipated minor cannot acquire a pauper settlement in a town by having his home therein for five successive years. It is only a "person of age" who can acquire such settlement by having his home in a town for the required length of time. R. S., ch. 27, sec. 1, par. 6; *Exeter* v. *Stetson*, 89 Maine, 531.

5. The marriage of the mother in 1901 to Stone whose settlement was in Friendship, transferred her settlement to that town but had no effect upon the settlement of the children. It is only when the father has no settlement in this State, that the children follow the settlement of the mother, and if she marries a second time her newly acquired settlement then becomes theirs also. R. S., ch. 27, sec. 1, par. 2; *St. George* v. *Rockland*, 89 Maine, 43; *Winslow* v. *Pittsfield*, 95 Maine, 53.

Independent therefore of the statute of 1893, P. L., ch. 269, there can be no doubt that these emancipated minors belonged to Greenbush when the supplies in question were furnished.

6. What effect then does this statute have upon the situation in this case? None whatever. It does not change the status of these minors in the slightest degree. From a cursory reading of the words "he and those who derive their settlement from him lose their settlement in such town," it might be assumed that this covers all who in the past have derived their settlement from him. But further consideration shows that this is not the true construction. It means that those who, at the time he loses his settlement, namely, at the end of five years, are so connected with him as to then have a derivative settlement from him, lose theirs also. The tie of settlement still existing between father and unemancipated minors, his loss is their loss. But when that tie has been severed before the five years expire, then the loss is his alone, because the emancipated children are pursuing an independent course and the expiration of the five years cannot revive the relations between parent and child nor reunite the tie once broken. The statute was not designed to disrupt already acquired settlements in this way. Its purpose is apparent. Prior to its enactment, absence from the State interrupted but did not destroy a settlement once gained here. "Settlements acquired under existing laws remain until new ones are acquired. Former settlements are defeated by the acquisition of new ones." R. S., 1883, ch. 24, sec. 3. No residence in another State, however long, destroyed an existing settlement in this State and whenever such person returned to Maine the old settlement awaited him. This sometimes caused hardship as it was difficult to trace the early movements of these parties after the lapse of many years. To remedy that difficulty, this statute was passed and the five years' absence, under the conditions named, now extinguishes the settlement of the party and of those still bound to him at the end of that time. It means that and nothing more. The statute does not speak until the end of five years and when it does speak it has no retroactive force to bring a loss of settlement to those who at

one time derived their settlement from such party but do so no longer.

To illustrate the application and the non-application of the statute. Suppose Partridge had moved to Massachusetts with his family, and at the end of five years his family embraced several children still minors and still unemancipated. The statute applies and was designed to apply to such a case, and the children as well as the father would have lost their settlement in Maine.

On the other hand, suppose that upon leaving his family in Maine in 1899 Partridge had entered into a written contract with his oldest son giving him his time until of age. That constituted emancipation and when emancipated the father's settlement and therefore the son's was in Greenbush. Can there be any doubt that the loss of the father's settlement five years later because of residence in Massachusetts would have no effect upon the son. Or suppose that another son attained his majority before the father had lived five years in Massachusetts. Can it be questioned that the son would take the settlement of his father at that time, which was still in Greenbush, and retain it until he gained another for himself and that the father's loss at the end of the five years could not relate back so as to cover the son?

This court has had occasion only once to construe this statute and that was in *Portland* v. *Auburn*, 96 Maine, 501, cited by the defendant, but that is clearly to be distinguished.

In that case it was held that a wife abandoned by her husband and continuing to live in this State, loses her settlement here in case her husband loses his by reason of five years' residence elsewhere. There is a wide difference between a deserted wife and emancipated children. A man may desert or abandon his wife but he cannot emancipate her. Until divorce or death his settlement is hers, and his loss of settlement is hers, because at the time of the loss she still derives her settlement from him. The settlement tie is not severed and therefore the statute applies to both.

This decision is in full accord with the rule of construction which we adopt. The logical conclusion therefore is that the paupers for

whom the supplies were furnished had their legal settlement in the defendant town and the entry must be, in accordance with the agreement.

Judgment for plaintiff for $18.28 with interest from the date of the writ, February 23, 1909.

In Equity.

J. B. BROWN & SONS *vs.* BOSTON & MAINE RAILROAD.

Cumberland. Opinion December 13, 1909.

Deeds. Reservations. Construction. Railroads. Right of Way Deed. Specific Performance.

A reservation in a deed relates only to the land conveyed.

A railway right of way deed binding the company to always maintain an overhead-street crossing so far as concerned the property conveyed did not bind the company to build a bridge over an adjoining right of way of another company, though failure to do so defeats the reservation, and though the grantee company afterwards obtained control of the other company.

Specific performance of contracts is a purely equitable remedy, being a substitute for the legal remedy of compensation when it is inadequate or impracticable, and lies within sound judicial discretion on consideration of the particular surrounding circumstances.

Specific performance lies only when the matter can be disposed of by an order enforceable at once, not lying ordinarily to direct the performance of a continuous duty covering several years.

Specific performance does not lie to enforce a reservation in a railway right of way deed where it would not benefit plaintiff, and would put the company at an unnecessary burden and where a decree could not be wholly performed at once.

In equity. On report. Bill dismissed.

Bill in equity brought by the plaintiff corporation to compel the specific performance of an undertaking on the part of the defendant,

created by a reservation in a deed of land, to construct and maintain an overhead street crossing suitable for foot passengers and teams. Heard on bill, answer, replication and evidence before the Justice of the first instance. At the conclusion of the evidence, the cause was reported to the Law Court for determination.

The case is stated in the opinion.

Clifford, Verrill & Clifford, and Philip G. Clifford, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

WHITEHOUSE, J. This is a bill in equity brought by the plaintiff corporation to compel the specific performance of an undertaking on the part of the defendant, created by a reservation in a deed of land, to construct and maintain an overhead street crossing suitable for foot passengers and teams. The case was reported for the determination of the Law Court upon bill, answer and replication, and so much of the evidence reported as is legally admissible.

John B. Brown of Portland, the plaintiff's predecessor in title, was the owner of a tract of land in Portland over which the right of way of the Maine Central Railroad was located, and in 1873 he conveyed a part of it to the defendant, the Boston and Maine Railroad, by a deed containing the following reservation, to wit: "The grantor reserves to himself, his heirs and assigns, the right to an overhead street crossing at such point northerly of the Portland & Ogdensburg location as he, his heirs or assigns may designate, suitable for foot passengers and teams, to be on request constructed and always maintained by the grantees, their successors and assigns, so far as concerns the property herein conveyed, the obligation to do which is imposed upon the said grantees, their successors or assigns, by the acceptance of this deed."

The tract described in this deed is one hundred feet in width and is bounded on the east by the westerly line of the location of the Maine Central Railroad. But the grantor still retained title to the remaining parts of the original tract, one lying on the west side of and adjoining the strip conveyed to the defendant by the deed

in question, and the other situated on the east side of and adjoining the location of the Maine Central Railroad. The plaintiff corporation is successor in title to the two last named tracts of land, and to all rights secured by the reservation above quoted from the deed to the defendant. Thus it appears that the Maine Central location lies between the tract described in the defendant's deed on the west side and land owned by the plaintiff on the east side. The situation is approximately shown by the following diagram:

J. B. BROWN & SONS.
Place designated for crossing.
B. & M. R. R.
100 feet.
82 1/2 ft.
M. C. R. R. CO.
J. B. BROWN & SONS.

After reciting the facts above stated the bill alleges that in October, 1908, and at divers other times the plaintiff made a demand upon the defendant to construct an overhead street crossing suitable for passengers and teams, and particularly designated a location therefor, and that the defendant refused so to do. The bill further alleges that the plaintiff has been greatly damaged by such refusal and has no adequate remedy at law, and accordingly prays for a decree to compel a specific performance of the defendant's agreement according to the terms of the reservation in the deed.

The defendant's answer raises no question respecting the title to the several tracts of land mentioned in the bill, and admits the acceptance of the deed of the tract in question with the reservation as stated. It also admits that a demand was made by the plaintiff upon the defendant for the construction of an overhead street crossing, and that a place was designated by the plaintiff for the construction of it across the tract of land conveyed to defendant, and the tracks of the Boston and Maine railroad. The defendant further says that it has at all times been ready and willing to perform any obligations assumed by virtue of the acceptance of the deed in question, but that no street crosses the land of the plaintiff or the location and tracks of the Maine Central Railroad, or the location and tracks of the defendant at the point designated for the overhead crossing by the plaintiff. "That an overhead crossing at that point over the land of the defendant could not be an overhead street crossing; that an overhead crossing at that point, if constructed, would end in the air above the point where the location of the Maine Central Railroad Company adjoins the location of the defendant; that an overhead crossing would not cross the location of the Maine Central Railroad Company, and would not be suitable for and could not be used by, foot passengers and teams; that the construction and maintenance of such an overhead crossing would be impracticable, useless and of no benefit to the plaintiff, and would impose upon the defendant, great, useless and uncalled for expense and hardship, and become a source of danger to the defendant and its employees; and that the obligation to maintain the bridge is continuous." The defendant also denies that the plaintiff

has been greatly damaged by the refusal of the defendant to build the bridge as set out in the bill, and says that if any damage has been sustained, the plaintiff has a clear and adequate remedy at law.

It appears from the testimony of a civil engineer called by the defendant, that an overhead street crossing suitable for foot passengers and teams across the strip of land conveyed to the defendant, must be 102½ feet long and 23 feet high, and if built 60 feet wide in accordance with the resolution of the city council respecting new streets, the cost of such a structure would be fairly estimated at $18,000. The witness expressed the opinion, however, that a bridge 30 feet wide would be suitable and sufficient in that place for any travel that might be expected to go over it. But with the appropriate reduction in the estimate of $18,000, required by this difference in width, it is obvious that the expense of such a structure 30 feet in width would still be very large. He further states that in his opinion such a bridge would not be of any benefit to any one, but only a source of annoyance by reason of the fact that it might obstruct signals in the yard, and in case of any derailment a pier would naturally aggravate any damage that might happen.

It is conceded by the plaintiff that an overhead bridge extending only across the 100 foot tract conveyed to the defendant and terminating in the air 23 feet above the pavement, at the westerly line of the Maine Central location, would be a useless structure; but it is contended that such a bridge would not be a suitable overhead street crossing such as was contemplated by the parties and described in the reservation in the deed. The plaintiff contends that the defendant must be presumed to have had knowledge of the grantor's ownership of the tracts of land on both sides of the strip conveyed, and that in making the reservation in the deed the parties must have contemplated the construction of an overhead crossing which would afford communication from one of these tracts of land to the other over both the Maine Central and the Boston and Maine locations. It is urged that any other construction of the contract would defeat the purpose for which the reservation was made.

This statement of the situation has the merit of plausibility, but the soundness of the argument must be tested by reference to the terms

of the reservation itself. The "grantor reserves . . . . . the right to an overhead street crossing . . . . . suitable for foot passengers and teams, to be upon request constructed, and always maintained by the grantees, so far as concerns the property herein conveyed." Here in addition to the general rule that a reservation in a deed relates only to the land thereby conveyed, this reservation in express terms limits the liability of the defendant to the land conveyed by the deed. Assuming that the location of a public street was not contemplated by the parties and that this was an undertaking on the part of the defendant to erect an overhead crossing, as a private way for the benefit of the grantor's lands, the scope of the language of the reservation cannot be extended beyond its plain and obvious meaning to include an obligation to build a bridge across the Maine Central location. It is highly improbable that the defendant agreed not only to incur the great expense of building a bridge across the land conveyed, but to duplicate the expense by continuing the structure 82½ feet further across the Maine Central tracks. It is still more improbable that the defendant would make an absolute contract to do this, irrespective of any statutes then existing or which might thereafter be enacted, designed in the interest of the safety of public travel, to regulate and control all such crossings over railroad locations. (See *Goding* v. *Railroad Co.*, 94 Maine, 542.) If the plaintiff's demand upon the defendant for a preformance of his contract had been accompanied by proof that the right to construct and maintain such a bridge over the Maine Central location had been acquired, and that that part of the crossing would be built by the plaintiff, or others, to meet the defendant's structure at the easterly line of the land conveyed, without expense to the defendant, a materially different question might have been involved.

It is true that the defendant subsequently obtained a majority of the stock of the Maine Central Railroad Company, and the plaintiff contends that it thereby acquired the power and came under obligation to build the bridge across the Maine Central location. But this view cannot be accepted by the court. If the defendant had become the owner of the fee of the Maine Central location, that

fact would not change the language of the contract or create an obligation which did not previously exist. In such a case the rights of minority stockholders would be under the protection of the law. As the case is presented therefore, it does not satisfactorily appear that the reservation in the deed required the defendant to do more than build and maintain the bridge across the land thereby conveyed.

The relief afforded by a bill for specific performance of contracts is purely equitable and is given as a substitute for the legal remedy of compensation whenever the remedy at law is inadequate or impracticable; and the granting of the equitable remedy is uniformly deemed a matter of sound judicial discretion, controlled by established principles of equity and exercised upon a consideration of all the circumstances of each particular case. 6 Pomeroy's Eq. Remedies 11, sects. 744, 762; *Rogers* v. *Saunders*, 16 Maine, 92; *Snell* v. *Mitchell*, 65 Maine, 48; *Telegraphone Corp.* v. *Canadian Tel. Co.*, 103 Maine, 444; *Curran* v. *Holyoke Water P. Co.*, 116 Mass. 90; *Washington Irr. Co.* v. *Krutz*, 119 Fed. 279; *Stoughton* v. *La Campagnie*, 113 Fed. 21; *Willard* v. *Tayloe*, 8 Wall. 557. In the last named case the court said:

"No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld when from a like view it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice."

In Pomeroy's Eq. Rem., sect. 796, it is said: "Specific performance not being an absolute right the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive and it will not be given." See also *Conger* v. *N. Y. W. S. & B. R.R.*,

120 N. Y. 29. Nor should the contract be such that its specific performance would be nugatory and useless. 4 Pom. Eq. Jur., sect. 1805. "It is an established principle of courts of equity never to enforce the specific performance of any agreement where it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement impracticable and inequitable to be enforced." *Tobey* v. *The County of Bristol*, 3 Story, 824; *Dunforth* v. *Philadelphia R. R.*, 30 N. J. Eq. 12. In *Murdfeldt* v. *N. Y. W. S. & Buffalo Ry.*, 102 N. Y. 703, the facts were analogous to those in the case at bar. There the plaintiff sought to enforce the specific performance of a reservation in a deed in which the defendant agreed to construct and maintain a passageway under its railway. In the opinion the court say: "If the under-crossing should be constructed as stipulated in the covenant, it would partly fill with water at the influx of the river tide, and besides that no practical connection would be made with such under-crossing for the use of the plaintiff by reason of the precipitous character of the high embankment on the west.

"The equities here do not demand the interposition of the court. No available crossing can be made in compliance with the covenant, and even if the defendant should be required to construct the under-passage it would only lead to a narrow strip of unproductive land, which can be reached much better further north where the railroad is built on the natural grade, and the plaintiffs have reserved the right to cross the railway when constructed to and from the same strip of land.

"These and the facts that the under-passage would be subject to the inflowing tide seem quite sufficient to justify the court in refusing to compel the defendant to expend a large amount of money, without any practical utility to the plaintiffs."

There is still another rule respecting this remedy, uniformly recognized by courts of equity, that is also applicable to the facts in the case at bar. It has not been overlooked that by the terms of the reservation the overhead street crossing was not only to be constructed but "always" maintained by the defendant. In Beach

Mod. Eq. Jr., sect. 576, the author says: "The court will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once. It will not direct the performance of a continuous duty extending over a number of years." This question appears to have been carefully examined in *Ross* v. *Union Pacific Ry. Co.*, 1 Woolw. 26, in which the authorities prior to that time are fully considered, and it was there decided that the court could not enter upon the duty of compelling one party to build a railroad and the other party to pay for it according to contract. This case was cited with approval in *Texas Ry.* v. *Marshall*, 136 U. S. 406, in which latter case it is said in the opinion: "If the court has rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

See also *Blackett* v. *Bates*, 1 Chancery App. Cases, 117; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.*, 9 Law Rep. Chancery Appeal Cases, 334.

In the case at bar it is manifest that performance of the contract according to the terms of the reservation would not be beneficial to the plaintiff, but would prove imperfect and nugatory; that it would impose an unnecessary expense and burden upon the defendant; and that since the bridge must be maintained forever, no decree could be made which could be wholly performed at once, but must be for the performance by the defendant of the perpetual duty of

maintaining the bridge and necessarily involve the frequent interposition of the court to consider the new conditions that might arise during the progress of time.

It is therefore the opinion of the court that a decree of specific performance would be unequitable and ought not to be granted, and that the certificate must accordingly be,

Bill dismissed with costs.

In Equity.

HERBERT SMITH *vs.* S. BENTON EMERY.

York. Opinion December 13, 1909.

Account. Accounting. Equity. Laches.

An equity suit brought in 1907 to compel defendant to account as an equitable mortgagee under a deed from decedent recorded in 1897 was barred by laches, where defendant's bond for a reconveyance, under which complainant claims, was assigned in 1900 to one who assigned to complainant in 1907, shortly after decedent's death, and delay in suing was not excused.

One seeking equity must do equity, by proceeding seasonably, while his adversary has fair opportunity and means to defend. He cannot purposely wait until death or other cause of probable event has removed that opportunity.

In equity. On report. Bill dismissed.

Bill in equity for an accounting against the defendant whom he claimed to be the equitable mortgagee of one Leonard Smith, deceased, to whose rights he succeeded by assignment. Reported to the Law Court for determination. The facts, as stated by Mr. Justice BIRD who prepared the opinion are as follows:

This bill in equity is brought for the redemption of sundry parcels of land from a conveyance alleged by complainant to be an equitable mortgage. The case is before us on report for determination upon bill, answer and proofs.

In the month of November, 1897 one Leonard Smith was the owner in possession of a homestead, a wood lot and one-fifth in common and undivided of a lot and store in Sanford and a wood lot and farm in Shapleigh. The homestead was subject to mortgages to defendant to secure the payment of notes for $1000 and $380, executed February 26, 1895, and March 8, 1897 respectively. The store and lot were subject to a mortgage to defendant, to secure payment of a note of $380 executed July 15, 1897 and all the parcels were under mortgage to one Nason, dated September 10, 1896 to secure payment of a note for $900. The interest upon all these notes was evidently in arrears. Several judgments had been rendered against Smith which remained unsatisfied and he was liable upon sundry simple contracts. He was financially embarrassed and applied to defendant early in November for a further loan to be secured by mortgage upon all the parcels of real estate. The defendant testifies, without contradiction, that he declined to make a loan upon mortgage or to make any further loan upon any mortgage security plaintiff could offer. November 20, 1897, Smith executed and delivered to defendant a warranty deed of the five parcels of land and received from defendant his check for $553.43 and his bond in the penal sum of $3000. The bond recites the agreement of defendant to convey to complainant the parcels of land conveyed to defendant by deed of even date and the agreement of Smith to pay the defendant the sum of $3000, in two years with interest semi-annually and is conditioned that, after payment of said sum and interest at or before the time due, and all taxes and expenses incurred by the obligor and at request of Smith, his heirs, etc., the obligor shall convey the real estate with good title to the obligee, his heirs, etc. The bond further provides that the obligee shall have possession of the "premises until he shall have failed to perform the conditions of this bond." There is evidence tending to show that the value of the property conveyed was from four to six or seven thousand dollars. The check was at once applied to the satisfaction of executions in favor of one S. Pendexter and of one Nason for $236.95 and $215.01 respectively and in payment of the claim of one Crediford. The deed was recorded November

27, 1897 and the bond October 19, 1906. December 6, 1897, defendant procured the assignment to himself of the Nason mortgage for the sum of $941. None of the mortgages above mentioned given by Smith earlier than November 20, 1897, appear to have been discharged of record and all of them, the notes secured thereby and the two executions uncancelled were produced and offered in evidence by defendant. Smith never offered nor made payment of $3000 and interest to defendant or any part thereof and died June 10, 1907. During his lifetime he remained in possession of the homestead and defendant is not shown to have exercised any dominion over the other parcels except that he received from the agent of the cotenants Smith's proportion of the net rents of the store for two years ending July 1, 1904, $36.27 and $38.20 respectively, and upon the destruction of the store by fire in April, 1905, he received from the agent one-fifth of the insurance—$396. Defendant states that the amounts received by him as rents he gave to Smith as a present. During the last year of his life Smith was sick and in need and distress and his wants were supplied by defendant, who, at his decease, provided for his burial.

Since the decease of Leonard Smith, defendant has repaired the homestead at an expense of some $400 or $500. Complainant urges that, in the event an accounting be ordered, the sums expended for the benefit of deceased and repairs by defendant cannot be allowed to him.

In January or February, 1899, A, an attorney at law, recovered in behalf of clients sundry judgments against Leonard Smith upon which he subsequently cited him to disclose. The disclosure proceedings were extended over a period of nearly a year and on August 7, 1900, deceased assigned his interest in the bond to A for the benefit of the judgment creditors. After the decease of Leonard Smith, July 15, 1907, A assigned without consideration the bond to complainant, the brother of deceased, the agent who collected the rents of the store and the insurance thereon and who, for many years has resided directly opposite the homestead.

June 26, 1907, complainant made written demand on defendant for an accounting.

George W. Hanson, for plaintiff.
Cleaves, Waterhouse & Emery, for defendant.

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

BIRD, J. Complainant brings his bill of complaint for an accounting against defendant whom he claims to be the equitable mortgagee of Leonard Smith, deceased, to whose rights he has succeeded by assignment. The defendant denies the existence of a mortgage and claims that the transaction between himself and deceased was a conditional sale. The cause is reported to this court for the determination of all questions involved upon such of the evidence as is legally admissible.

A discussion of the evidence bearing upon the issue of mortgage or conditional sale will not be profitable, but it may be stated that upon all the evidence adduced this court would hesitate to declare that the complainant has shown that it was the intention of the original parties to the transaction to secure the payment of a debt.

The deed of deceased and the bond of defendant were made on the twentieth day of November, 1897, and the deed was recorded one week later. Sometime in the year 1899, A, an attorney at law, holding sundry executions against deceased, cited him to make the statutory disclosure of his affairs and proceedings under the citation were not closed until nearly a year later. At no time subsequent, however, did A make any attempt to satisfy his executions, by recourse to the real estate described in the bond and deed. On the seventh day of August, 1900, A took an assignment of the bond but, during the lifetime of deceased, neither made demand upon nor commenced proceedings against defendant for an accounting. On the nineteenth day of October, 1906, some months after deceased was seized with his last sickness, the bond (with the assignment) was first recorded.

The death of deceased occurred on the tenth day of June, 1907. Action thereafter is more rapid. Two weeks later, the complainant, alleging himself assignee of the bond, makes demand in writing

upon defendant for an accounting. The assignment from A to complainant bears the date of July 15, 1907, and the bill of complaint is sworn to the eighth day of October, 1907. It alleges no circumstances in explanation of the delay in the commencement of proceedings and none of a valid character appears in evidence. (See *Marsh* v. *Whitmore*, 21 Wall. 178 at page 185.)

Under all the circumstances of this case, we think the complainant is barred by the laches of his assignor. Seeking equity, the complainant "must do equity; must proceed seasonably while the other party has fair opportunity and means to defend. He cannot purposely wait until death or other cause of probable event has removed that opportunity. If it appears that by unnecessary delay he has placed the other party at a substantial disadvantage, the court will dismiss his suit:" *Clark* v. *Chase*, 101 Maine, 270, 274-275 and cases cited. *O'Brien* v. *Wheelock*, 184 U. S. 450, 493; See also *Lindsey* v. *Fabens*, 189 Mass. 329, 331; *Doane* v. *Preston*, 183 Mass. 569, 572.

The defendant in this case was as much entitled to the testimony of Leonard Smith as a defendant sued in a representative capacity: *Frost* v. *Walls*, 93 Maine, 405. That proceedings were delayed until his decease is a significant fact which cannot be overlooked under the circumstances of the case: *Alden* v. *Goddard*, 73 Maine, 345, 351.

Bill dismissed with costs.

HARRY R. WYMAN *vs.* AMERICAN SHOE FINDING COMPANY.

Somerset. Opinion December 13, 1909.

Instructions. Review. Presumptions. Amendments.

Where the instructions given are not reported for review, they are presumed to have been proper.

To sustain a verdict for injury to an employee through a gin pole falling, the case may be considered as if the declaration had been amended to conform to evidence admitted without objection that he did not know that the pole was not set in the ground far enough to stand without guys, and evidence tending to show his superintendent's negligence in causing one of the lines supporting the pole to be loosened, thus exposing plaintiff to a new or increased danger which he either did not know, or knowing, appreciate.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $2200. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

Forrest Goodwin, for plaintiff.

William T. Haines, and John E. Nelson, for defendant.

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

BIRD, J. The plaintiff seeks to recover damages for injuries sustained by him while employed as he alleges by defendant corporation in securing in position a mast or "gin" pole erected by defendant. The verdict was for plaintiff and defendant filed a general motion for new trial.

The charge of the presiding Justice is not reported. It is to be assumed, therefore, that proper instructions were given.

Defendant urges that the plaintiff was a mere volunteer but upon the evidence we see no reason to disturb the verdict on that ground.

On the day preceding the accident the defendant had erected a mast or "gin" pole, stepping it into a hole, about two feet deep, in

the frozen ground and holding it in position by means of three guys or lines which were securely attached to proper anchorages. The guys, for convenience, may be referred to as northerly, easterly and southerly. The anchorages were located respectively in separate thirds of the circumference of the circle of which the bottom of the pole was the center. The pole was thus stable if the guys did not break or slip. The tackle and fall by which the pole was raised were left in position and the fall was drawn taut and secured at a point northwesterly of the mast.

On the morning of the accident, after the three guys had been made taut, the plaintiff, who had an experience of several years in the erection and climbing of poles for electrical purposes, was directed by the superintendent of defendant to climb the mast and substitute for one of the guys another of greater size. This he did, but the evidence is contradictory as to whether this guy was placed over or under the other two guys. He then again ascended the mast and, the fall having been unloosed, carried the block which had been left attached to the mast the night before, some distance upwards and there secured it to the mast. Upon the evidence, the jury would be warranted in finding that the other end of the tackle and fall was not again made fast to the anchorage. Attention was then called to the fact that the pin ordinarily put through the top of a "gin" pole to keep the guys from slipping was not in place. Plaintiff states that he thereupon ascended the mast with a pin, but could find no hole in which to place it and dropped it to the ground. Defendant produced evidence tending to prove that plaintiff refused to take the pin when offered him, saying that it was unnecessary. Plaintiff again ascended the pole with a light hand line with which to draw up a line to be attached to the top of the mast as a fourth guy which it was intended to anchor at a point westerly or northwesterly of the mast. While engaged in this work, and before the guy was made fast at the lower end, the mast toppled and fell and severe injuries to plaintiff resulted.

It is difficult, at first at least, to understand how the accident could have happened. The plaintiff himself is unable to explain it. We think, however, upon the evidence that when the fall was cast

off from its anchorage it allowed the mast to settle towards the east or southeast and partially removed the strain upon the other guys and allowed them to become somewhat slack thus permitting the southerly guy, which was lowest on the mast, to slip and as the mast swung the breaking of the northerly guy, from contact with some object, permitted the mast to fall to the ground.

In the first count of the declaration, the negligence of defendant is stated to consist in not having the guy line from the top of the mast to the corner of the factory fastened and in not planting the mast in the ground to a greater depth than two or three feet, of which plaintiff is declared to have been ignorant.

We cannot conceive how plaintiff could have failed to know if one of the three guy lines was unfastened nor is there any evidence to sustain his contention it was unfastened. It is clear that a "gin" pole, or derrick without boom, is not buried in the ground to any considerable depth and that to so bury it as to render it stable without guys would render it useless for the purpose for which it is designed.

In the second count of the declaration failing to secure the guys from slipping upon the mast and to properly plant the mast in the ground is the negligence complained of, but plaintiff upon his own testimony knew that no provision was made for keeping the guys from slipping and must have known and appreciated the danger of such condition and, therefore, assumed the risk.

Strictly therefore under neither count of the declaration is there evidence upon which the verdict can be sustained: See *Patton* v. *T. & P. Ry. Co.*, 179 U. S. 658, 663. But the plaintiff testified without objection that he was not aware that the mast was not set in the ground to such depth as to remain erect without guys and claimed that defendant was wanting in due care in not so informing him (*Welch* v. *Bath Iron Works*, 98 Maine, 36, 367). So too upon evidence, admitted without objection, the jury may have properly found that defendant's superintendent whom the jury might likewise upon the evidence have found to be a vice principal *Donnelly* v. *Granite Co.*, 90 Maine, 110, 116) in directing or

permitting the loosing of the fall, thereby exposed plaintiff to a new and greater danger from the increased liability of the guys to slip which he did not know, or, knowing, did not appreciate. It is true that the declaration contains no allegations to which the evidence or such findings can be referred but, had plaintiff asked to amend, his motion would undoubtedly have been granted by the trial court (*Babb* v. *Paper Co.*, 99 Maine, 298, 302; *Anderson* v. *Wetter*, 103 Maine, 257) and we are of opinion that under the circumstances we may consider the case as if the amendment had been actually made (*Cowan* v. *Bucksport*, 98 Maine, 305, 308) and must overrule the motion for new trial.

Motion overruled.

HENRY J. CONLEY, Assignee, *vs.* DAVID F. MURDOCK.

Cumberland. Opinion December 13, 1909.

Insolvency. Assignment. Rights of Assignee. Intoxicating Liquors. Chattel Mortgages. Replacing Stock. Preferences. Estoppel. Instructions.

In the absence of fraud an assignee in insolvency takes only the property rights and interests of the debtor.

An instruction that an assignee in insolvency took the assignor's rights and disabilities was not prejudicial error for ignoring the question of fraud where there was no evidence of fraud.

A mortgage of an entire stock of drugs is not unlawful as to the mortgagee because the stock included intoxicating liquors if he did not know thereof.

The assignee of an insolvent mortgagor of a stock of drugs is estopped to attack the transaction as unlawful because the stock included intoxicating liquors, where the mortgagee relied on the mortgagor's statement that there were no such liquors in the stock.

Under the rule that the law will leave the parties to an illegal contract where it finds them, the assignee of an insolvent chattel mortgagor cannot recover the property on the ground that it was an unlawful transaction if it was unlawful as to both parties.

Under a chattel mortgage of a stock of goods permitting the mortgagors to make retail sales and buy for cash other goods to replace those sold, the mortgagors could remain in possession, and make sales in the ordinary course of business, on condition that the proceeds should be used to replace the goods, so as to prevent impairment of the mortgagee's security, but an unpaid for folding couch, carpet, movable office, and clothes-press bought on credit, and placed in the store after the mortgage and not bought to replace mortgaged stock, are not covered by the mortgage.

Under a chattel mortgage of a stock of goods permitting the mortgagors to make retail sales and buy for cash other goods to replace those sold, neither the mortgagors nor their assignee in insolvency could recover against the mortgagee on the theory that they have not used the proceeds to purchase new goods, but bought new goods on credit so that they would not be subject to the mortgage.

The taking of possession of a stock of goods by the mortgagee thereof under a mortgage given before the mortgagor's insolvency was not the acceptance of a voidable preference.

On motion and exceptions by plaintiff. Motion sustained. Exceptions overruled.

Action of trover brought in the Superior Court, Cumberland County, by the plaintiff as assignee in insolvency of Charles F. Landers, an insolvent debtor, to recover the value of a certain stock of druggist's goods, fixtures and furniture claimed by the assignee to belong to the insolvent estate. Plea, the general issue. Verdict for defendant. Plaintiff excepted to several rulings during the trial and also filed a general motion for a new trial.

The case is stated in the opinion.

Henry J. Conley, and Peabody & Peabody, for plaintiff.

M. P. Frank, and C. E. Gurney, for defendant.

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

WHITEHOUSE, J. This was an action of trover brought by the plaintiff as assignee in insolvency of Charles F. Landers, an insolvent debtor, to recover the value of a certain stock of druggist's goods, fixtures and furniture claimed by the assignee to belong to the insolvent estate. The contention of the defendant was that the goods were included in the terms of a certain mortgage given to the defendant by Landers and Babbage, co-partners, in March, 1895, more than two years prior to the insolvency and that the defendant

took possession of the goods by virtue of the mortgage, and with the consent of the mortgagor on the 9th day of August, 1897, on the day of the petition in insolvency but before the petition was drawn, and subsequently perfected his title by foreclosure. Babbage disposed of his interest to Landers and withdrew from the partnership several months prior to the defendant's taking possession of the goods.

The plaintiff's contentions were, first, that the stock of goods covered by the mortgage in question to the defendant included a quantity of intoxicating liquors and that the mortgage sale was therefore made in violation of the statutes of Maine, illegal and void and that the act of the insolvent in delivering the goods to the defendant, as well as the act of the defendant in taking possession of them, a few hours before the filing of the petition in insolvency was in fact a transfer of the property prohibited by law as a preference, and consequently that the goods described in the writ were not legally or equitably included within the terms of the mortgage.

As described in the mortgage the goods consisted of the entire stock in trade and of the fixtures, furniture, screens, screen doors, and all other goods and chattels contained in the store therein designated. The mortgage contained the following proviso: "It shall and may be lawful for the said Landers and Babbage to continue in possession of all and singular, the aforesaid goods and chattels and make sales of the same at retail in the usual course of business and with the proceeds of such sales to buy for cash other goods and chattels which shall stand for and in the place of the goods and chattels so sold and to be covered by this mortgage." The plaintiffs contended and there was evidence tending to show that the mortgagors after the date of the mortgage from time to time made additions to the stock in trade by the purchase of druggists' goods on credit which have never been paid for, and also by the purchase from time to time of fixtures, furniture and other chattels not of the nature of stock in trade and not paid for which though placed in the store, the plaintiff claims were not subject to the terms or lien of the mortgage.

The verdict was for the defendant and the case comes to this court on the plaintiff's exceptions to the rulings and instructions of the presiding Judge and to his refusal to give certain requested instructions; and also upon a motion to set aside the verdict as against the evidence.

In the absence of fraud, the plaintiff as assignee in insolvency took only the property rights and interests of the insolvent debtor. There was no evidence of fraud, actual or constructive on the part of the defendant and the instruction of the presiding Judge that "whatever rights Mr. Landers had, his assignee and representative had and whatever disabilities Mr. Landers was under by reason of an illegal contract or otherwise, the plaintiff was under, as his assignee," was correct as applied to the facts of this case. The qualifying phrase "in the absence of fraud" would doubtless be requisite to render the statement complete and legally correct as a general proposition of law, but it was unnecessary and therefore not prejudicial under the circumstances of this case. *Deering* v. *Cobb*, 74 Maine, 332.

With respect to the plaintiff's contention that intoxicating liquors were included in the stock of goods covered by the mortgage at the time it was given, the presiding Judge instructed the jury as follows:

"Of course, gentlemen, you will inquire in respect to the validity of this mortgage. I have already instructed you that if the goods covered by the mortgage contained intoxicating liquors it would make the mortgage illegal. But it would not be illegal, so far as Mr. Murdock is concerned, if he did not know intoxicating liquors were there; if in good faith he did not know they were there, and those liquors were in the store, the transaction would not be illegal so far as he is concerned.

"But another principle of law is involved here. Where two parties to an illegal transaction, as I have already explained to you, are equally guilty, both being cognizant of the fact, and one happens to be in a better position than the other, the law always leaves them just where they are. And so here, if two men are parties to a sale of goods which includes intoxicating liquors, and one of the men gets possession of the entire property, if the trans-

action was originally legal, tainted by the presence of intoxicating liquors in the merchandise sold, why the law leaves the parties just where it finds them."

There is no exceptionable error in these instructions. The entire stock in trade and fixtures were mortgaged without an inventory. The transaction was in legal effect the sale of an entire stock for an entire purchase price. Every sale of property is effected by a contract between the parties, and every true contract is the result of the mutual intention and understanding of the parties. It would violate the elementary principles of contracts and pervert the obvious meaning of terms to hold that one may be legally made a purchaser of intoxicating liquors without his knowledge or consent, and have a bona fide purchase of an entire stock of legitimate merchandise tainted with illegality by the subsequent discovery of a quantity of intoxicating liquors which he never intentionally bargained for. Such a doctrine is so repugnant to all considerations of reason and justice that it appears to have remained without the sanction of judicial authority. It is manifestly distinguishable from the rule adopted in criminal prosecutions under the statute as illustrated by *State* v. *Eaton*, 97 Maine, 289. It was there held that if one sells liquors which are in fact intoxicating, but which he believes are not intoxicating, he nevertheless violates the statute because the prohibition is not limited to knowingly selling without authority. But the purchaser of an entire stock without knowledge that it contains intoxicating liquors does not participate in the wrong of the seller who has knowledge of that fact.

But even if it be assumed that the mortgage was rendered illegal as to the defendant as well as the mortgagor on account of the presence of intoxicating liquors in the stock, of which the defendant was entirely ignorant and that the instruction was technically erroneous, it was not prejudicial to the plaintiff. The evidence is undisputed that both at the time the defendant took the mortgage, and at the time he took legal possession of the goods, Landers, one of the mortgagors, stated to him that there were no intoxicating liquors in the stock. By the covenants in the mortgage itself, the mortgagors also declared that they had "good right and lawful

authority to dispose of" all the goods in the store at that time covered by the mortgage. The defendant testifies that he had no knowledge that there were any intoxicating liquors in the store at that time, and there is no evidence in the case that he did have such knowledge. Relying upon the statement of Landers that there were no intoxicating liquors in the stock, the defendant advanced $2500, as the consideration of the mortgage. In that situation the plaintiff is debarred by the familiar principles of equitable estoppel from now taking a contrary position by asserting the presence of intoxicating liquors in the stock at that time to the great detriment of the defendant.

Again assuming that there were intoxicating liquors in the stock to the knowledge of both parties and that the whole transaction was tainted with illegality as to both, the defendant is protected by the uniformly accepted principle of law crystalized in the maxim "In pari delicto potior est conditio defendentis." By virtue of this rule, the law does not seek to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from the illegal agreement. *Groton* v. *Waldoborough*, 11 Maine, 306; 9 Cyc. of Law and Proc. 546. And "where a contract made in violation of law has been executed, courts will not lend their aid to compel one party to restore the other to the condition which he held before the contract, unless the statute has made some provision for such a purpose." *Andrews* v. *Marshall*, 48 Maine, 30. Briefly stated the rule is that the law will not aid either party to an illegal contract, but leave the parties where it found them. Thus whether the jury found the contract to be legal or illegal, the plaintiff was not legally aggrieved by the instructions under consideration.

The plaintiff also has exceptions to the refusal of the presiding Judge to give the following requested instructions, to wit: "Goods and chattels purchased after the date of a chattel mortgage as additions to the mortgaged stock and not paid for, or not paid for from the proceeds of the sales of the stock, cannot be held under a mortgage which provides that goods and chattels may be bought

with the proceeds of sales from the mortgaged stock for cash and so stand for and in the place of the goods and chattels so sold and be covered by the mortgage.

"Property acquired after the date of a mortgage is not covered by the mortgage unless its terms expressly provide that it shall cover it and unless the mortgagee shall take possession of such after-acquired property before the date of insolvency of the mortgagor or before the rights of third parties intervene. Nor then if the mortgagee took possession of such after-acquired property within four months prior to the insolvency proceedings, having knowledge or reasonable grounds of believing that the mortgagor was insolvent."

The instructions were properly refused. The obvious meaning of the provision in the mortgage is that the mortgagor may continue in possession of the stock and make sales of the same at retail in the ordinary course of business, on condition that with the proceeds of such sales they buy for cash other goods and chattels which shall take the place of those sold and be covered by the mortgage. By continuing in possession and carrying on the business they came under obligation to use the proceeds from these sales to purchase for cash other goods to take the place of those sold. The obvious purpose of the agreement was to prevent the impairment of the defendant's security by requiring the stock to be kept up substantially to its value at the date of the mortgage. The mortgagors continued in possession for more than two years and the defendant appears to have believed that they were observing their covenant in good faith by purchasing for cash new goods to take the place of those sold, and were thus keeping the stock up to its value at the date of the mortgage, and he was thereby induced to delay taking possession until the stock was so reduced that he eventually realized but $1100 from his loan of $2500, which appears to have been the actual cash value of the goods at the date of the mortgage. The case is thus brought within the principle of estoppel, applied in *Allen* v. *Goodnow*, 71 Maine, 420, and as there stated, the mortgagors could not, and the plaintiff cannot be permitted to set up in defense that they "had not used the proceeds from the sales of

the stock to purchase the new goods put into the store, as it was their duty to do, but had appropriated it to their own use and bought the goods on credit so that they would not be subject to the mortgage. The law will not sustain a defence so manifestly unjust."

The defendant took and retained possession of the stock by virtue of his mortgage. This was not the acceptance of a preference, but the assertion of a right previously acquired under the mortgage, and it was effectual against the plaintiff and those whom he represents. 6 Cyc. of Law & Proc. 1051; *Burrill* v. *Whitcomb*, 100 Maine, 286; *Chase* v. *Denny*, 130 Mass. 566. In the last named case the court say: "If the after acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. . . . . Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other."

The conclusion is from this view of the law applicable to the facts of this case that the plaintiff was not aggrieved by any rulings, instruction or refusal to instruct by the presiding Judge, and that all of the exceptions must be overruled.

But it is equally clear that the motion to set aside the verdict as against the evidence must be sustained. It is shown by uncontroverted testimony that a folding couch valued at $15, a carpet valued at $13, a movable office valued at $35, and a clothes-press valued at $8, were among the things which came into the possession of the defendant. They had been purchased on credit and placed in the store after the date of the mortgage and had never been paid for. It does not appear that they were put in to replace any

of the mortgaged stock. The terms of the mortgage did not require the mortgagors to pay cash for those articles in order to keep the defendant's security unimpaired and they did not become subject to the mortgage lien.

Motion sustained.
New trial granted.

FRED S. THORNE *vs.* CASUALTY COMPANY OF AMERICA.

Kennebec. Opinion November 27, 1909.

Insurance. Agents. Statutes. Warranty. Estoppel. Accident Insurance. Contracts. Construction. Revised Statutes, chapter 49, section 93.

Revised Statutes, chapter 49, section 93, providing that agents of insurance companies shall be regarded as in the place of the companies in all respects regarding any insurance effected by them, and that an insurance company is bound by the agent's knowledge of the risk, etc., applies to life as well as fire insurance companies.

A foreign insurance company transacted business through a domestic corporation which had power to issue policies. An applicant for insurance, having no knowledge of the company, applied to an agent who had full knowledge of the risk, and who took the application to the corporation and it issued a policy the same day and delivered it to the agent, who delivered it to the applicant, who paid the premium to the agent, who remitted the same, less his commission. The applicant, who was deformed and suffered from impairment of vision, warranted himself to be in sound condition. The agent knew of the physical defects. *Held*, that under Revised Statutes, chapter 49, section 93, providing that agents of insurance companies shall be regarded as in the place of the companies, and that a company is bound by the knowledge of the agent, the company was chargeable with knowledge of the physical defects of insured, and waived so much of the warranty as related thereto.

A foreign insurance company transacted business through a domestic corporation which had power to issue policies. The corporation issued a policy through a third person as agent. The insured had no knowledge of the

name of the insurer in which he might have a policy, but he left the matter to the third person. There was nothing to show fraud, and the insured accepted the policy issued by the company through the corporation, and paid the premium. The warranty in the application that the insured was in sound condition was false, and so known to the third person. *Held*, that, though the company had no actual notice of the falsity of the warranty, it was liable on the policy, since it was the moving cause authorizing the transaction, of which insured became an innocent victim.

A stipulation in an accident policy that, if the insured is injured while at work in any occupation classed as more hazardous than that stated in the schedule, the liability of the insurer shall be only for such proportion of the indemnity as the premium will purchase at the rate fixed by the company for the hazard, does not contemplate the inhibition of acts performance of which is necessarily implied from the vocation named in the policy, but applies to a regular occupation engaged in by the insured, in a class other than that named in the policy; and where the insured's occupation is stated as a member of a firm or employed as manager of a beef company, and where his duties are described as "office duties and travelling only," the insurer is liable for injuries received by the insured while in the refrigerator of his employer's plant directing the transfer of carcasses from one truck to another, and illustrating to the workmen how to do the work.

On report. Judgment for plaintiff.

Assumpsit on a policy of insurance against accidental injury, brought to recover a stipulated sum for a surgical operation and the face of the policy for the loss of the sight of the plaintiff's right eye. Plea, the general issue with brief statement as follows:

"And for a brief statement of special matter of defense to be used under the general issue above pleaded the said defendant further says that upon the taking and acceptance by plaintiff of the policy of insurance declared on in this action and as a part thereof said plaintiff did specially warrant that he was in sound condition, mentally and physically, having correct habits and no impairment of sight or hearing. Whereas, in fact and as plaintiff well knew, he was not in sound condition mentally and physically but on the contrary was seriously deformed as to his right hand and arm, his right hand being totally incapable of use from birth, and further he was suffering from serious impairment of vision of his right eye which had existed for a period of twenty years prior to the date of said policy and continued until the time of the accident."

In reply to the defendant's brief statement, the plaintiff filed a replication as follows:

"And now the said plaintiff comes and in answer to the brief statement of subject matter of defense in the above entitled action, says: That the defendant company is estopped to set up the defense that the plaintiff was deformed as to his right hand and arm, or that there was any imperfection in his right eye, because the agent of said defendant company had full knowledge of the condition of the plaintiff's arm or hand, and of the condition and appearance of his right eye, and this he prays may be inquired of by the country."

At the conclusion of the evidence the case was reported to the Law Court for determination upon the legally admissible evidence, and if judgment should be for the plaintiff said court to assess the damages.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Harvey D. Eaton, for defendant.

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

SPEAR, J. This suit is on a policy of insurance against accidental injury. After the issuance of the policy the plaintiff met with an accident resulting in the loss of his right eye. This suit is brought to recover a stipulated sum for a surgical operation and the face of the policy for loss of the eye. The defense is stated as follows: "Defendant resists payment on the ground that plaintiff warranted himself to be in sound condition mentally and physically and without impairment of sight; whereas, in truth and in fact, plaintiff had been deformed from birth as to his right hand and arm, and for more than twenty years prior to the time of the accident had been suffering from impairment of vision of the right eye, which facts were entirely unknown to the defendant company."

The reply of the plaintiff is "That the company is estopped as regards this special matter of defense, because of agent's knowledge." The case comes before the Law Court on report. The statement of

facts fairly deducible from the report is as follows: On the 29th day of October, 1907, the defendant company issued to the plaintiff an accident policy under the following circumstances. Mr. Thurston S. Burns of Westbrook, Maine, who had been an agent for the New York Life Insurance Company for twenty years and was also agent of the Employers Liability Accident Company, called upon the plaintiff at his place of business in Gardiner, Maine, to solicit insurance. Having closed their conversation with respect to life insurance Mr. Burns inquired, "Wouldn't you like some accident insurance?" The plaintiff replied, "No, I have plenty. I have some with you and some with Mr. Dunlap." To the answer that he had none with Mr. Burns Mr. Thorn's clerk was directed to look up his accident policies and it was found that all the policies had expired. Then the plaintiff informed Mr. Burns that he would take $10,000 accident with him; one a $5000 combination health and accident, and the other $5000 straight accident. This concluded the interview and comprises all that was said and done by the plaintiff and Mr. Burns prior to the issue and delivery of the policy. Mr. Burns took from the expired accident policies such data as he desired for the accident insurance application without any suggestion or statement in regard to the warranties by the plaintiff; or in regard to what company was to issue the policies.

Upon the method of procuring the memoranda and obtaining the policy issued we quote Mr. Burns' undisputed testimony.

"Q. Did you make up such memoranda as you wanted for the purpose of presenting an application for him?

A. I made copies from that policy previously written. I merely copied the answers that were in that policy, and this I took to Macomber, Farr & Whitten at Augusta and asked Mr. Carll—gave him the facts, and he and I together made out the application. The policy was issued and delivered to me, and the same afternoon I delivered it to Mr. Thorne, collected the premium and then, or a day or two later, I gave Macomber, Farr & Whitten the premium, less my commission. That closed the transaction until after the accident." Mr. Thorne did not read the policy but accepted Mr. Burns explanation in regard to its terms. Mr. Burns, who had known

Mr. Thorne twenty years, knew of the imperfection of his eye and the malformation of his hand. Mr. George E. Macomber, President of the Macomber, Farr & Whitten Company, says in an affidavit which was admitted as evidence: "I have known Mr. Fred S. Thorne for more than twenty years and observed long ago that his right hand was defective and there was some trouble with his right eye." But Mr. Macomber was not present when the policy of insurance was issued and had no actual knowledge of the application for the policy. Item 8 of the warranties in the application reads: "The applicant is in sound condition mentally and physically, having correct habits and no impairment of sight or hearing except . . . ." Upon this state of facts two questions may arise, (1) Can the constructive knowledge of Mr. Macomber as to the plaintiff's physical condition be regarded as a waiver of Item 8, and (2) can the knowledge of Mr. Burns be regarded in this transaction as the knowledge of the defendant company. As a decision upon the second point will be conclusive of the issue, it becomes inexpedient to consider the first. The question then is, should the knowledge of Burns in procuring this policy be regarded as that of the defendant? We think it should, under the doctrine of estoppel.

R. S., chapter 49, sec. 93, provides as follows: "All notices and processes which, under any law, by-law or provision of the policy, any person has occasion to give or serve on any such company, may be given to or served on its agent, or on the commissioner, as provided in the preceding section, with like effect if given or served on the principal. Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to an agent shall be regarded as known to the company, and waived by it as if noted in the policy." This statute applies to life insurance as well as fire insurance companies. *Marston* v. *Insurance Co.*, 89 Maine, 266. The defendant's home office was in New York City. Its representative in this State was the corporation, Macomber,

Farr & Whitten. Through this corporation it transacted its business and dealt with all its policy holders in Maine. This corporation appears to have been more than a general agent. It had authority to issue policies direct from its office and did so issue the policy in question. The same day that the application was taken to this office, the policy, signed in blank by the officers of the home company, was written and countersigned by its representative in this State, delivered to Mr. Burns and by him delivered to the plaintiff. This policy could not have gone to New York and returned the same day. They were not only to be regarded under the statute "as in the place of the company in all respects," but were as a matter of fact subrogated to the authority of the company to issue policies, at least, to issue this policy to the plaintiff. Had they sent one of their office force to Mr. Thorne and had he done precisely what Mr. Burns did, and knew precisely what Mr. Burns knew with respect to the applicant, could it be possible that the defendant company could repudiate the acts and knowledge of this office employee on the ground that he was not its agent? If so, the statute intended for the protection of the assured becomes a deception and an open door to the commission of fraud. The defendant could receive all the benefits of premiums without the assumption of any of the risks of insurance. But what is the distinction between sending out an office employee to solicit this policy, and ratifying the acts of Mr. Burns who had solicited it? Mr. Thorne had no knowledge of the company in which he was to be insured. His application was made out by Mr. Burns who had a full knowledge of the risk. Mr. Burns took the application away and returned with a policy duly issued by the defendant company for which he paid the required premium. By delivering the policy to Mr. Burns to be by him delivered to the plaintiff, Macomber, Farr & Whitten, by that act made Mr. Burns their agent. But when they made him their agent they were presumed to have knowledge that whatever Mr. Burns knew of the physical defects of the assured they would be charged with knowing. The statute will not permit an authorized agent to escape responsibility by using dummies. The Macomber, Farr & Whitten Company were there-

fore put upon their inquiry as to whether Mr. Burns was cognizant of any physical defects, knowledge of which might be regarded as a waiver of any warranty. Not having made inquiry, which it may be presumed would have revealed Burns' knowledge, they must now be estopped from asserting that they did not know of the defects of which Burns knew. Therefore Mr. Burns' knowledge became their knowledge, and their knowledge, under the statute, became that of the defendant company. We think the logical deduction from the facts is that the defendant company should under the statute be made chargeable with knowledge of the physical defects of the assured, and held to have waived so much of the warranty in the application as related to them.

There is another ground upon which the defendant should be estopped from asserting as a defense that the physical defects of the assured were facts "entirely unknown to the defendant company." The defendant company appointed Macomber, Farr & Whitten its agent at Augusta. This agent issued the policy in question through Burns as agent or broker, it is immaterial which. Thorne, it seems, had neither knowledge or care as to the name of the company in which he might have a policy. He left this entirely with Burns. He acted in good faith. Fraud is not even suggested. He accepted without question the policy issued by the defendant, countersigned by Macomber, Farr & Whitten Company and delivered to him by Burns, and paid in full the premium required. He did not solicit the policy. This was done by Burns. He is therefore entirely innocent of any agency whatever in producing the situation from the existence of which, he or the defendant company must suffer, even upon the assumption that the defendant company was not chargeable with the knowledge of Burns. Grant that the defendant had no actual notice of such knowledge, it, nevertheless, was the moving cause tending to furnish the transaction of which Thorne would become, under the defendant's contention, the innocent victim. It is incomprehensible that Thorne had he understood the facts would have paid a premium for a worthless policy. Therefore the conditions set in motion through the agency of the defendant, induced the plaintiff to do what he would not otherwise have done.

The case consequently falls fairly within the rule laid down in *Packard* v. *Insurance Co.*, 77 Maine, 144, in which it is said: "It is common knowledge that the authority of the agent comprises not what is expressly conferred, but also as to third persons, what he is held out as possessing. Hence the principal is frequently bound by the act of his agent, performed in excess, or even in abuse of his actual authority; but this is only true as between the principal and third persons, who, believing, and having a right to believe, that the agent was acting within the scope of his authority, would be prejudiced if the act was not considered that of the principal. . . The doctrine is established to prevent fraud and proceeds upon the ground that when one of two innocent persons must suffer from the act of a third, he shall sustain the loss who has enabled the third person to do the injury."

It is the opinion of the court that the defendant is liable for whatever may be found due under the stipulations of the policy.

In the schedule of warranties the plaintiff's occupation is set down Item 4, "Member of Firm or employed by Armour & Co. as Manager of Gardiner Beef Company." His duties are described: "Office duties and travelling only." Article 3 of the General Agreement reads: "If the assured is injured, fatally or otherwise, while at work pertaining to any occupation classed with this company as more hazardous than that stated in the schedule, the company's liability shall be only for such proportion of the principal sum or other indemnity as the premium paid will purchase at the rate fixed by this company for such increased hazard." The report shows that the work which the plaintiff was doing at the time of the accident was performed outside the office, but in the refrigerator connected with the office. On the 17th day of December, 1907, the plaintiff whose business was Manager of Armour's Refrigerator in Gardiner, Maine, went into the refrigerator to direct the hanging of lambs' carcasses from one truck to another, and in illustrating to the workmen how to do the work, took hold of one carcass, and as he lifted it away from the hook, another just behind swung around so that a projecting bone struck him in his right eye, cutting it so seriously that its removal was necessary and was done the

same day. The plaintiff's vocation is stated in the application as that of Manager of Gardiner Beef Company; his duties, as office duties; not, however, the office duties of a clerk, but the office duties of a Manager, or General Superintendent. That is to say his employment was not to be classed with that required in the performance of the manual labor in operating the refrigerator but with that necessary to the oversight and direction of its affairs, from the office. It is too obvious for discussion, that the business manager of a concern, the bulk of whose business is transacted outside the office, cannot superintend the work without leaving the office.

From the nature of the business then is to be implied the duties and responsibilities of his employment. As head of the concern in Gardiner, he was solely responsible for its management. He was superintendent of every department and responsible for every detail of the business. The designation of his office therefore by necessary implication not only authorized but required him to visit every part of the establishment, to direct in every detail of the work and if necessary point out and illustrate how it should be done. To hold then that a person designated as manager of a business concern could not step from his office, to direct the performance of any part of the work, without being charged under an insurance contract with engaging in work defined in the policy is extra hazardous, would be to put a serious check upon the transaction of business, or cut down the indemnity for which a policy holder had fully paid, and to which he would be otherwise entitled.

Article 3, above quoted did not contemplate the inhibition of these acts, the performance of which would be necessarily implied from the vocation named in the policy. This article was rather intended to apply to a regular occupation or business, engaged in by the assured, in a class other than that named in the policy. As was said in *Eaton* v. *Insurance Company*, 89 Maine, 570, "This provision relates to the occupation, employment or business — a vocation, and not an avocation, occasional, exceptional and outside his regular vocation." Upon this point *Berliner* v. *Travelers Ins. Co.*, 121 Cal. 458, is pertinent. The court say: "The fact that the insured is killed or injured while engaged temporarily in an act

or occupation classed as more hazardous than the one in which he was accepted, does not limit his recovery to the amount provided for such more hazardous risk or occupation, when there has been no fraudulent attempt to mislead. The merchant who at one time measures a few bushels of grain, at another time hangs a few rolls of wall paper upon his own premises, at another drives horses in a carriage or wagon, or at another rows a boat for exercise or recreation, does not change his occupation so as to change his class under the insurer's classification of risks, or becomes at these several times, a grain measurer, a paper hanger, a teamster, or a boatman, and the word occupation refers only to a vocation, profession, trade, or calling in which the insured is occupied for trade or profit, and does not preclude him from performing such actual acts and such duties as are mere incidents in the daily life of men in any occupation, or engaging in acts of exercise or diversion." See also *Hess* v. *Preferred Masonic N. Acc. Ass'n*, 112 Mich. 196; *Fox* v. *Masons' Frat. Acc. Ass'n*, 96 Wis. 390; *Holiday* v. *American Mut. Acc. Ass'n*, 103 Iowa, 178.

Under a fair interpretation of Item 4, in the Schedule of Warranties, specifying the plaintiff's occupation and his duties, we think he is entitled to recover the full amount claimed in his declaration for indemnity and for the operation upon his eye, amounting to $1676.66.

Judgment for the plaintiff for $1676.66, with interest to be added from July 10, 1908.

BERNARD J. McCAFFERTY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 15, 1909.

Master and Servant. Negligence. Fellow Servant. Rules. Assumption of Risk. Contributory Negligence.

The plaintiff, a competent and experienced steam fitter and piper, and thoroughly familiar with all his surroundings, was engaged in fitting a pipe in the defendant's machine shop. He was left to do the work in his own way. In doing so, he had ascended a ladder to the track of an electric movable crane, over twenty feet from the ground. While working he lay with his body partly on or over the rail. The operator of the crane knew of the work in which the plaintiff was engaged, and that it required him to go up onto the rail. But at the time in question he did not notice that the plaintiff was then at work at that place, and in moving the crane to accommodate other work in the shop, run it onto the plaintiff and caused the injury. The plaintiff did not hear the approaching crane or have notice of it. Neither the plaintiff nor the defendant company gave notice to the crane operator that the plaintiff was then going up onto the rail. There was no bell or other device on the crane to give warning of its approach. Nor had the defendant company promulgated rules for its operation. There was no occasion for any employee to go up onto the rail in the ordinary work done in the shop. Only twice in five years had any work been done which required any one to go up onto the rail. There was evidence from which the jury were warranted in finding that the brake of the crane was not in good order, so that the crane could not be stopped by the operator as quickly as it otherwise could be. The operator in this case, however, did not apply the brake at all until after the plaintiff had been struck, and the defect in the brake did not cause the injury in the first place. It only increased or aggravated it.

Held: 1. The question of the defendant's negligence is to be considered, not with reference to the general work commonly carried on in the shop; but to the special and temporary work in which the plaintiff was engaged; not with reference to dangers arising from the operation of the crane to other employees in other places, but to the danger to the plaintiff in the work which he was doing.

2. It was not the duty of the defendant to give special notice to the crane operator each time the plaintiff went up onto the track. It was sufficient if the defendant gave the operator notice in general of the plaintiff's work and its character and dangers. And if the operator knew, as he did in this case, all that could have been told him, further notice was unnecessary.

3. The want of rules and regulations and the want of any device on the crane to give warning of its approach, cannot under the circumstances of this case, be deemed negligence on the part of the defendant.
4. There is no evidence of the defendant's want of reasonable care in employing and retaining the crane operator. And whether the operator had been properly instructed in the performance of his duties or not is immaterial since it clearly appears that he understood his duties so far as they related to the plaintiff while working on the special job.
5. The plaintiff assumed all the risks of his employment, which were known to him, and he knew them all except the defect in the brake of the crane.
6. The proximate cause of the plaintiff's injury was the negligence of the crane operator, the plaintiff's fellow servant, and this is a risk which the plaintiff assumed, and for which the defendant is not responsible.
7. The evidence shows clearly that the plaintiff himself was guilty of contributory negligence.
8. The negligence of the defendant in not keeping the brake of the crane in order was not an intervening negligence subsequent to the plaintiff's contributory negligence, so as to give the plaintiff a right of action for that reason.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $7500. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

William H. Looney, and Robert Treat Whitehouse, for plaintiff.

Nathan and Henry B. Cleaves and Stephen C. Perry, and White & Carter, for defendant.

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

SAVAGE, J. Action on the case to recover for personal injuries alleged to have been caused by the negligence of the defendant company. The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial. There is little dispute as to most of the essential facts.

The defendant has a machine shop at Thompson's Point in Portland, in which locomotives and cars are repaired. The building is about two hundred and fifty feet long, and about eighty feet wide,

and it is built of brick. In the north side of the building are eleven openings or doors through each of which a track is laid so that locomotives and cars can be pushed into the building. Just inside each door, and under the track, a pit is excavated, so that workmen can conveniently work under the locomotives or cars. These pits are numbered from 1 to 11 beginning at the east end. Within the building, on the north side, over the pits, a movable electric crane for raising and moving heavy articles was operated, with trucks running on parallel rails fifty feet apart. The rails were about twenty-four feet above the floor of the shop, high enough to allow the crane to pass over locomotives standing over the pits, without touching them. Suspended from the crane was an open steel cage in which the operator of the crane sat. The crane was operated by electric power, and the operator by handling various levers could cause the crane to move back and forth, east and west, on its tracks. He could also cause the hoisting apparatus to be raised and lowered, and to move sideways, north and south, by means of a carriage under the crane itself. The crane was provided with a friction brake, consisting of a solid iron drum revolving on a shaft, surrounded by wooden friction blocks, which were compressed against it by a circular metal band operated by a foot lever in the cage. There was no gong, whistle or other device for giving warning of the approach of the crane, and the defendant company had promulgated no rules for regulating the running of the crane, or the work in the shop. The northerly rail traversed by the wheels of the crane was five inches high and rested on an I beam thirty inches high and ten inches wide on the top, and the I beam was supported by brick piers built up from the floor. The I beam was about seven or eight inches from the north wall of the building, and was stayed to the wall by anchor plates built into the wall at one end, and riveted to the I beam at the other. These anchor plates came nearly to the top of the beam. A water pipe had been laid back of the rail, on top of the anchor plates, and in April 1908, the defendant prepared to lay an air pipe on the same plates, parallel with the water pipe. No part of the ordinary busi-

ness carried on in the shop required any employee to work upon or about this rail, and no one ever had so worked, except when laying these pipes.

The plaintiff was a skilled machinist and steam fitter and piper in the employment of the defendant. He was about sixty years of age, and a man of more than ordinary intelligence. He had worked for the defendant at the Thompson's Point machine shops about eighteen years. The first shop having been burned, he had worked in the shop now in question about five years, and was entirely familiar with its appointments, and with the methods of work pursued there. He was injured, as will be hereafter described, on Tuesday, April 14, 1908. On the Saturday before, his foreman directed him to come on Sunday and commence laying the air pipe, but gave him no directions whatever how to do it. He was left to do it in his own way and time, except that he was to commence on Sunday. He and his helper worked on the pipe Sunday and Monday, and, until the plaintiff was hurt, Tuesday. They procured ladders and rested them against the crane track, and carried up pieces of the main pipe and laid them on the anchor plates beside the water pipe, and then fitted them together. They fitted Ts into the main pipe, one near each door, into which upright pipes from below were to be fitted. As the work progressed they moved their ladders from time to time. Some of the work of fitting, like putting in the Ts, was done at the bench, but the jointing of the lengths of the main pipe had to be done after they were in place on the anchor plates, and the fitting of the uprights into the Ts could only be done after the main pipe was in place and jointed. So it happened that the plaintiff and his helper a part of the time were at work at their bench in the shop, and a part of the time were working upon or around the crane track. While the placing of the main line of pipe in position necessarily required the plaintiff, or his helper, or both, to go up onto the crane track, the plaintiff tried in two different ways to fit the uprights into the Ts from below. He decided that these methods were impracticable, and then, to use his own language, "We conceived the idea that if I went up the ladder and laid down so I could get my hand down in and could see to hold

it under there, a man could catch it very readily; and in that way we expedited the work." And the plaintiff adopted that method. He went up onto the crane track, lay down as well as he could between the track and the wall, put his left arm down between the air pipe and the water pipe, and taking the upper end of the upright pipe in his hand, held it in the proper place, while his helper, standing down on the floor, turned it into the T. The operation took from one to three minutes. While in this position, the plaintiff's body was partly above the crane track, for the top of the pipe was only three or four inches below the top of the rail.

While the plaintiff was engaged on this job, the crane was moved back and forth as the general business of the shop required. The operator knew about the work the plaintiff was doing, and where he had to work. Several times Monday and Tuesday the crane had to be stopped to allow the plaintiff to take down his ladders so that it could pass by. On Sunday, the crane at one time hit and broke a ladder. It should be said, however, that the regular operator, a young man eighteen years old, was not there Sunday. Tuesday forenoon the plaintiff went up his ladder onto the track, to assist in fitting into a T an upright pipe which was held up to him by his helper underneath. He was then, he thinks, over pit No. 7. He lay down, as before described, between the rail and the wall, with his head towards the east end of the building, and his right arm and one leg over the rail, and looked down and watched the motions of his helper. He observed, before he lay down, that the crane was easterly of him near the end of the building, and that it was at work hoisting. He had given no notice to the crane operator that he was going up at that time, and did not know whether the operator was aware of his being up there or not. While the plaintiff was lying down and helping fit the upright into the T, another employe of the defendant, not knowing the plaintiff's situation, motioned the crane operator to move the crane to the west, wishing to use it at pit No. 10. The operator obeyed the signal. He looked down and watched the movements of the man who had motioned to him, so as to know where to stop. He did not look for, or see, or think of, the plaintiff. He testified that he did not know that the plain-

tiff was on the track, that he had seen him move his ladders and go away, and that he supposed he had finished his job, but that he did not know where the plaintiff went. But, at any rate, he moved the crane onto the plaintiff, and caused him grievous injuries. The plaintiff did not hear the approaching crane, or have any notice of it until it struck him.

It appears that for the proper working of the brake, the friction should be slightly lubricated. It is contended for the plaintiff, though denied by the defendant, that at this time, and for some time previously, too much oil had been applied to the friction so that the brake was apt to slip. And the operator testified that on this occasion, when he felt a jar, he applied the brake, but it slipped, and he stopped the crane by reversing the power. In the meantime, the plaintiff had been pushed along the track several feet by the moving crane. We think the jury would have been warranted by the evidence in finding that the brake slipped this time by reason of there being too much oil on the friction.

There is one other disputed question, namely, whether the operator of the crane was notified to look out for, and not run upon, the plaintiff. The preponderance of the evidence is that such notice was given, but the operator denies it, and the jury were warranted in adopting his version.

Upon this state of facts, the plaintiff alleged in his writ, and now contends, that his injury was caused by the defendant's negligence in the following particulars:—(1) by causing the crane to be started and run along the track while the plaintiff was upon it; (2) for want of a reasonably safe and suitable place to work; (3) for want of rules and regulations; (4) for want of sufficient instructions to the operator; (5) for want of special notice to the operator of the plaintiff's position from time to time; (6) for want of a gong or other means of warning persons of the approach of the crane; (7) for want of a competent person to operate the crane; and (8) for the slippery condition of the brake. On the other hand the defendant contends that all the risks were assumed by the plaintiff, and that he was guilty of contributory negligence.

At the outset it should be observed that these questions are to be considered, not with reference to the general work commonly carried on in the shop, but to the special and temporary work in which the plaintiff was engaged; not with reference to dangers arising from the operation of the crane to other employees, in other places, but to the danger to the plaintiff in the work which he was doing. If, in this case, the defendant is to be held negligent, it must be because it failed in its duty to the plaintiff, either by doing something which it ought not to have done, or by omitting to do something which it ought to have done, for the plaintiff's safety. All other aspects of negligence are to be eliminated. In *McTaggart* v. *M. C. R. R. Co.*, 100 Maine, 223, where the alleged negligence consisted in the improper placing of a boiler and pipe, the court used this language:—"This question must be considered in the light of the defendant's duty to the deceased at the time. It was its duty to exercise reasonable care so as to place its boiler and pipe as to make it reasonably safe for him to perform any service which it had any reason to expect that he might properly do at that place by virtue of his employment. Any omission to exercise such care would be negligence as to him. It matters not whether the pipe was so placed as to be safe or unsafe as to other servants in the performance of their respective duties."

It should be observed, also, that this case is to be distinguished from those cases where a servant is set to work at a particular thing, at a particular time and place, and in a particular manner. Doubtless if a master sends a servant into a dangerous place to do a particular thing at that time, he is under the duty of exercising reasonable care to protect him from other dangers while there. If notice to others of the dangerous situation is necessary for his protection, the master is bound to give it. But here the plaintiff was set at work on a job, all the details of which were left to his own discretion and judgment. His work was partly on the track overhead, a place of danger, and partly on the floor beneath, a place of safety. He was not sent into the place of danger specially at any time. When he should go above and when he should continue below were left to his own volition. He could select his times.

The master did not undertake to interfere. The servant was master of his own movements. We think it was not the duty of the defendant to give special notice to other employees, or any of them, each time the plaintiff went up onto the track. To require that would be to require unreasonable, or extraordinary, care. It was sufficient, in this respect, if the defendant gave notice of the plaintiff's work and its character and dangers to the other employees, the performance of whose duties might imperil the plaintiff. If any of such other employees, after notice or knowledge of the situation, failed to heed it, and injury to the plaintiff resulted therefrom, it would be the negligence of a fellow servant, and that was one of the risks which the plaintiff assumed, and for which the defendant is not responsible.

After these general statements we will discuss as briefly as we may the various points presented. First, was the place where the plaintiff was at work suitable and safe? We assume that it was the proper place for him to do the work. The place was safe, so far as this case is concerned, except as it might be made unsafe by the improper management of the crane. That was liable to happen only if the operator was negligent, or if he was ignorant, that is, without notice, or knowledge, of the plaintiff's position. If the operator, a fellow servant, was negligent, the defendant is not liable for that. If, however, the operator had not been informed, in some way, then we assume for the purposes of this discussion that the failure of the defendant to inform him would be proximate cause of the injury, for which it would be responsible.

Therefore the question whether the movement of the crane at that time was due to the negligence of the defendant depends upon another question, whether the operator had notice or knowledge. While the jury may have been warranted in finding that no particular notice had been given by the foreman to the operator, that does not settle it. The evidence is plenary that the operator knew the work the plaintiff was doing, and where it was. He had seen the ladders, the upper ends of which rested on his track, and which had to be moved before he could pass with the crane. He had seen the plaintiff on the ladders. He knew everything which could have been told

him, except the precise moments when the plaintiff would have occasion to go up onto the track. He was so situated that he could see the plaintiff going up and down the ladders. He did not need to move. He only needed to use his eyes and his mind. He did not, at the time in question, give any thought to the plaintiff. We have already said that it was not the duty of the defendant to notify the operator each time the plaintiff went up onto the track. If the operator, knowing, as he did, that the work was going on, and the character of it, run the crane over the track without looking for, or thinking of, the plaintiff, it was negligence, and the negligent act of a fellow servant of the plaintiff, and it was the proximate cause of the injury. That being so, the question whether the defendant before that time was negligent in not giving notice to the operator becomes unimportant. Causa proxima, non remota, spectatur. So far as the plaintiff is concerned he cannot be said to have been harmed by the want of special notice.

It is true the operator testified that he "supposed" the plaintiff had finished his work. Assume this to be true. His only reason was that he saw the plaintiff take down his ladders and go off. He does not say where he saw him go. But the plaintiff necessarily had moved his ladders before as his work moved along. He had gone back and forth, between his bench and the track, and the operator, if attentive to his duties, must have seen all this. If the operator, then, with nothing more than he says he saw, without making inquiry or receiving any information that the work was done, moved the crane as he did, we think it unquestionably a negligent act. In fact at the time the crane was moving, and in front of it in the direction it moved, stood the plaintiff's ladder, in full view, leaning against the crane track. It needed only a glance to see it. But the operator had dropped the plaintiff out of his mind, and was intent upon something else. This was negligence as to the plaintiff, but it was the negligence of a fellow servant. It was, in no sense, the negligence of the defendant.

Next, as to the want of rules and regulations. It is the duty of a master engaged in a dangerous and complex business to make and enforce such rules and regulations for the conduct of his business

and the government of his employees as will afford reasonable protection to his servants while doing his work. *Moran* v. *R. T. & C. St. Ry.*, 99 Maine, 127. But in this case, whatever may have been the complexity of the defendant's business in other respects, and however necessary were rules for its regulation, there was nothing complex in the work which the plaintiff was doing, or in its relation to the movement of the crane. It required no rules. The situation and the danger was obvious. The only rule which could be of service would be to say to the operator, "Do not run over the piper when he is on the track." Such a rule does not need to be promulgated.

The want of a gong, or means of warning, on the crane, is complained of. We do not think that negligence can be predicated from this fact, under the circumstances. We must recall again the fact that this was a special, temporary job. It was to be done by a man who was as familiar with the premises, and the manner in which the crane was used, as any of his superiors, and this fact was known to the defendant. The crane was at all times within the view of a man on or beside the track. The plaintiff knew there was no gong, and did not rely upon any. It would be unreasonable to expect a gong or other appliance put onto the crane to warn persons on the track, when no one ever got onto the track, except at intervals of several years, and for a special purpose.

The plaintiff contends that the crane operator was incompetent. This contention seems to be based upon the fact that the operator was only eighteen years old. For there is no other evidence, aside from running the crane onto the plaintiff, which tends to support the contention. Much less is there any evidence which tends to show that the defendant failed to exercise reasonable care in employing and retaining him. And that is the measure of the defendant's duty in this respect. *Blake* v. *M. C. R. R.*, 70 Maine, 60. Of course, the age and intelligence of the operator are facts to be considered in weighing his competency. But that is not all. This operator had been employed in that capacity for nearly a year, and until the day of the plaintiff's injury nothing is shown to have occurred which in any way tended to show that he was not

competent to operate the crane. We think there is no evidence of want of reasonable care on the part of the defendant in employing and retaining this operator in that capacity.

It is further contended that the defendant did not sufficiently instruct the operator for the performance of his duties. This point is not tenable. If it is intended to apply to the performance only of his general duties, it is unimportant. Besides, whether instructed or not, he seems to have understood them, and to have performed them efficiently. So far as his duties related to the plaintiff while working on this special job, it is clear that he understood them. Beyond what he knew and appreciated, instructions were unnecessary.

Lastly, of the plaintiff's contentions, it is claimed, and as we have already said, the jury were warranted in finding, that the defendant was negligent in allowing the brake of the crane to become and remain in such condition that it slipped on the drum when the operator attempted to stop the moving crane. This did not cause the crane to run onto the plaintiff, but it prevented its being stopped afterwards as quickly as it might otherwise have been done. It did not cause the injury in the first place, but it increased and aggravated it. And for this increase and aggravation the plaintiff claims that he can recover in any event.

The legal situation is this. In accordance with well established principles, the plaintiff assumed all the risks which were obvious and incident to his employment. *Demers* v. *Deering*, 93 Maine, 272. He assumed all the risks which were known to him, and which should have been appreciated by him, or which he ought, by the exercise of reasonable care, to have known. *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 113; *Caven* v. *Bodwell Granite Co.*, 99 Maine, 278; *Bryant* v. *Great Northern Paper Co.*, 103 Maine, 32. He assumed the risk of the negligence of fellow servants. *Cowan* v. *Umbago Pulp Co.*, 91 Maine, 26. But he did not assume the risk of defective or imperfectly working machinery which was not known to him. It was no part of his business to know about the brake on the crane. He did not know it and he did not assume any risk on account of it. Therefore the plaintiff says that

if he cannot recover for the primary injury, caused by risks which he had assumed, he may recover for the additional injury caused by being pushed along on the track, when the brake did not work properly.

Without discussing this proposition, however, it is only necessary to say that we think it cannot avail the plaintiff. It is an elementary principle that an injured servant cannot recover against his master for the latter's negligence, if his own negligence contributed to the injury. On this proposition, no authorities need be cited. It seems to us from the plaintiff's own testimony, not only that he assumed all the risks which led to his injury, except that of the brake, but that he was careless in doing so, and that his carelessness contributed to the injury. As we view it, there is no reasonable alternative to the proposition that he failed to use reasonable care under the circumstances for his own safety. He says he went up onto the track. He noticed that the crane was at work hoisting. Since the purpose of the crane was to move the articles it hoisted, this was notice to him that the crane would be likely soon to move on the track. But he lay down, head towards the crane, in the narrow space between the rail and the wall, his face downward between the rail and the pipe, his left arm down between the two pipes, and his right arm and leg over the track. A more dangerous position can scarcely be conceived. Just the kind of care which the plaintiff exercised is shown by the following extracts from his testimony:

Q. Your mind wasn't on the crane?

A. No. I had no need to have it on the crane. I don't know why I should.

Q. You didn't intend to look out for it, or take any care whether it was coming?

A. I didn't see that I had any necessity to.

Q. You were there without any thought of whether the crane was coming or not?

A. I supposed if there was good judgment taken the crane would not run me down.

Q. So far as you were concerned you paid no attention to whether it was coming or not?

A. The idea was that I wouldn't be up there more than two minutes, and if they were looking in the direction in which they were running the crane they would be apt to see me.

. . . . . .

Q. And you didn't watch out for it?

A. I don't know as I did.

. . . . . .

Q. Did I understand you to say that when you went up the ladder you looked and saw the crane occupied in the eastern portion?

A. Yes sir.

Q. Did you, as you lay there upon the track rely in any way upon the crane's continuing occupied while you were there?

A. I presumed it would be occupied.

Q. Did you in any way rely upon its stopping when it came down your way on this occasion?

A. The operator running the crane, whichever way he is running he is generally watching.

Q. repeated.

A. I supposed it would stop, yes sir.

And yet, he knew that situated as he was, his body was partly concealed from the eyes of the operator, who was lower than he was, he knew that he had not notified the operator of his going, and he did not know, as he says, whether the operator knew that he was up there or not.

It is very clear that the plaintiff was taking the chance of being able to finish his work before the crane would come along, or taking the chance that the operator would discover him, and we think it is equally clear that in so doing he did not exercise reasonable care.

The plaintiff claims, nevertheless, on the authority of *Atwood* v. *Railway Co.*, 91 Maine, 399; *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Coombs* v. *Mason*, 97 Maine, 274, and other cases, that the plaintiff's action should not be defeated, because the negligence of

the defendant intervened, at the end, so that the contributory negligence of the plaintiff was not the proximate cause of his injury. But we think the doctrine of these cases, sometimes called "the last clear chance" doctrine, does not apply to the facts in this case. That principle applies, as these cases show, when there is some new negligence on the part of the defendant independent of and subsequent to the plaintiff's negligence, and not to a negligence already existing, as in this case.

After a very careful study of this case we feel compelled to say that the distressing injury of the plaintiff was so clearly the result of his own negligence that the verdict of the jury ought not to be allowed to stand. Their conclusion was manifestly wrong.

Motion for a new trial sustained.

FRED L. MOORE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion December 15, 1909.

Railroads. Crossing Highways. Statutory Provisions. Speed. Compact Part of Town. Negligence. Emergency. Evidence. Revised Statutes, chapter 1, section 6, clause VI; chapter 82, section 56.

1. The word "highway" in R. S., chapter 52, section 86, which provides that "no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour" is not limited to ways established by county commissioners or by municipal authority, but is used in its more generic and popular legal sense. It embraces all public traveled ways, including ways by prescription.
2. In the case at bar the jury were warranted in finding that the way upon which the plaintiff was traveling at the time he received his injury was a highway within the meaning of the statute.
3. The phrase "near the compact part of a town" in R. S., chapter 52, section 86, is not limited to the largest or principal compact part of a town, but applies to any compact portion. And in the case at bar it is held to

include a village, with church, school house, engine house, store and dwelling houses in all at least twenty-five buildings, and all situated within three hundred and fifty feet of a central point.

4. In a case where a railroad company became obligated by contract to build, and did build and plank and keep open a crossing for a prescriptive right of way, the public had a right to use the crossing. It is a crossing within the purview of R. S., chapter 52, section 86.
5. The running of an engine or train faster than the statute permits is not negligence per se, but it is competent evidence of negligence to be submitted to the jury.
6. It is not shown that the findings of the jury that the defendant company run the train which collided with the plaintiff at an unlawful and dangerous rate of speed, that this was the proximate cause of the plaintiff's injury and that the plaintiff was not guilty of contributory negligence, are clearly wrong. Nor do the damages awarded appear to be manifestly excessive.
7. Negligence is the want of that care which ordinarily prudent men use in the same circumstances, and as even ordinarily prudent men, when caught in a trap where they must act instantly, miscalculate and misjudge the fact that one caught in a passage near a railroad with a frightened team mistakenly concluded that the safest course would be to try to cross the track, and so came nearer to the track than he otherwise would, would not necessarily be negligence.

On motion by defendant. Overruled.

Action on the case to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, in running one of its trains at a dangerous and unlawful rate of speed. Plea, the general issue. Verdict for plaintiff for $2750. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

John A. Peters, for plaintiff.

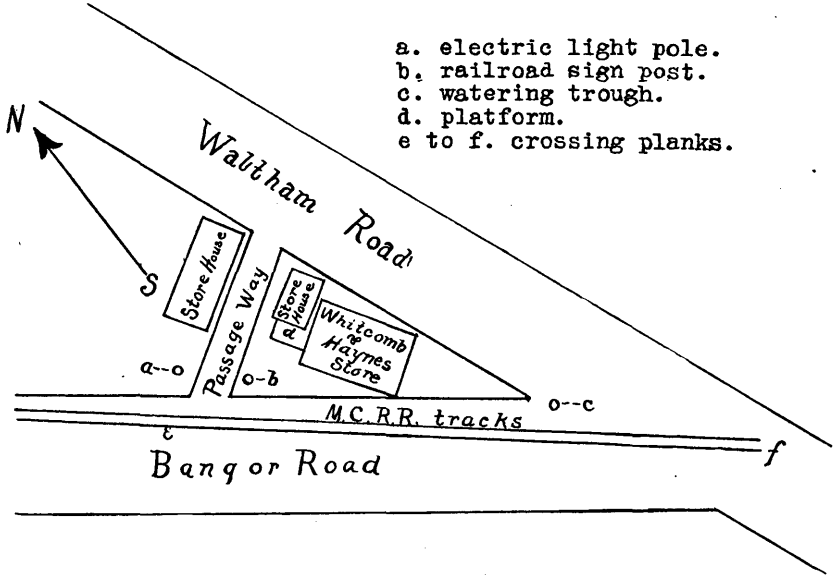
Hale & Hamlin, and Oscar F. Fellows, for defendant.

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

SAVAGE, J. Action on the case to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, in running one of its trains at a dangerous and unlawful rate of speed. The train collided with a team driven by the plaintiff, whereby the plaintiff was seriously injured. The defendant denies negligence on its own part, and contends that the plaintiff was guilty

of contributory negligence. The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial.

The collision complained of occurred at Ellsworth Falls, about five o'clock in the afternoon of December 19, 1908. The situation may be better understood by referring to the accompanying sketch.



At Ellsworth Falls there is a junction of two roads, the Waltham road, so called, and the Bangor road. About one hundred and eighty feet westerly from the junction there is a passage way about ninety feet long and twenty feet wide, connecting the two roads. Upon the heater piece bounded by the two roads and the passage way stand the store and storehouse of the Whitcomb & Haynes Company, and in the rear of the store is a platform, onto which the rear door of the store opens. On the outer side of the passage way is another storehouse. The tracks of the defendant's railroad are laid within the limits of the Bangor road all the way from a point considerably east of a watering trough which stands in the "square" formed by the junction of the two highways to a point two hundred and forty feet west of the passage way, substantially as

shown in the sketch. From the northerly rail to the platform is forty-three feet; to the northwest corner of the store is twenty-five and one-half feet; to the southwest corner of the store is nearly nine feet; and to the storehouse on the westerly side of the passage way is nearly thirty-three feet. On the west side of the passage way stands an electric light pole, thirteen feet from the rail, and on the east side, ten feet from the rail, stands a railroad sign post on which is a sign reading, "Railroad Crossing." There were no other obstructions between the store and the track. The train consisted of a locomotive, tender and caboose car. It was running northerly from Washington Junction to Bangor as a special, without time schedule.

The other material facts which the jury might properly have found from the evidence, though somewhat in dispute, are these. The plaintiff, who was a teamster in the employment of the Whitcomb & Haynes Company, was on his way to the stable, at the end of his day's work. He drove up the Waltham road from the watering trough and down the passage way to the platform, for the purpose of getting several bags of meal from the store. His team consisted of a pair of horses and a traverse sled. The horses were old, well broken, accustomed to trains of cars, and usually not afraid of them. When the plaintiff stopped the team, the sled was abreast the platform, and the horses were facing the railroad. He threw the reins over a stake on the sled, and, leaving the horses unhitched, went across the platform, opened the door, took a bag of meal which was near the door, and immediately returned to the platform, where he says he first heard the sound of an approaching train. The horses were then starting, or had already started a step or two. The plaintiff threw the bag onto the sled, and jumped on himself and seized the reins. What happened afterwards is in dispute. The plaintiff contends that his horses became frightened by the approaching train, that he could not stop them, and that he then tried to swing them to the right so as to keep them off the track, and that in so doing the horses or sled or both came in contact with the passing locomotive. On the other hand the defendant contends that the plaintiff was attempting to cross the track in

front of the train, and that his horses were on the track when the locomotive hit them. Of the merit of these contentions, we shall speak later on.

Just before the time of collision, the engineer discovered the team, applied the emergency brake, and stopped the train as quickly as it could be stopped, at a distance of about two hundred and forty-seven feet from the crossing. It was found that the horses and sled had been thrown or carried along a considerable distance. They were on the easterly side of the tracks, just at the rear end of the train when it stopped. The horses were not much hurt. In some way, the plaintiff had been thrown under, or partly under the pilot of the locomotive, and in that position had been pushed along on the rail or ground.

The plaintiff contends that the train was proceeding at a speed variously estimated at from twenty to thirty-five miles an hour, and in violation of R. S., ch. 52, sect. 86, which reads as follows: "No engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman, or a gate, or automatic signals ordered or approved by the railroad commissioners, at the crossing of such highway. . . . ." The defendant had no flagman at the crossing. Nor was there any gate or signals.

But the defendant contends, so far as the statute is concerned, that it is not applicable (1) because the passage way upon which the plaintiff was driving, and which crossed the railroad, at or near the point of collision, was not a highway within the meaning of the statute, and (2) because it was not "near the compact part of a town." It also contends that the train was not moving at a dangerous rate of speed. We will consider these contentions in their order.

The passage way connected two public ways. It was a short cut-off between the Waltham road and the Bangor road. There was evidence from which the jury might properly find that, though never laid out as a way, under the statute, it had been open, and had been commonly used by the public for the purposes of travel

for at least forty years, and that the public had gained a prescriptive right of travel over the way. The defendant, however, urges that a right to cross a railroad cannot be gained by prescription, citing *Chapin* v. *Maine Central Railroad Co.*, 97 Maine, 151. This is undoubtedly true. But it is shown in reply that the Maine Shore Line Railroad Company, which was the predecessor of the defendant company, when it built its road, took a deed of the premises where this passage way crossing is, and that deed contained the following provision :—"Said company by acceptance of this deed promising to construct and maintain one train crossing over the track on said strip herein conveyed." And it also appears that the defendant has kept the crossing open, has kept it planked, at times has stretched a rope across the way while fast trains have been passing, and has maintained a sign at the crossing on which are the words "Railroad Crossing," which as well as being a warning, was an invitation to the public to use the crossing. In view of these facts, which are undisputed, we think that at the time of the accident the public had a right to cross the railroad from the passage way, at least, with teams, and that is all that this case calls for.

The next question is, was the passage way a "highway" within the meaning of the statute? In the chapter of definitions, R. S., ch. 1, sect. 6, cl. VI, it is provided that "the word 'highway' may include a county bridge, county road or county way." In *Cleaves* v. *Jordan*, 34 Maine, 9, the court, referring to this definition, said :—"The meaning of the provision appears to be that, when the word [highway] is used in the statutes, its import should be that which is mentioned in the article, unless the sense would require a different one." And in *Waterford* v. *County Comrs.*, 59 Maine, 450, the court, again referring to the same definition, said :—"The meaning of this provision is that when the word is used, its import is to be taken as thus defined, unless the obvious sense of the statute should require a different construction." It follows, therefore, that the word "highway" in a statute generally means a county way, a way leading from town to town, and established by county commissioners, as distinguished from a town way which is within the territorial limits of a town. and is laid out by

municipal authority. But as the cases cited show, this is not an absolute rule. It does not apply when it is obvious that the word is used in a statute in a different sense. And that may appear either from the purpose of the statute itself, or from the context. It seems clear to us that the meaning of the word "highway" in the statute we are considering was not intended by the legislature to be limited to the definition in the statute of definitions, which we have cited. Its obvious purpose was to protect public travel at railroad crossings. Now, if "highway" means only county way, then all town ways are excluded from the operation of the statute. Yet the dangers at town way crossings are as great as are those at highway crossings. And it happens, as is well known, that perhaps the larger number of ways in the compact portions of towns are town ways or streets, laid out and built by towns to accommodate a growing population. It will be absurd, and we shall do violence to the statute, if we hold that "highway" in this statute means only a county way. Keeping in view the object of the statute, we think it should be held, and we do hold, that the word "highway" in this statute is used in its more generic and popular legal sense. A highway is defined by Webster as "a public road, a way open to all passengers." "Every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the king's subjects,' is a highway." 3 Kent's Com. 4321. "The word 'highway' embraces every kind of public ways common to all citizens." "A highway is a passage open to all citizens of the state to go and return, pass and repass, at their pleasure." See the numerous definitions in 4 Words and Phrases, 3292. When used in the popular sense it includes all public traveled ways, whether county or town. *Harding* v. *Medway*, 10 Met. 465.

The passage way in question was a public way, and so was a highway within these definitions. The railroad company treated it as a public way, and the plaintiff had a right to use it as such. And it was within the protection of the statute regulating the speed of trains across highways.

Next, was this highway "near the compact part of a town?" We think the jury was not only warranted, but required, to answer

the question in the affirmative. It is true it was not the only compact portion of the city of Ellsworth. It was not the largest compact portion. The statute does not mean that. We have no doubt that it was intended to prohibit and does prohibit, the running of trains faster than six miles an hour over crossings near any compact portion of a town, where there is no flagman, nor gate, nor signals. Ellsworth Falls is a little village, with church, school house, engine house, stores and dwellings, in all at least twenty-five buildings, and all within three hundred and fifty feet of the Whitcomb & Haynes store. Such a settlement is "a compact portion of a town" within the meaning of the statute.

On this branch of the case it remains to inquire whether the speed of the train was unlawful, and whether it was dangerous, so that negligence may properly be inferred from it. The speed was unlawful if it exceeded six miles an hour; and the train hands called as witnesses all agree that it did exceed that rate. So it may be regarded as settled that the speed was unlawful. But that is not enough. The running of a train faster than the statute permits is not negligence per se. But it is competent evidence of negligence to be submitted to the jury. *Neal* v. *Rendall*, 98 Maine, 69. It is not conclusive. Alone, it may be sufficient, and it may not. If not, when considered alone, it may be when taken in connection with other evidence. In this case it will serve no useful purpose to analyze the testimony. The estimates of speed were, as is usual, widely variant. After a careful examination of the testimony we cannot say that it clearly appears that the jury erred in finding, as it necessarily must have found, that the train was run at an unlawful and dangerous rate of speed, that the defendant's servants were guilty of negligence in so running the train, and that their negligence was a proximate cause of the plaintiff's injury.

A more difficult question arises when we inquire whether it has been sufficiently shown by the plaintiff, upon whom was the burden, that he was free from contributory negligence. And it is all the more difficult, because some phrases of the plaintiff's own testimony seem to show that he was negligent, while others tend to show the contrary.

In the first place, the defendant claims that the plaintiff was violating an ordinance of the city of Ellsworth, which provides that "every person having the care of any team in any street of the city shall at all times be so near the team as to have perfect control thereof, unless the same be properly fastened." Assuming that this ordinance is applicable to the facts of this case, we say, as we said of the violation of the statute by the railroad trainmen, that a violation of the ordinance is only evidence of negligence. It is not conclusive. Whether leaving unhitched a pair of old, well broken, work horses such as these are described to have been, while the driver stepped across a platform, opened a door and took out a bag of meal which was close by the door, did so deprive the driver of uch "perfect control" as is reasonably contemplated by the ordinance, and whether the violation of the ordinance was actually negligence, and, if so, whether it contributed in the end to the injury, are questions which have been settled by the jury, under instructions to which no exceptions were taken, and settled adversely to the defendant's contention. And we see no good reason to disturb their finding in this respect.

While it is claimed by the defendant that the plaintiff, having learned while in the store that a train was coming, negligently drove down onto the crossing in an attempt to cross over ahead of the train, it is contended for the plaintiff, as already stated that he did not know of the approach of the train until he stepped out onto the platform, that the horses had already stepped forward a step or two, that, although not ordinarily afraid of cars, they were frightened at this time and became more so, that he tried to stop them, and, being unable to do so, that he tried to swing them around to the right to prevent their getting onto the track, and while doing so the team was struck by some part of the locomotive. And, in this claimed condition of affairs, it is urged that there was no want of ordinary care on the part of the plaintiff. This is the view that the jury took, and we are of opinion that it has not been shown to be clearly wrong.

Not much light is thrown upon the affair by the physical effect of the collision itself. Just what happened no one knows. And

no one ever can know just what will happen in a case of collision between a powerful moving force like a locomotive and a team. The bag of meal, it is claimed, was found on one side of the track and the horses and sled on the other, and the plaintiff was under the pilot. If the horses were where the engineer says they were when struck, it is difficult to understand how they could have escaped with so slight injuries. And upon either theory it is not easy to see how the plaintiff got under the pilot. But he did.

The claim of the plaintiff that the horses were frightened and that he tried to stop them, and then to turn them, is corroborated by the testimony of two other persons who saw the affair. A witness called by the defendant testified that he heard the word "whoa" shouted by someone back of the store, and no one else is shown to have been there, besides the plaintiff. The same witness it is true, says he heard also the expression "giddap." There was evidence, too, that it had been arranged by the drivers of the four teams of the Whitcomb & Haynes Company who were at work on the same job, that the plaintiff's team and another one should go to the store on the way to the stable that night and get meal for all; and it was in pursuance of this arrangement that the plaintiff had driven to the rear of the store. He testified that he had intended to get five or six bags, but he had in fact taken only one when he heard the sound of the train. If it be true, and we think the jury might well believe it, that the plaintiff's purpose there was to get several bags of meal, there seems to be no reason why, having taken only one bag, he should, of his own volition, drive away and try to get across the track ahead of the train. If his team was not frightened, and was under control, it would naturally be expected that he would wait and take on the other bags of meal. This circumstance points strongly to the conclusion that something happened which took the attention of the plaintiff from the meal to the care of the team. All this evidence certainly furnished some basis for the conclusion that the plaintiff did not start from the platform with the intention of crossing the track at that time. And, even if, after he had found himself in a position of danger, he had mistakenly concluded that the safest course would be to try to cross the track, and so

came nearer to the track than he otherwise would, that would not necessarily have been negligence. Negligence is the want of that care which ordinarily prudent men use in the same circumstances. And even ordinarily prudent men, when they are caught in a trap, and must act instantly, miscalculate and misjudge. But the plaintiff claims that all the time after he became aware of the approach of the train he acted with all the care which he had any opportunity to exercise. And in considering the question of contributory negligence, it should be remembered also that there is an electric light pole thirteen feet from the track, on one side or the other of which the horses had to pass. This fact may have added to the confusion and difficulty of the situation.

It is suggested by the defendant that instead of turning to the right, the plaintiff should have turned the horses to the left where there was no obstruction to his passage. We think however that it cannot be said to have been negligence necessarily, because the plaintiff turned his frightened horses away from the approaching train rather than towards it, under the circumstances. Nor would it necessarily be so, even if he had, in the stress of the moment, decided unwisely, and unfortunately for himself.

On the whole, we think there is sufficient evidence to sustain the verdict of the jury on the question of liability.

The amount of the verdict is also complained of. But it does not seem to be clearly excessive. The frightful experience of the plaintiff and the consequent nervous shock, together with the other physical ailments of the plaintiff call for very substantial damages.

Motion for a new trial overruled.

MOWRY & PAYSON, INC., *vs.* HANOVER FIRE INSURANCE COMPANY.

Knox. Opinion December 20, 1909.

Statutes. Construction. Judicial Power. Statutory Waiver. Fire Insurance. Referees. Statute, 1905, chapter 158. Revised Statutes, chapter 49, section 4, paragraph VII, section 5.

When the language of a statute is clear and unambiguous, admitting of only one meaning, it is not permissible to interpret what has no need of interpretation. It is not the province of the court to incorporate into the statute by judicial construction provisions which the legislature did not see fit to insert.

In construing a statute, its practical operation and possible consequences may be considered.

A statutory waiver may be established without proof of an actual intention to waive a known right.

Where an insurance company under the arbitration clause of the Maine Standard Policy named three persons as referees, in accordance with the terms of the policy, from whom the plaintiff might select one, and the person selected by the insured declined to act, *held* that the company had failed to name three persons each of whom was willing to act as one of the referees not only at the time he was named, but at the time he was required to serve, and therefore had failed to comply with the imperative terms and absolute conditions of the statute, and according to the language of the statute must "be deemed to have waived the right to arbitration."

On exceptions by plaintiff. Sustained.

Assumpsit on a fire insurance policy, known as the Maine Standard Policy, issued by the defendant company. There was no submission of the question of damages to arbitration as required by the terms of the policy, before the action was brought. When the action came on for trial, an agreed statement of facts was filed and the presiding Justice ruled "as a matter of law" that the defendant had not lost or waived its "right to arbitration under the policy" and that the action could not be maintained. To this ruling the plaintiff excepted.

The case is stated in the opinion.

Littlefield & Littlefield, for plaintiff.

F. W. Brown, for defendant.

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

WHITEHOUSE, J. This is an action on a fire insurance policy issued by the defendant corporation in the form known as the Maine Standard Policy prescribed by chapter 49, section 4, par. 7, as amended by chapter 158 of the Public Laws of 1905. The policy contains the following clauses:

"In case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be within a reasonable time rendered to the company setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured."

"In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

Respecting the latter clause, section 5 of the same chapter contains the following provisions:

"If the insurance company shall not, within ten days after a written request to appoint referees under the provision for arbitration in such policy, name three men under such provision, each of whom shall be a resident of this state, and willing to act as one of such referees; or if such insurance company shall not, within ten days after receiving the names of three men named by the insured under such provision, make known to the insured its choice of one of them to act as one of such referees, it shall be deemed to have waived the

right to an arbitration under such policy and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage."

The policy in suit was for insurance to the amount of $1,000 on certain stock of cloths and clothing and all materials for the manufacture of same, while contained in a frame factory building situated in Rockland, Maine. This property was damaged by fire on the 4th of June, 1907, and on the 25th of the following July, the plaintiff executed and delivered to the defendant a sworn statement purporting to contain the information required by the first clause of the policy above quoted. On the 9th day of the following September, being unable to agree with the defendant as to the amount of his loss, the plaintiff requested the defendant to appoint referees in accordance with the provisions of the policy and of the statutes of Maine, and named three persons from whom the defendant might select one. In accordance with this request, on the 18th of the same month, the defendant named three persons from whom the plaintiff might select one. Each of the persons so named by the defendant was a resident of Maine and before his nomination had stated to the defendant that he was willing to serve if chosen by the plaintiff.

Of the three persons so named by the defendant, the plaintiff on the 11th of October, 1907, chose Chas. L. Brackett as one of the referees, but on the 14th of the same month, Mr. Brackett informed the defendant that on account of the death of his father and the many calls upon him in connection with his regular business, he should be unable to serve as referee. The next day the defendant informed the plaintiff by letter of Mr. Brackett's inability to serve as referee stating that it would "do whatever is necessary to bring the reference about at once," and three days later submitted the name of another person in place of Mr. Brackett. On the 30th of the same month the plaintiff notified the defendant that it did not recognize the right of the defendant to submit any other name and that it declined to make any choice. On the same day this action on the policy was brought without a reference.

The case comes to the Law Court on exceptions to the ruling of the sitting Justice in favor of the defendant made on an agreed state-

ment of facts and the correspondence between the parties. It appears from the statement of facts that the defendant waived any unreasonable delay in furnishing the proof of loss, but it is contended that the action is not maintainable, because a reference in accordance with the provisions of the policy is made a condition precedent to any right of action thereon unless the reference has been waived and that there has been no such waiver in this case.

On the other hand, the plaintiff contends that inasmuch as the defendant did not within ten days after request, submit the names of three persons, each of whom was willing to act as one of the referees, it must by the express terms of the statute "be deemed to have waived the right of an arbitration under such policy and be liable to suit thereunder as though the same contained no provision for arbitration as to the amount of loss or damage." This is the only question presented for the determination of the court.

The submission of the question of damages to arbitration as required by the terms of the policy, is expressly made a condition precedent to the plaintiff's right of action, and it is admitted that no such reference was had and no award of referees made respecting the "amount of loss or damages" before the commencement of this action. It is not questioned that within the time prescribed by the statute the defendant in good faith responded to the plaintiff's request for a reference by naming for referees three persons who had expressed a willingness to act as referees. It is admitted that the ultimate declination of Mr. Brackett to serve was not occasioned through any fault of the defendant, and that after the refusal of Mr. Brackett to act, the defendant promptly offered to do whatever was necessary to secure a reference and submitted a new name in place of Mr. Brackett.

Upon this state of facts it is earnestly contended that it would be unreasonable to hold that the defendant must be deemed thereby to have waived the right to arbitration. It is argued that the practical effect of such a construction of the statute would be to make the company guarantee that the persons named by it for referees should not only be willing to serve when named, but that they shall remain alive and able and willing to serve during the

entire limit of two years within which the action may be commenced.

Several cases are also cited which are claimed to be in some respects analogous to that at bar and to lend some support to the defendant's contention. In *Fisher* v. *Insurance Co.*, 95 Maine, 486, the referees were duly selected and made their award, but the plaintiff claimed that the award was invalid by reason of misconduct on the part of "the referees," and sought to recover his damages in an action on the policy, irrespective of the amount awarded by the referees. There was neither allegation nor proof, however, that such misconduct was caused or participated in by the defendant, and it was accordingly held that if the award was invalid without fault of the defendant "it was the duty of the defendant to seek a new determination in the manner provided by the contract." It will be seen that the question here decided was wholly different from that at bar, and that no reference whatever was made to the provisions of the statute here involved. A precisely similar question was decided in *Levine* v. *Insurance Co.*, 66 Minn. 138, cited in *Fisher* v. *Insurance Co.*, 95 Maine. In *Fire Assn. of Phila.* v. *Appel.*, 76 Ohio, 1, (80 N. E. 952) it was held that when the company's appraisers withdrew, neither party appearing to be in fault, it was the duty of the company upon request of the insured to select another appraiser in his place and go on with the appraisal, and that if the company refused so to do and insisted on a new appraisement, such conduct would amount to a waiver on its part of the right to arbitration. Similar questions were decided in *Westenhaver* v. *Insurance Co.*, Iowa, (84 N. W. 717) and *Grady* v. *Home Ins. Co.*, 27 R. I. 436, but no reference was made in any of these cases to any stipulation in the policy or provision of the statute fixing the time within which the referees must be named or selected.

In *Smith* v. *Insurance Co.*, 87 Maine, 190, an action on a Massachusetts policy issued prior to the enactment of the statute fixing the number of days within which the persons must be named for referees, this court said: "It was as much the duty of one party as of the other to initiate proceedings, unless it may have possibly been more the duty of the plaintiff as the affirmative party." Thus

the law appeared to be left in a state of doubt and uncertainty respecting the party upon whom it was incumbent to initiate the proceedings. That opinion was announced January 23, 1895, and the statute under consideration was enacted by the legislature then in session, and was a part of section one of chapter 158 of the laws of that year, the same chapter and section which prescribed the form of the Maine Standard Policy. It declares that if the insurance company shall not, within ten days after a written request to appoint referees . . . . name three men, each of whom shall be a resident of this State and willing to act as one of such referees . . . . it shall be deemed to have waived the right to arbitration. It was apparently enacted for the special purpose of removing the previously existing uncertainty in regard to the mode of procedure, and of definitely prescribing the conditions under which the privilege of arbitration might be enjoyed or the right deemed to be waived. In *McDowell* v. *Insurance Company*, 164 Mass. 447, the efficacy of a statute of substantially the same tenor as our own was brought in question and it was held that if the insurance company failed to name three persons for referees within ten days after request or failed to choose one of the three named by the insured, it must be deemed "to have waived its right to have the amount of the loss determined by arbitration." There was no suggestion that the provisions of this statute might be construed as merely directory. They were treated as definite imperative and controling.

The statute is manifestly one of more than ordinary importance to the parties. In concise and definite terms, it states the conditions upon which the insured is compelled to surrender his right to a jury trial if he should prefer a jury trial upon the question of damages, as well as the obligations to be discharged by the company, if it would receive any advantages that might be derived from a settlement of the damages by arbitration. It fixes a brief and definite limit of ten days within which the names must be presented and a referee chosen for the obvious purpose of securing a more prompt administration of justice. The statute requires the company within ten days after request to name three men "each of whom shall be

willing to act as one of the referees." It gives the insured the right to select from three who are willing to serve. It contains no provision which gives the defendant the right to present a new name in lieu of the one refusing to serve. Respecting the course to be pursued in the event that one or two of the three named shall refuse to serve, the statute is silent. It fails to anticipate such a contingency. It contains no provision giving the company the right either to present a new name in lieu of one refusing to serve, or to name three new men from whom the insured could make a second selection. If it should be held that in the contingency named the company should have the opportunity to present either one or three new names, no limitation of time is fixed by the statute within which such a new submission of name might be made. It specifies no limit beyond the single term of ten days.

When the language of a statute is clear and unambiguous, admitting of only one meaning it is not permissible to interpret what has no need of interpretation. It is not the province of the court to incorporate into the statute by judicial construction, provisions which the legislature did not see fit to insert.

It is true that in this case the good faith of the defendant is not questioned, but in determining the justice and propriety of the rule contended for by the defendant, its practical operation and possible consequences may properly be considered. By selecting Mr. Brackett as referee in this case the plaintiff thereby distinctly preferred him to the other two and by implication necessarily rejected the other two. It would be an injustice to compel the plaintiff to accept one of those men after Mr. Brackett declined to serve, and if the opportunity were given the defendant to designate a new man in place of Mr. Brackett, the plaintiff would be practically forced to accept any name which the defendant might deem it advantageous to present.

Again if the court should assume to establish a rule that would authorize the men named by the defendant for referees to refuse to serve after the expiration of ten days, and still permit the defendant to retain the benefit of the arbitration clause irrespective of the limitation of time now prescribed by the statute it is evident that through the adroit management of a zealous insurance agent, the

insured would in some instance be effectually deprived of the choice given him by the statute and find himself reduced to the necessity of accepting for referee the only one who had not declined to serve and the one especially desired by the defendant. While there is no suggestion that the company designedly sought to create the situation that existed in this case, it is an illustration of the possible results of such a rule. The company failed to give the plaintiff the opportunity to make the choice to which he was legally entitled, within the time limited by the statute. It failed to name three men each of whom was willing to act as one of the referees, not only at the time he was named, but at the time he was required to serve. It failed to comply with the imperative terms and absolute conditions of the statute, and must be held legally responsible for the failure of the arbitration and according to the language of the statute "be deemed to have waived the right to it." It is not a question of the good faith or actual intentions of the defendant. It is not an intentional waiver, but a statutory waiver that deprives the defendant of the right to arbitration. A statutory waiver may be established without proof of an actual intention to relinquish a known right. The defendant failed to comply with a definite and positive requirement of the statute, and it is immaterial whether such failure was the result of a controversy respecting the legal duty of the defendant, or of its misfortune in selecting for referee one who was not willing to act as such at the time he was required to serve.

The rule contended for by the defendant would enable the company to defeat the purpose of the statute through a "change of mind" on the part of one of the men named for referees, and leave the insured in practically the same state of uncertainty, and subject to the same delay as before the adoption of the amendment. If it be deemed just and proper to preserve to the defendant the right of arbitration in the contingency which occurred in this case or in the event of the death of one of those named for referees it is the province of the legislature to take appropriate action to accomplish that result. It is not the duty of the court to seek to accomplish it by judicial legislation.

Exceptions sustained.

DISSENTING NOTE.

EMERY, C. J., CORNISH, KING, J.J. We are unable to concur. We think the case, though naturally different in some details, is essentially within the spirit, the principle, of the case, *Fisher* v. *Insurance Company*, 95 Maine, 486, and cases there cited. That principle is that when the first proceeding to procure the stipulated appraisal fails without fault of the defendant, it is incumbent upon the plaintiff to initiate another proceeding for that purpose. In this case the failure was admittedly without the fault of the defendant.

INHABITANTS OF MILFORD *vs.* BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot. Opinion December 20, 1909.

Waters and Watercourses. Municipal Fire Protection. Contracts.

Where the defendant company made a contract with the plaintiff town to furnish water to the plaintiff town, for protection against fire, and to afford as an effective service as furnished to the City of Old Town, and it appeared that the plaintiff town in consideration of a reduced rental agreed that the main pipe should be six inches in diameter instead of eight inches as in Old Town, *held* that the defendant company was only bound to use reasonable care and diligence to furnish a fire service as near the efficiency of the Old Town service as the six inch pipe would enable it to do; that it was not bound to furnish the same efficiency as the Old Town plant furnished, but only such efficiency as could be reasonably obtained with the plant in the plaintiff town.

A water company contracting to furnish water for fire protection is not liable for municipal property burned through the company's failure to furnish an adequate supply, in the absence of an express undertaking to furnish protection to such property.

Milford v. *Bangor Ry. & Electric Co.*, 104 Maine, 233, affirmed.

On motion by defendant. Sustained.

Action on the case brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality and were destroyed by fire in April, 1905. (See Inhabitants of *Milford* v. *Bangor Railway & Electric Company*, 104 Maine, 233.) Plea, the general issue. Verdict for plaintiffs for $4,101. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

Louis C. Stearns, Louis C. Stearns, Jr., and Taber D. Bailey, for plaintiffs.

E. C. Ryder, for defendant.

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

WHITEHOUSE, J. This is an action on the case brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality and were destroyed by fire in April, 1905. It is alleged that this loss was caused by the negligence of the defendant in failing to perform its contract to supply through its pipes water of sufficient current, pressure and volume to extinguish fires within the range of its hydrants.

A general demurrer to the declaration was filed by the defendant; and it was stipulated by the parties that the cause should be heard by the Law Court on the amended declaration, demurrer and joinder, that if the demurrer was overruled the defendant should have the right to plead anew, and if sustained, the plaintiff should be nonsuited.

The count in the declaration especially relied upon by the plaintiffs was the "amended count," which is as follows:

"In a plea of the case, for that on the 28th day of April, A. D. 1905, the said inhabitants of Milford were the owners of a certain public building called a Town Hall, of the value of five thousand

dollars, and certain planks and timbers constituting a sidewalk of the value of two hundred and fifty dollars, and certain fire hose of the value of two hundred and fifty dollars; and the plaintiffs aver that on the said 28th day of April 1905, the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes and hydrants, the same being laid and placed in the streets of said plaintiffs' town, water of sufficient current pressure and volume to extinguish fire within range of said hydrants, and especially and particularly fires orignating in or communicated to plaintiffs said building and property, in consideration of the sum of eight hundred dollars per annum paid to it by said plaintiffs; now the plaintiffs say that on said 28th day of April a fire started in a board pile at a considerable distance, to wit, a quarter of a mile, from the plaintiff's said buildings and property, which said fire might easily have been extinguished and put out had there been any pressure and volume of water in said mains and hydrants, but the defendant unmindful of the duty and obligations in this behalf wrongfully, carelessly and negligently suffered and allowed said mains, pipes and hydrants to be destitute of any current of water or sufficient pressure, force and volume to be of any value or utility in extinguishing said fire or any fire, so that the plaintiffs were unable by the use of the greatest diligence and the strongest efforts to quench the fire in said pile of boards, although they were in the use of due care in this behalf; and the plaintiffs aver that said fire in said board pile was communicated to the said buildings and property of plaintiffs by sparks, firebrands or cinders, so that the same were utterly burned and consumed, although hydrants were at hand and in close proximity to said buildings and property, and competent and capable men were at hand with suitable hose and appliances ready to extinguish the fires started by said cinders and fire brands upon plaintiffs said building and property and were prevented from doing so solely by the lack and want of water in said hydrants which it was the duty and obligation of said defendant to furnish. And the plaintiffs aver that the sole cause of the said loss and damage was the wrongful neglect of duty of said defendant, to the damage of said plaintiffs (as they say) the sum of six thousand dollars."

It has been seen that the declaration as amended in the new count relied upon, alleged that "the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes and hydrants, the same being laid and placed in the streets of said plaintiff town, water of sufficient pressure and volume to extinguish fires within the range of said hydrants, and especially and particularly fires originating in, or communicated to plaintiff's said building and property." Upon the strength of these allegations, admitted by the demurrer to be true, the sufficiency of the declaration was determined, and the demurrer overruled. The opinion of the court is reported in *Milford* v. *B. R. & E. Co.*, 104 Maine, 233. To the doctrine of that opinion founded upon the definite and specific allegations of the plaintiff's amended declaration the court still adheres.

The cause came on for trial before the jury at the January term, 1909, upon the defendant's plea of the general issue, and it was then discovered that the written contract between the parties introduced in support of the declaration did not contain the particular stipulations above quoted upon which the opinion of the court was based in overruling the demurrer. But the cause was submitted to the jury under instructions to which no exceptions were taken, and a verdict was returned in favor of the plaintiff for $4,101. The case now comes to this court upon the defendant's motion to set aside the verdict as against the law and the evidence.

By the terms of the contract introduced in evidence and actually made by the parties, the defendant agrees that it will provide said town with sixteen post hydrants and water for the same, and that these hydrants shall be so placed that they will afford proper protection against fire; that each hydrant shall have two nozzles and be supplied by pipes at least four inches in diameter; that the "water works to be established under the contract shall be supplied by a pump or pumps of a capacity of not less than one million gallons per day, and that they may be operated by direct pressure or by reservoirs or by stand pipe system; that the main pipe as far as the first branches shall be not less than six inches in diameter . . . and shall be equal in all respects and afford as effective service as that furnished to the city of Old Town."

There is no specific averment either in the original declaration or the amended count, that these special stipulations in the contract were not performed, and the uncontradicted evidence at the trial shows that all of them with the possible exception of that last named were unquestionably fully performed by the defendant. With respect to the last stipulation that the main pipe shall afford as effective service as that furnished to the city of Old Town, it appears that the plaintiffs were advised to have the main pipe eight inches in diameter but they were unwilling to incur the additional expense, and in consideration that the annual rental should be reduced to $800, agreed that the main pipe should be six inches in diameter. The presiding Justice therefore properly instructed the jury upon this branch of the case as follows:

"The defendant company was only bound to use reasonable care, reasonable diligence to furnish a fire service as near the efficiency of the Old Town service as the 6 inch plant named in the contract would enable them to do; that they were not bound to furnish the same efficiency as the Old Town plant furnished, but only such efficiency as could be reasonably obtained with the plant put in at Milford."

The defendant accordingly insists that the contract actually made between the parties was in effect only such as is ordinarily made by a water company to establish a plant and supply water without any stipulation to do any specific thing or to afford protection to any particular property.

In support of the motion the defendant earnestly contends that in making this contract with the water company for the protection of property against fire, the town acted for the general public good; that in the absence of an express covenant to do a particular thing, the contract does not protect any particular property, but is for the benefit of all, and that the town as a property owner derives the same benefit that every other property owner does and no other or different advantage or protection; that since there is no express covenant in the contract, the security afforded the plaintiff's property was only the same security which in the exercise of its governmental functions, the plaintiffs had obtained for the whole

town; that the defendant simply agreed to furnish a water system and supply it with water, and did not agree to extinguish fires or to insure property against loss by fire, and that, consequently, in the absence of any special agreement to furnish a certain pressure, or a certain amount of water, or specifically to protect the plaintiff's property, no action can be maintained to recover for the loss of property by fire. It is confidently claimed that since the reasoning adopted and the authorities adduced in support of the conclusion reached in the former opinion on the demurrer had reference solely to the averment of the specific stipulations which it was discovered at the trial, were not contained in the contract, that opinion is not authority upon the questions raised under the pending motion now before the court.

In *Hone* v. *Presque Isle Water Company*, 104 Maine, 217, it was held that where a public service water company makes such a contract with a municipality to furnish a supply of water for general fire purposes without a specification of any particular thing to be done to that end, and without any stipulation respecting liability for losses by fire, or where the duty of such a water company to furnish water arises solely from an accepted service for general fire purposes, individual owners of property destroyed by fire cannot maintain an action on the case against the water company for a loss resulting from the negligent failure of the company to furnish a sufficient supply of water. In that case the court said in the opinion: "But the proposition advanced by the plaintiffs would require water companies to assume, to some extent, the responsibility of insurers, and it does not satisfactorily appear that such a doctrine would be more in harmony with considerations of public policy, or more consonant with reason and justice than the established rule. Ample opportunities are already afforded for all property owners to obtain insurance against losses by fire, and the assumption of such risks by water companies, even in a modified degree, would result in a double insurance and largely increased water rates. Furthermore, capital would not readily seek investments in enterprises involving a public service exposed to incalculable hazards and constant litigation. In the practical administra-

tion of the law the established rule has not been found the cause of extraordinary hardships or the occasion for exceptional complaints."

It is contended in behalf of the defendant that these general observations are equally pertinent in the case at bar. As before intimated the question now raised upon the defendant's motion has never before been presented to this court, and no case has been cited by the learned counsel which can be deemed a direct authority for the plaintiff's contention. The only case to which the attention of the court has been called tending directly to support the defendant's contention is that of *Ukiah* v. *Ukiah Water City Co.*, 142 Cal. 173. (75 Pac. Rep. 773.) In that case it was held that "Where a municipal corporation enters into a contract with a company to supply water for the extinguishment of fires through hydrants, connected with its mains, such contract being entered into for general purposes and for the benefits of all its inhabitants, no protection to any specified property being contemplated, the relation of the water company is not different, as to the property of the municipality from the relation of any of its citizens to such company, and it cannot recover for the loss of its property from the failure of the water company to furnish an adequate supply of water as provided for in such contract."

In the opinion the court adopting the language of the trial judge said: "It is true that no written contract covering the time of the fire is shown, but no particular form is prescribed by the statute for such contracts, and the evidence forces the conclusion that, at the time of the fire, the same relations existed between the town and the defendant as to the furnishing of water for general purposes, as ordinarily exist between the private consumer and the water company, as to water for domestic purposes."

"No formal written contract seems to be required by our statute to establish this relationship between the municipality and the company.

"The evidence clearly shows that whatever the relationship between plaintiff and defendant was, so far as the furnishing of water for fire purposes is concerned, it was entered into by the town in

the execution of the power conferred upon it to provide protection against fire for the benefit of all the inhabitants, and there is nothing to indicate that the protection of any specific property was contemplated.

"In providing for a water supply for general fire purposes, a municipality exercises the same character of functions that it does when it provides fire-engines and other apparatus for the extinguishment of fires, or when it employs policemen or watchmen for the protection of its inhabitants against crime.

"Where, in the exercise of this power, it establishes or acquires its own system of waterworks, and undertakes to itself provide an adequate supply, it is settled beyond controversy that the city is not liable to its citizens whose property is destroyed by fire for failure to provide an adequate supply, the power vested in the city being in its nature legislative and governmental, requiring the exercise of judgment and discretion.

"Where, instead of acquiring its own system and attempting to itself provide the water for such purposes, it contracts with a water company to furnish such service, thus making such company practically the agent or employee of the city, the many decisions of the appellate courts of other states are practically unanimous in holding, upon apparently the soundest reasoning, that the water company is not liable at the suit of a third person whose property was destroyed by fire, by reason of its failure to supply sufficient water to the town for such purpose.

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water.

"It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual, but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more.

"In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which the municipality, as a property owner, derives the same incidental benefit that every other property owner does—no more, no less.

"Yet in each there is a contractual relation.

"The bar to such a recovery in each case is, that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection.

"I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction; that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town; and that the plaintiff, as a property owner, is without right of action."

The opinion proceeds to show that *Paducah Lumber Co.* v. *Water Co.*, 89 Ky. 34, (12 S. W. 445) and *Gorrell* v. *Water Co.*, 124 N. C. 328 (32 S. E. 720) in which the opposite conclusion was reached, are to be distinguished from the California case against the Ukiah Water Company by reason of the fact that in the case of the Paducah Lumber Co. and in the Gorrell case there was an express contract to do certain specific things, which appear to have been equivalent to the stipulations alleged in the plaintiff's declaration in the case at bar. The court then further say: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in

the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which in the exercise of its governmental functions the plaintiff had obtained for the whole town."

In the leading case of *Hadley* v. *Baxendale*, 9 Exch. 353, so often cited as authority in this country, the familiar rule was enunciated that the damages which a party ought to recover as a result of a breach of contract "should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." See also Farnham on Waters and Water Rights, 848. It certainly cannot be reasonably claimed that for the moderate consideration received by a water company under such a contract as the one actually made in the case at bar, it was within the contemplation of both parties that the water company had undertaken to make good the loss which would result from the destruction of the plaintiff's property by fire.

It is the opinion of the court that the legal effect of the contract in this case cannot be distinguished in any essential particular from that considered in *Ukiah City* v. *Ukiah Water Company*, supra, and that the verdict of the jury in this case being against the law, cannot be sustained.

Motion sustained.
Verdict set aside.

MANUFACTURERS NATIONAL BANK

vs.

HOLLINGSWORTH & WHITNEY COMPANY.

Androscoggin. Opinion December 20, 1909.

Evidence. Memoranda. Logs and Lumber. Contract. Scale. Assignments. Liability of Debtor.

Where a scaler agreed upon by the parties uses an assistant who measures and scales logs in accordance with the scaler's instructions and directions, and who enters on scale pads the separate contents of each log scaled by him, which pads the scaler examines and tests from time to time and signs, adopts and uses as the memoranda of his scale, and identifies them in court as the pads so made by his assistant and adopted by him, such pads are admissible without producing the assistant who made them.

The scale of a scaler agreed upon by the parties is not to be disregarded because an assistant performed some of the work necessary to be done in making the scale. The data obtained by his assistants in their measurements and scale of the logs, and the entries and memoranda thereof made by them, acting under his direction, and inspected, corrected and adopted by him, may be used by the scaler in ascertaining the quantity of logs scaled.

In the absence of fraud or mathematical mistake the scale of a scaler agreed upon by the parties is conclusive, and the burden is upon the party attacking the scale to prove such fraud or mistake.

Held: That the evidence offered in the case at bar to set aside the scale of the scaler agreed upon by the parties falls far below that degree of proof essential to establish fraud, bias or prejudice on the part of the scaler; neither is it shown that there was any mathematical mistake.

An agreement by the defendant November 26, 1902, to pay a bank amounts becoming due from the defendant to a firm during the current season on a logging contract which ran for four years, only bound the defendant as to amounts falling due the firm during the logging season of 1902-3, not applying to left-over logs, since under the logging contract nothing became due on them during that season, and the bank could not recover on a quantum meruit as to such left-over logs, nor did the agreement prevent the defendant from giving the firm a check to pay labor bills, from taking over a loan to the firm made by defendant's employee, or from buying supplies of the firm.

On report. Judgment for defendant.

Assumpsit on a contract arising out of a written acceptance by the defendant of an order given by J. S. Longley & Son for the payment to the plaintiff of such amounts as should become due them under their logging contract with the defendant. The writ also contained a count for a quantum meruit. Plea, the general issue with a brief statement alleging that the defendant "paid to the plaintiff all that it assumed to pay to the plaintiff." At the conclusion of the evidence, the case was reported to the Law Court, upon so much of the evidence as was legally admissible, "to determine both the law and the facts and to render judgment accordingly."

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

Norman L. Bassett, for defendant.

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

KING, J. This case is before the Law Court on report. It is an action of assumpsit on a contract arising out of a written acceptance by the defendant of an order given by J. S. Longley & Son for the payment to the plaintiff of such amounts as should become due them under their logging contract with the defendant. The writ also contains a count for a quantum meruit.

May 4, 1901, J. S. Longley & Son entered into a written contract with the defendant to cut, haul and drive logs for the next four succeeding seasons. The logs were to be cut on Misery Township, Somerset County, Maine, landed in Chase Stream and Indian Pond, and driven into the East Branch of Kennebec River. They were to be scaled at sound scale by a competent scaler, mutually agreed upon. The 9th paragraph of the contract reads:

"9th. Said party of the first part hereby agrees to pay, and said party of the second part to receive, as full compensation for the services herein specified, the sum of five dollars and fifty cents ($5.50) per thousand feet for that part hauled into Chase Stream and six dollars ($6.) per thousand feet for that part hauled into Indian Pond, sound survey for all logs so cut, hauled and driven, payments

to be made as follows: $4. per thousand feet April 1st of each season for the amount of logs which in the estimation of the scaler are cut, yarded and landed at that date, and the balance as it may appear by the scaler's bills, when said logs are driven and delivered at the place of delivery above specified: provided, however, said party of the first part is satisfied that all bills for which a lien upon said logs could be claimed, have been paid and discharged by said party of the second part, and said party of the first part shall not be obliged to pay said balance until it is satisfied of said fact. In case only a portion of said logs are driven and delivered the first season, then said party of the first part shall pay said balance per thousand for such quantity of logs only as are so driven and delivered, and shall retain the balance until the remainder of said logs are driven and delivered by said party of the second part, and said party of the first part is satisfied that all liens, claims and demands have been paid and discharged."

Before beginning the second season's operation under the contract, the Longleys, on Nov. 20, 1902, gave to the defendant this order:

"Please pay to the Manufacturers National Bank of Lewiston, Maine, all that may be due us under the terms of contract with you for hauling and driving logs until otherwise notified by the Directors of said Bank."

Nov. 26, 1902 the defendant wrote the plaintiff bank:

"We have received an order from J. S. Longley & Son to pay you such amounts as shall become due on their contract with us this season, and will forward to you such amounts as become due as requested."

A portion only of the logs cut during the winter of 1902-3 were hauled and driven, the rest being left on the "yards" in the woods.

Two questions are presented; First, did the defendant pay to the plaintiff all that became due under the contract with the Longleys for the logs hauled and driven? Second, was the defendant required under its contract of acceptance to pay the plaintiff anything on account of the logs that were cut during the winter of 1902-3 but left over on the "yards?"

1. A. D. Heald, of Gardiner, was agreed upon as the scaler for the operation of 1902-3. According to his scale bills the amount of logs that the Longleys succeeded in hauling and driving that season was 2,768,630 feet, amounting at the contract price to $15,227.46. The defendant had from time to time during the operation made payments to the plaintiff aggregating $16,000, an amount somewhat in excess of the contract price for the logs actually driven.

The plaintiff, however, claims that a much larger quantity of logs was hauled and driven than Mr. Heald's scale bills show, and much evidence was presented relative to that issue. It will not be practicable or perhaps useful to attempt here an extended analysis and discussion of that evidence, but only to refer briefly to that which shows the method and manner of Heald's scale, and that which the plaintiff claims discredits that scale.

The logs hauled were landed on Chase Stream in three separate landings, designated by the surveyor by numbers. No. 1 landing was the upper one. Nos. 2 and 3 were practically one, being on opposite sides of the stream, and about one mile below No. 1.

Mr. Heald testified that he was "sixty-eight years old," had "scaled thirty-five consecutive winters," and "for about every one on the Kennebec River." He began scaling at No. 1 landing on Jan. 10, 1903, and used the "Five Lined Holland Log Rule" called for in the contract, applying "the common method of surveying logs." He used scale pads, so called, on which was kept the data of the scale as the work progressed. These are small sheets or slips of paper made for the purpose, each being ruled into 200 small squares or checks, and in each square is entered in figures the contents of a separate log as surveyed. He continued scaling alone at No. 1 landing until Jan. 28 when C. G. Aldrich came as his assistant. Heald worked with Aldrich one day, instructing him, and ascertaining and testing his method and efficiency. He says: "I scaled the same logs he scaled, so as to compare with him; see how he scaled them, and how they agreed with my work." He then left Aldrich to scale on No. 1 landing as his assistant, for whose scale he was responsible, and went to landings 2 and 3 to

scale there. From time to time Heald went to No. 1 landing and inspected Aldrich's work to see that the scale was being done right, and he approved and adopted it as his scale.

There were 82 scale pads filled at No. 1 landing, 73 of which were signed by Mr. Heald, the other 9 being unsigned. The pads filled between January 10 and 28 represent data obtained by Heald personally, the data for the others having been obtained by his assistant, Aldrich, under his direction, and those pads Mr. Heald corrected, adopted, signed and retained as the detailed memoranda of his scale, and from time to time he sent them, or copies of them, to the defendant and the Longleys.

The method of scaling at the other landings was the same. As to No. 2 landing Mr. Heald testified: "I say I scaled them all. I did, but the pads don't show it. Henry Wilson's pads I accepted for a certain length of time. We both scaled together through the whole hauling season. He scaled the same logs I scaled and I accepted his pads up to No. 32—about 32 pads—and sent them into the office . . . . after the 32 that I speak of, I stopped sending in his pads and sent in my own pads." At landing No. 3 a helper assisted Mr. Heald in getting the lengths of the logs, but Heald took the diameters of all, made the scale, and filled out all the pads excepting "just a few pads that he (Wilson) personally scaled." The record shows only one pad from No. 3 landing signed by Wilson.

After the scale was completed Mr. Heald rendered to each party to the logging contract a final scale bill showing that he had scaled 36,082 spruce logs at 2,664,480 feet, 337 pine logs at 54,620 feet, and 939 cedar logs at 49,530 feet, a total of 2,768,630 feet.

Objection was made by plaintiff to the admission of the scale pads, on the ground that Mr. Heald, the surveyor agreed upon by the parties, did not personally perform all the labor in making the scale of the logs as represented on the pads, but that some of it was done by assistants who were not called to identify those pads made out by them and verify their correctness.

As the case is to be determined here on so much of the evidence only as is legally admissible, it is of little consequence whether all

the pads were strictly admissible, for the testimony of Mr. Heald, the surveyor, and his final scale bill, amply show the method, manner and quantity of his scale. But we think the objection is without merit, and that upon both reason and authority the pads were properly received in evidence. They were original entries made by a person in the regular course of business whose duty it was to make them. They were made under conditions calculated to prevent mistakes and insure accuracy. They were identified by Mr. Heald as those used in the work of scaling. The larger part of them he personally made out, and the rest were made under his direction, by his assistants, whose work he inspected and tested from time to time and adopted as his. Practically all the pads were signed by him, and kept and used by him as the original memoranda of his scale. It would seem that no further proof of their genuineness ought reasonably to be required.

Speaking of the admissibility of such and similar entries without their verification on the stand by all the persons who were concerned in their making, Wigmore in his work on Evidence, section 1530, says: "Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that the expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room."

In *Mississippi River Logging Co.* v. *Robson*, 69 **Fed.** 773, a case directly in point, the logs were scaled by "camp scalers" so called, who entered the measurements first on cards and at night transcribed them upon scale books. From time to time inspectors visited the camps and examined the scale books, verifying them by measuring some of the logs. The inspectors identified the scale

books and testified to their correctness. It was held that the books were admissible without producing the camp scalers, the court saying: "They appear to have been kept under conditions that were calculated to prevent mistakes therein, and to secure a high degree of accuracy. They were also identified by witnesses who were familiar with their contents, and whose special duty it was to see that they were properly kept. Under these circumstances we think that the trial court would have erred if it had excluded the books on the ground that they had not been sufficiently identified, or that they were not the best evidence."

Neither can the plaintiff's contention be sustained that Mr. Heald's scale is to be disregarded because other persons assisted him, and he did not personally perform all the work necessary to be done in making the scale. It would be quite impossible for one person to measure and survey each log in a lumbering operation amounting to several millions, especially when there were several landings at some distance apart. It was, therefore, to be expected that the surveyor for this large operation would require helpers and assistants, for the work to be done demanded it. Such, too, is the custom followed in the scaling of logs in large lumbering operations in this State. The data obtained by his assistants in their measurements and scale of the logs, and the entries and memoranda thereof made by them, acting under his direction, and inspected, corrected and adopted by him, may be used by the scaler in the determination of the quantity of logs scaled. *M. D. & I. Co.* v. *Allen Clothing Co.*, 102 Maine, 257, 260.

The plaintiff further claims that Mr. Heald's scale did not give the full contents and quantity of the logs, and for that reason it should not control. But in the absence of fraud or mathematical mistake the scale of the scaler agreed upon by the parties is conclusive, and the burden is upon the party attacking it to prove such fraud or mistake. *Atwood* v. *Mfg. Co.*, 103 Maine, 394; *M. D. I. Co.* v. *Allen Clothing Co.*, supra; *Nadeau* v. *Pingree*, 92 Maine, 196.

We think the plaintiff has failed to sustain this burden. Mr. Heald was a scaler of long experience and good reputation. He

was selected by the parties, and no reason is suggested why he should be unfair. The method he employed was calculated to prevent mistakes, and it is not made to appear wherein any mistake was made.

An examination of his scale bills show a scale of 36,082 spruce logs making a total of 2,664,480 feet, an average of 13.54 logs per thousand. That portion of the logs left over on the yards in the woods were scaled in 1904 on the landings by Edward Ireland, a scaler agreed upon by the parties. His scale bills show that he scaled 22,217 spruce logs making 1,651,820 feet, an average of 13.45 logs per thousand. This small difference between two independent scales of logs, cut at the same time and in the same operation, and made at different times and by different scalers, both having been mutually selected by the parties, is a convincing circumstance in answer to a claim of fraud or mathematical mistake in the Heald scale.

The plaintiff claims to have introduced evidence tending to show that the logs did in fact run at about an average of $11\frac{1}{2}$ per thousand. We have examined with care the testimony of the witnesses called by the plaintiff on this point, and we do not find in it sufficient proof of facts and circumstances that reasonably discredit either the fairness or accuracy of the Heald scale.

George Gordon, who hauled the left-over logs, from his observation of the logs only, estimated that it would take "about eleven and one half" per thousand. James O'Brien, from his observation while working on the logs as a river driver, estimated about eleven per thousand. William E. Drewry, called by the plaintiff on this point, actually scaled on No. 1 landing 17,269 pieces making 1,151,330 feet with an average of "over fifteen to a thousand." He gave as an explanation why his scale took two more logs per thousand feet than the Heald scale, that many long logs were cut into two on the landing. But the scale of Heald included the same logs. Joseph Bairlargeon, who had charge of the camps, estimated "eleven and a half perhaps." He scaled, however, one day only and his total for that day was 500 feet less than the Heald scale for the same day. Urban Spaulding scaled the left-

over logs on the yards in the woods and his average was "about eleven." But he scaled "at the bigness," which means that he made no allowance for unsoundness. The contract, however, called for a "sound scale" and this was the scale made by Heald. Herein, and in the fact that many long logs were cut in two after being hauled, is to be found sufficient reason to account for Spaulding's smaller average. Henry M. Wilson, who scaled on No. 2 landing through the hauling season, along with Mr. Heald, but as an independent scaler, testified that he took an average of "practically eleven." With respect to Wilson's scale it is to be noted that of the 75 scale pads filled out at No. 2 landing, the first 32 sent to the defendant and put in evidence were Wilson's, which Heald adopted. This fact would tend to show that there could have been no material difference between their scales, at least during the first part of the scaling. The average of the Heald scale was that of all the logs on all the landings combined. That of Wilson was only of those on No. 2, and this undoubtedly accounts for the difference in the averages, for the result of Drewry's scale shows that the logs on the upper landing must have been smaller than those on the other landings. In *Bailey* v. *Blanchard*, 62 Maine, 168, 171, the court, speaking of the conclusiveness of the scale of a scaler agreed upon, said: "Neither party is at liberty to set it aside or impeach it, except upon such evidence as would avoid the award of an arbitrator mutually chosen—evidence which will satisfy the jury that the scaler acted corruptly, or that injustice is done by reason of some bias, prejudice, or foul practice in the procurement of it." The evidence offered by the plaintiff here to set aside the scale of the scaler agreed upon by the parties falls far below that degree of proof essential to establish fraud, bias or prejudice on the part of the scaler in making the scale. It is also to be observed in this connection that the contract expressly provides that in case of dissatisfaction as to the scale the parties would then agree upon a committee to test the scale. If there was any dissatisfaction with the scale as the work progressed, it does not appear that any effort was made to have the scale tested in the manner provided for in the contract.

It is, therefore, the opinion of the court that the scale of Mr. Heald, the scaler agreed upon by the parties, must control and is conclusive as to the quantity of logs driven in during the season of 1902-3, and the case shows that the defendant paid to the plaintiff all that became due under the contract for those logs.

II. With respect to the left-over logs, the plaintiff claims in its writ that the defendant is liable to it for the cutting and yarding of 2,500,000 feet of logs at $3.50 per thousand.

The following facts and circumstances seem necessary to be stated as somewhat explanatory of this claim, and of the contentions of the learned counsel for the plaintiff in argument.

April 16, 1903, the defendant, at the urgent request of the Longleys, and upon their representation that the money was needed to pay labor bills, gave the Longleys a check for $5000. No part of the proceeds of this check was turned over to the plaintiff, and $2000 of it appears to have been used to take up a note which had nothing to do with the lumbering transaction. The Longleys still requested further assistance from the defendant to pay the men on the drive. This request was not directly granted, but on May 1, 1903, W. J. Lanigan, who then was and for a long time had been in defendant's employ, and was the representative of the defendant through whom the Longleys chiefly negotiated, loaned them $3000, taking their note therefor on one year secured by a mortgage of their teams and lumbering outfits. On May 9, 1903 this note and mortgage was transferred by Lanigan to the defendant. The plaintiff was not informed either of the $5000 check or the Lanigan loan.

In the line of a suggestion of the Longleys for a readjustment of the logging contract "so that we can come out whole in the future if possible" negotiations between them and the defendant resulted, on September 28, 1903, in an agreement whereby the logging contract was cancelled, and the defendant was to take over the supplies and outfits of the Longleys for $1850, pay them $700 on account of a dam they had built, and pay them "at the rate of $3.50 per M ft. for yarding the logs which are now on the yards, after we haul them on to the landings and scale them." The plaintiff was not informed of this new arrangement.

The defendant claims that the quantity of logs so taken by it on the yards, according to the scale made on the landings after they were hauled in the winter of 1903-4, was 1,708,870 feet, for which it credited the Longleys, at $3.50 per M, $5,981.05. The defendant's account with the Longleys for the operation of 1902-3, as presented in the record, shows disbursements of $24,000, made up of the $16,000 paid to the plaintiff, the $5000 check given to the Longleys, and the $3000 Lanigan loan. Against this is credited, for the logs driven in the spring of 1903, $15,227.46, for work on road, $69.15, for account of dam, $700, for supplies, etc., $1850, and for the left-over logs at $3.50 per M, $5,981.05, a total of $23,777.66, leaving a deficit of $222.34.

It is claimed in the brief of the plaintiff that in giving to the Longleys the $5000 check, in taking over the Lanigan loan of $3000, and in purchasing the supplies for $1850, the defendant diverted the payments of those sums from the plaintiff wrongfully. But it should need no argument, we think, to make it apparent that unless those amounts became due under the logging contract, the fact that the defendant paid them to the Longleys would not make it liable to the plaintiff for them under its contract of acceptance of the Longley order. Nor do we perceive in what manner those specific transactions can have any material probative value in the determination of the question of the extent of the defendant's liability under that acceptance, for if its liability included the payment of something on account of the left-over logs the amount of such payment would not be determined or controlled by those transactions.

The question of the extent of the defendant's obligation to the plaintiff involves, perhaps, a consideration (1) of whether the Longley order and the defendant's letter of Nov. 26, 1902 are to be construed and treated as an assignment to the plaintiff, binding upon the defendant, of all amounts that should become due under the logging contract until otherwise notified by the directors of the plaintiff bank, and if so what would be the extent of its liability thereunder, and (2) of whether the defendant's liability under its letter is limited to payments of such amounts only as became due that season.

The Longley order would, no doubt, in equity, be treated as an equitable assignment of the moneys to become due under the contract until otherwise notified by the bank. But this is an action at law, and not a bill in equity to enforce obligations and secure rights under an equitable assignment. The effect, however, of such an assignment, if made, would have been merely to put the plaintiff in the Longleys' place, and subrogate it to their rights to receive such amounts as should become due under the contract. "Neither in law nor in equity will an assignment by one contracting party of his interest in a contract or of money due or to grow due thereon enure in favor of the assignee, to deprive the other party of the benefit and advantage of the terms and conditions contained in the contract." *Bernz* v. *Marcus Sayre Co.*, 52 N. J. Eq. 275, 283. Even if the plaintiff could rely here upon the doctrine of an equitable assignment to determine the defendant's obligation to it, then the defendant could not be found liable in the premises, for there was not at the time of the order, and has not been since any money due under the terms of the logging contract which, if the order had not been given, the Longleys could have recovered of the defendant, except for the logs driven in the spring of 1903 which was paid to the plaintiff. There was then no money in the hands of the defendant,—no fund to which the assignment attached. *Goldengay* v. *Smith*, 62 N. J. Eq. 354.

But the defendant's liability to the plaintiff does not depend upon the application of the doctrine of an assignment to the plaintiff of the Longley's rights to payments under the contract until such time as the bank should otherwise notify. The obligation of the defendant to the plaintiff arose upon the contract expressed in its letter of Nov. 26, 1902. By that letter the defendant agreed "to pay to you such amounts as shall become due on their contract with us this season." There is no uncertainty about the meaning of that engagement. It was limited in the time of its application. It included no other season except the one then ensuing—the logging season of 1902-3. The defendant was not bound to enter into any express promise to make payments to plaintiff, but it was its

right, in making such promise, to limit it, and fix the period during which it should be in force, and having done so its obligation is measured thereby.

It remains only necessary to refer to the express provisions of the logging contract to ascertain that no payments became due thereunder during the logging season of 1902-3 for the logs cut and yarded but not hauled. It is provided in the contract that on April 1st, of each season a payment of $4 per thousand should be made on account of all logs "which in the estimation of the scaler are cut, yarded and landed at that date." Nothing was to be paid under this provision unless the logs were landed, that is hauled to the stream. And in the ninth paragraph of the contract it is expressly provided that if a portion of the logs are not driven the defendant shall not be required to pay the final payment on such logs until they are driven and it "is satisfied that all liens, claims and demands thereon have been paid and discharged."

There is no ground on which the plaintiff can recover anything under the count for a quantum meruit. It was no fault of the defendant that the Longleys did not haul and drive the logs left over, and the cancellation of the contract was at their suggestion, and voluntary on their part. Before the new arrangement was made under which the defendant agreed to allow the Longleys $3.50 per M, for the left-over logs, they could not have recovered of the defendant on a quantum meruit for the cutting and yarding of those logs. *Homer* v. *Shaw*, 177 Mass. 1, 5, and cases cited. If the Longleys could not have recovered on a count for a quantum meruit, provided the order had not been given, then the plaintiff cannot recover under such count.

It is, therefore, the opinion of the court that the plaintiff is not entitled to recover in this case, and the entry must accordingly be,

Judgment for defendant.

ROBERT D. LINN et al. *vs.* GEORGE W. BARKER et al.

Penobscot. Opinion December 23, 1909.

Negligence. Fires. Burden of Proof. Evidence. New Trial. Verdict against Evidence.

The burden is on one suing for damages caused by a fire communicated from defendant's premises to show defendant's negligence.

On moving for a new trial in a suit for negligently causing a fire, on the ground that a verdict for defendant was against the evidence, plaintiff must not only show a strong preponderance of evidence of negligence, but must show that there was no other reasonable inference from all the evidence on which the jury could act.

In the case at bar *held* that while the evidence showed that the fire was communicated from the defendants' premises, yet it was not sufficient to show that the loss was caused by the defendants' negligence.

On motion by plaintiffs. Overruled.

Action on the case to recover damages for the loss of the plaintiffs' buildings by fire and caused by the alleged negligence of the defendants.

The declaration is as follows :

"In a plea of the case, for that the said defendants on the 28th day of April, A. D. 1905, were occupying and running mills known as the Bodwell Water Power Company's mills, situated in said town of Milford; and the plaintiffs aver that the defendants were using said mills for the manufacture of box boards and clapboards, and that there was adjacent to and west of said mills on the east bank of the Penobscot River a piece of land used by the said defendants as a common dump in said town of Milford, said mills and dump being located upon lands leased to the said defendants by the Bodwell Water Power Company and situated on the east bank of said Penobscot River. And the plaintiffs aver that the said defendants used said dump in common for the purpose of placing upon it the refuse from their said mills, and thereon burning the same, and on

the day and year last aforesaid the defendants were so using said dump for piling the refuse of said mills, separately used by the said defendants, thereon and burning the same.

"And the plaintiffs aver that whereas according to the law and custom of the land hitherto used and approved, every person, co-partnership or corporation is bound to keep his, their or its fire secure by day and by night so that no damage may accrue to his, their or its neighbors for want of good care of his, their or its fire.

"And the plaintiffs aver that they were on the day and year last aforesaid, and ever since have been, seized and possessed of a lot of land together with the buildings thereon situate in said town of Milford, on the westerly side of Davenport Street in said Milford, about two hundred (200) feet easterly from said mills and said dump used as aforesaid by the defendants.

"And the plaintiffs aver that the said defendants on said 28th day of April, 1905, at said Milford, did rashly and inconsiderately kindle a fire in a pile of refuse piled upon said dump located as aforesaid; and the plaintiffs aver that there were around and about said dump and approximate thereto large piles of lumber belonging to said defendants and other people, and large piles of refuse which were dry and combustible, and the plaintiffs aver that the defendants took no precaution whatever to guard against the fire set by them on said dump on said day, and that they had no hose or men to guard against the spreading of said fire, and that notwithstanding all of which the said defendants did negligently and carelessly set said fire.

"And the plaintiffs aver that said defendants aforesaid wittingly kindled said fire on said dump and on land next adjoining to the plaintiffs' in said town of Milford, and at about the distance of two hundred (200) feet, more or less, from the plaintiffs' said land, and so negligently watched and tended said fire that the said fire came into the plaintiffs' said land and consumed their dwelling house, barn and buildings thereon situate of the value of thirty five hundred (3500) dollars, and personal property contained in said dwelling house, barn and buildings of the value of five hundred (500) dollars, all of which damage and injury to the property

of the plaintiffs was through the negligence and carelessness and want of due care on the part of the said defendants, and through no negligence and want of due care on the part of the plaintiffs.

"And the plaintiffs aver that on said day and year last aforesaid said defendant did negligently and carelessly set fire to a large pile of refuse piled by them on said dump as aforesaid, although being cautioned not so to do, and that then and there with full knowledge of the surrounding conditions, the velocity of the wind and the dryness of the combustibles around and about said dump, said defendants did negligently and carelessly set said fire as aforesaid, which spread from the dump behind the mills where it was set as aforesaid to the home of the plaintiffs as aforesaid, utterly destroying and burning the same to the ground, consisting of the dwelling house, barn and sheds, and most of the personal property therein contained, all of which is to the damage of the plaintiffs, as they say, in the sum of five thousand (5000) dollars.

"Yet though often requested, said defendants have not paid said sum, nor any part thereof, but neglect and refuse so to do, to the damage of said plaintiffs (as they say) the sum of five thousand dollars."

Plea, the general issue. Verdict for defendants. The plaintiffs then filed a general motion for a new trial.

The case is stated in the opinion.

P. H. Gillin, and Harvey D. Eaton, for plaintiffs.

H. H. Patten, Louis C. Stearns, Louis C. Stearns, Jr., and W. H. Powell, for defendants.

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

SPEAR, J. In April, 1905, there were two saw mills on the east side of the Penobscot in the town of Milford owned by the Bodwell Water Power Company, one of which was rented to George W. Barker & Son, the defendants. From underneath these mills a small narrow guage railway track led out and down the east bank of the river for several hundred feet. Its object was to remove waste and it was equipped with several cars for that purpose operated by hand. For

300 or 400 feet at the south end of this railway ran a stone wall which was from four to six feet high on the west side, next the river, and by the steepness of the bank and perhaps some filling, was about even with the surface on the other side. This place was called the dump and the practice for more than thirty years had been to dump waste beside the track along this wall and burn it.

Immediately east of this dump and extending nearly a mile up and down the river, were large lumber yards or piling grounds, where in April, 1905, millions of feet of dry lumber were stuck in piles, some of them nearly thirty feet high. Between the dump and the lumber was a board fence about 200 feet long and fifty feet east of the dump.

Milford Village was located near these piling grounds, the main street running about 500 feet from the river. Shortly after three o'clock in the afternoon of April 28, 1905, a small blaze was discovered under the west end of the pile of boards in the west tier of piles next the west track and about 150 feet northerly from the dump. Mr. Barker, one of the defendants, had been burning waste from both mills, and had a fire then in the dump which was started about one o'clock. The fire which was discovered in a board pile spread to adjoining piles, burned a vast quantity of lumber and destroyed nearly all the little village.

The plaintiffs' residence was among those burned and they have brought this action to recover therefor. From the above statement of facts taken substantially from the plaintiffs' brief they seek to establish two propositions, (1) that the fire in the board pile caught from the dump; (2) that the defendants' negligence was responsible.

The jury found a verdict for the defendants and the plaintiffs filed the usual motion to set it aside.

We should have but little difficulty in determining that the fire was communicated from the dump to the board pile from which spread the conflagration that consumed the village. But the second proposition, the affirmative of which the plaintiffs are required to establish, presents a more troublesome question. The plaintiffs, upon motion, are compelled to present, not only a strong preponderance of evidence of the defendants' negligence, but must assume the

negative of showing that there was no other reasonable inference from all the evidence upon which the jury could act. The burden in this case is a heavy one and we are unable to say that the plaintiffs have sustained it. The determination of this question depends upon all the circumstances in the case, natural and artificial, as they existed and transpired on the 28th day of April, 1905. In view of the whole situation, then, were the jury warranted, if they believed the testimony and saw fit to draw the inference, in finding the following facts in favor of the defendants:

(1) Was the use of the dump, as it existed on the 28th day of April, an exercise of due care? It should be noted that all these matters are to be considered from the jury's point of view.

The evidence shows that a dump with these two mills was considered a necessity. This particular dump, in substantially the same condition as it was April 28, had been used for consuming the waste from these mills for thirty years. During this long period no fire had escaped, and the relation of the board piles to the dump, all these years, had been practically the same as on the day of the fire. From this evidence the dump could not be considered per se a nuisance. We are able to discover nothing in the physical condition of the dump to render its use such an act of negligence, as to require a reversal of the verdict upon this point.

(2) Was the fire sufficiently guarded? It appears that Mr. Barker, one of the defendants, watched the fire from the time it was set until it was discovered in the board pile, with the exception of a period of ten minutes when he was called away. The verdict finds the affirmative of this proposition and must stand.

(3) Were the defendants provided with sufficient men and fire apparatus in view of the duty devolving upon them to anticipate the possibility of fire? No question can be raised as to the adequacy of the number of men. The sufficiency of the hose becomes immaterial in this particular case as the evidence shows a complete want of pressure at the hydrant to which the hose were intended, in case of fire, to be attached. The want of pressure would have rendered any amount of hose useless. The defendants were not responsible for this failure.

(4) Were the weather conditions such, under all the circumstances that the exercise of due care forbid the use of the dump? In this inquiry appear the two vital questions in this case. (1) In view of the drought was it negligence to set the fire; (2) In view of the velocity of the wind at one o'clock p. m., did due care permit it?

(1) With respect to the arid conditions, the testimony shows that seven days before the fire there was a rain fall from eleven o'clock in the morning which continued into the night, and that, previous to this, during the month, there had been snow falls and showers. These facts taken in connection with the time of year, do not disclose such paramount evidence of drought as to warrant a disturbance of the verdict.

(2) The velocity of the wind at one o'clock, at and in the near vicinity of the dump, is the crucial test of due care or negligence in setting the fire. None of the other conditions were materially different from those upon a thousand days when this dump had been used. The only evidence upon this point is the record of the observation automatically registered at the weather bureau at Orono, five miles away, upon the top of a two story building. By this record the wind was blowing on the top of this building at the rate of 13 miles per hour. Abstractly we have but little idea of the breeze this velocity produces. But if we put it in the concrete form of the wind pressure, produced by driving a team or automobile at the speed of thirteen miles per hour, we can readily recall that it is but a gentle breeze. But the evidence is far from proving that the velocity of the wind at the dump was the same as that where the observation was taken. In fact the natural inference is that in a place, situated as these lumber yards and the dump were, the breeze would be impeded and the force of it much less than in an unobstructed place well up in the air. The testimony of the witnesses as to the velocity of the wind between three and four o'clock, after the fire had gotten under some headway, and may have created a draft of its own, was entitled to but little consideration as bearing upon the condition of the wind at one o'clock,

when the alleged negligent act of the defendants was performed. The court cannot say that the verdict upon this point is so clearly wrong as to require reversal.

We have examined this case with great care. What we deem to be the salient points we have briefly alluded to and find no profitable end to be subserved in a further analysis. Under our system of jurisprudence the verdicts of juries are entitled to their legal weight. Due regard for this rule entitles the present verdict to stand.

Motion overruled.

NETTIE ROLFE

vs.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE COMPANY.

Knox. Opinion December 27, 1909.

Insurance. Fire Policies. Riders. Liability. Tender. Revised Statutes, chapter 49, section 4.

1. Under the provisions of Revised Statutes, chapter 49, section 4, to the effect that a fire insurance company may write, or print in type not smaller than long primer, upon separate slips or riders to be attached to the policy, provisions adding to or modifying those contained in the standard form of policy, more than one such modifying provision may be written or printed on the same slip or rider.
2. When a fire insurance company fills the blank space in the standard form of policy, stating the gross amount of indemnity or insurance to be paid, it may at the same time, under the provisions of Revised Statutes, chapter 49, section 4, by a rider attached to the policy, limit the extent of its liability, and the limitation in the case at bar, to two-thirds of the actual destructible value of the property insured is upheld.
3. In the case at bar, the tender made by the defendant is found to have been too small by nine cents, therefore the tender is held to have been insufficient.

4. The word "separate," as used in Revised Statutes, chapter 49, section 4, providing for riders to be attached to policies, "on separate slips or riders" was used to express the idea of something separate from or not physically a part of the policy; something originally distinct, apart from the policy, to be attached thereto.

On report. Judgment for plaintiff.

Assumpsit on a policy of fire insurance with a "rider" attached, issued by the defendant company, and reported to the Law Court on an agreed statement of facts. (See *Rolfe* v. *Patron's Androscoggin Mutual Fire Insurance Company*, 105 Maine, 58.)

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

John A. Morrill, for defendant.

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

SAVAGE, J. This is an action upon a fire insurance policy to recover the indemnity therein provided, and the case comes up on report.

The total amount of the loss by fire has been determined by arbitration as $850. The gross amount for which the policy was issued was $900. But a rider was attached to the policy when it was issued, which contained several independent provisions, among which was this one:—"It is a part of the consideration of this policy and it is especially agreed that the liability of this company hereunder shall not in any case, nor under any circumstances, exceed the sum herein stated, nor more than two thirds of the actual destructible value of the property at the time the loss may happen." The loss was a total one. Therefore it must be assumed that the actual destructible value of the property insured at the time of the fire was the loss as determined by the arbitrators, or $850.

Two questions are presented:—First, whether the plaintiff is entitled to recover, as she claims, the full amount of $850, or only two thirds thereof; and, secondly, whether the tender made by the defendant before suit was sufficient in amount.

The plaintiff claims that the rider was illegal and ineffective, and

that she is entitled to recover the total loss, just the same as if there were no rider. The grounds of her contention are (1) that the rider contained several provisions upon one slip, whereas the statute requires, as she contends, that each rider provision should be on a separate slip, and (2) that the statute did not authorize the defendant company to modify or limit its liability as expressed on the face of the policy in suit, by rider or otherwise; that the company, having written into the policy in the blank left for that purpose the gross amount for which the property was insured as $900, could not, by rider, limit its liability to less than that sum in case the loss amounted to so much. We think neither ground is tenable.

Section 4, chapter 49, of the Revised Statutes contains a form for a standard policy of fire insurance. The same section also contains the following provisions:—"No fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form herein set forth, except as follows: . . . . VI. A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form."

So far as the form of the rider in question is concerned, we are of opinion that the statute does not require a separate slip or rider for each provision adding to or modifying those in the policy. Such an interpretation of the word "separate" in the statute seems to us to be too narrrow. We think that the word "separate" was used to express the idea of something separate from, or not physically a part of, the policy, something originally distinct, apart from the policy, but "to be attached thereto." The excepting clause VI, as a whole, empowered an insurance company either to write additional or modifying provisions upon the margin or across the face of the policy itself, or to write them on slips or riders, separate from the policy, but to be attached to it.

In considering the second ground of objection to the rider, it is not necessary to discuss what, if any, limits in the use of riders are imposed upon fire insurance companies by the standard policy statute, for it is clear to us that, in any event, the modification of

liability stipulated in the rider was one which might properly be made by a rider. The statute does not undertake to prescribe the amount of indemnity for which a company may become liable under a standard policy, with the exception that it is provided that it shall not be liable in excess of the value of the property. The parties are not prohibited from making any agreement they choose with respect to the extent of liability. In the absence of a statutory limitation it would seem that this must necessarily be so. There is a blank in the standard form of policy for the amount of indemnity. That blank the company as the maker of the contract may fill to suit itself. It may say that it will be liable absolutely for a definite amount; or that it will be liable for two-thirds of a certain amount; or for two-thirds of the value, not exceeding a certain amount. It may fill any of these propositions into the blank itself, or, having stated in the blank the extreme extent of the indemnity promised in any event, we think it may modify or limit that indemnity by a rider, so as to make the amount to be paid dependent upon the value of the property. Such a modification seems to come precisely within the language of the statute permitting the use of slips or riders. The effect, in the case of a policy like the one we are considering, would be that if the indemnity named in the blank is no more than two-thirds of the value of the property, the insured, in case of total loss, would get the full indemnity; otherwise, he would be limited to the two-thirds value.

It is therefore the opinion of the court that the rider was a lawful one, both as to form and substance, and that it is to be regarded as a part of the policy. Hence the plaintiff is entitled to recover only two-thirds of the loss as determined by the arbitrators.

Under the terms of the rider on the policy, the amount of the loss was payable upon the expiration of ninety days after the proof of loss was made. As it makes no difference in the result in this case, we assume, for the purposes of the case, that the time of payment could be extended by a rider from sixty days after proof, as required in the standard form of policy, to ninety days. The proof was made October 12, 1906, and accordingly two-thirds of $850, or $566.66 was payable to the plaintiff on January 11, 1907. On

July 18, 1907, the defendant tendered to the plaintiff $584.23. But this was not enough, for there was due on that date, including interest, $584.32. The difference is small, but the plaintiff was entitled to it. The tender was insufficient in amount.

The sum tendered was turned over to the plaintiff at the time the agreed statement was filed, and by agreement it is to be credited on the final judgment, as of that date. Accordingly the entry will be,

Judgment for the plaintiff for $566.66 with interest thereon from January 11, 1907, on which judgment is to be credited $584.23 as of the date of the filing of the agreed statement.

In Equity.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY

vs.

AUBURN AND TURNER RAILROAD COMPANY.

Androscoggin. Opinion February 9, 1910.

Sales. Conditional Sales. Seller's Lien. Revised Statutes, chapter 113, section 5.

Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption, and permitting foreclosure of the same as chattel mortgages, applies to an agreement of sale whereby title was retained until payment of notes for the purchase price.

Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption and permitting foreclosure of the same as chattel mortgages, gives the buyer a right to redeem after condition broken, which right continues until the seller forecloses in the manner provided for foreclosing chattel mortgages.

Under Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption and permitting foreclosure of the same as chattel mortgages, the seller can sue

for the debt and also enforce his lien, concurrently or successively, and is entitled to possession as a means of enforcing payment, there being no contrary provision in the contract.

In equity. On exceptions by plaintiff. Sustained.

Bill in equity brought by the plaintiff against the defendant corporation for the appointment of a receiver and adjustment of claims due and owing various creditors from the defendant corporation. The case is stated in the opinion.

White & Carter, for Westinghouse Elec. & Mfg. Co.

S. Merritt Farnum, for Gould Storage Battery Co.

Hight & Hight, for American Trust Co.

Harry Manser, for Auburn & Turner R. R. Co.

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

SPEAR, J. This is a bill in equity brought by the plaintiff, a creditor, against the defendant, seeking the appointment of a receiver to determine and liquidate its affairs. A receiver was appointed to take charge of the defendant company and a master selected to examine and report the condition of its accounts. Among the claims presented in addition to that of the plaintiff, was one by the Gould Storage Battery Company for the conditional sale of an electrical apparatus for $6400 for which a note of the defendant was given and endorsed by Edgar S. Hill and Frank W. Dana. The contract of sale duly executed by the Battery Company and the defendant company contained the following stipulation: "The title to the apparatus sold shall not pass from the Battery Company until payments herein (including deferred payments and any notes and renewals thereof if any) shall have been fully made in cash. The purchaser agrees to do all acts necessary to perfect and assure such retention of title in the Battery Company."

"Terms of payment: Nine (9) months from date of invoice, to be secured by note of the Auburn and Turner Railroad, bearing interest at five (5) per cent, and endorsed by Mr. Frank W. Dana."

After it became due suit was brought upon the note and on the 16th day of February, 1907, judgment was recovered in the Supreme

Judicial Court for the county of Androscoggin against the defendant and the endorsers for the sum of $6843.55. The claim of the Westinghouse Electric & Mfg. Co. was also based upon a judgment.

Upon this state of facts, reported by the master, the plaintiff and the Gould Storage Battery Company, petitioned the court among other things, to "declare and establish the title of your petitioner by virtue of said contract to the electrical apparatus and merchandise therein described." The sitting Justice declined to grant the petition, and held that "under the terms of the contract, upon default, the claimant had an election of rights and remedies. It has a right to reclaim the property, and this would have been an election to treat the transaction as no sale. Or, it had a right to bring an action for the price, and this, I think, at least, if the action was pursued to judgment, would have been an election to affirm the same." Upon exceptions to this ruling the case is before us.

From the opinion of the sitting Justice his ruling would appear to be based on the theory that the transaction was a mere common law conditional sale, unaffected by any statute. We think, however, that under our statute, R. S., ch. 113, sec. 5, the vendor retained, not the entire title, but practically only a lien on the property as security for the promise of the vendee to pay the agreed price, and hence that we have no occasion to consider what would be the rights of the parties to a conditional sale. The statute makes the authorities cited in support of the ruling inapplicable to this case. The statute (R. S., ch. 113, sec. 5) is as follows:

"No agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby. And when so made and signed, whether said agreement is, or is called a note, lease, conditional sale, purchase on installments, or by any other name, and in whatever form it may be, it shall not be valid, except as between the original parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase. The fee for recording the same shall be the same as that for recording mortgages of personal property. All such property, whether said

agreements are recorded or not, shall be subject to redemption and to trustee process as provided in section fifty of chapter eighty-eight, but the title may be foreclosed in the same manner as is provided for mortgages of personal property." The language is comprehensive enough to include a transaction like that in this case. By the statute the vendee has the right of redemption after condition broken which right continues till the vendor forecloses the right in the manner provided for foreclosing chattel mortgages. Practically, therefore, the right of the vendor is that, and only that, of a mortgagee of personal property under a chattel mortgage given as security for a debt. He can attempt the collection of his debt by suit and also by enforcing his mortgage security concurrently, or successively. *Whitlock Machine Co.* v. *Holway*, 92 Maine, 414.

In these cases the debt has not been paid though over due and the vendors (there being in the contract no stipulations to the contrary) are entitled to the possession of the property as prayed for as a means of enforcing the payment of the debt.

It was said by the sitting Justice, "In essential particulars this claim," meaning the Westinghouse claim, "does not differ from that of the Gould Storage Battery Co." We concur in this conclusion, and therefor the same rules of law govern the decision of both cases, and the entry in both cases must be,

Exceptions sustained.

JULIUS MUSKIN *vs.* ABRAHAM LAZAROVITCH.

Cumberland. Opinion January 29, 1910.

Sales. Conditional Sales. Title of Vendor. Replevin. Chattel Mortgages. Revised Statutes, chapter 113, section 5.

1. Since the amendment of the statute of frauds, R. S., chapter 113, section 5, an unrecorded agreement that the title in chattels delivered under a conditional sale shall remain in the vendor until payment is of no avail, against a purchaser or mortgagee in good faith of the chattels from the vendee.
2. When chattels are taken upon a writ of replevin, the owner of the chattels if a stranger to the writ can maintain an action against the plaintiff in replevin for their value.
3. The mortgagee of chattels under a duly recorded mortgage can maintain an action therefor, at least up to the amount of his claim thereon, against one who takes them upon a writ of replevin against the mortgagor alone even if the mortgage has not been foreclosed.

On motion and exceptions by defendant. Overruled.

Trespass brought in the Superior Court, Cumberland County, for taking and carrying away certain goods and chattels alleged to belong to the plaintiff. The writ also contained a trespass quare clausum count. Plea, the general issue with a brief statement alleging in substance that the goods and chattels were taken and carried away under and by virtue of a replevin writ duly and previously sued out by the defendant against one Tatilbum and in which said suit the defendant recovered judgment. Verdict for plaintiff for $100. The defendant then filed a general motion for a new trial and also excepted to several rulings made during the trial. See *Lazarovitch* v. *Tatilbum*, 103 Maine, 285, also *Muskin* v. *Moulton*, 104 Maine, 557.

The material facts are stated in the opinion.

Dennis A. Meaher, and Augustus F. Moulton, for plaintiff.

George S. Murphy, and Connellan & Connellan, for defendant.

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

EMERY, C. J. The case is this: The plaintiff had a duly recorded mortgage of certain chattels from one Tatilbum, in whose possession they were. The defendant had a claim upon the same chattels by assignment from Tatilbum's vendor by a conditional sale in the form of a lease, but this claim or lease was not recorded as required by R. S., ch. 113, sec. 5, and hence was of no avail against the plaintiff. The defendant, however, replevied the chattels upon a replevin writ against Tatilbum alone and recovered judgment. The plaintiff now brings this suit against the defendant for the value of the chattels, the mortgage debt not having been paid.

The jury found that the plaintiff's mortgage was a subsisting one given in good faith for security for an actual debt, and we find enough evidence to support the verdict on this issue. It also appears in evidence that the defendant personally accompanied the officer and specifically directed him to take the chattels upon the replevin writ, that the officer did so and delivered them to the defendant who refused to give them up on demand for them by the plaintiff. The verdict was for the plaintiff for a sum less than the mortgage debt remaining unpaid.

As to the exceptions, the question presented is whether upon the foregoing facts the plaintiff can now maintain an action for the value of the mortgaged chattels (at least up to the amount of the mortgage debt remaining unpaid) against the now defendant who was the plaintiff in the replevin action. We see no reason why he cannot. True, we held in *Muskin* v. *Moulton*, 104 Maine, 557, that such an action could not be maintained against the officer who in obedience to his writ took the chattels which he found in possession of the defendant in the replevin action. The plaintiff in replevin, however, has no such immunity from action. He does not act in obedience to any writ or other lawful command. He sets the writ in motion of his own volition and thereby becomes liable for any injury done by reason thereof to any person not a party to

the writ to whom he has given no indemnifying bond. He cannot by replevying chattels from one person deprive other persons of the right to assert their claims by actions of trespass or trover for the value.

It was not necessary for the plaintiff to foreclose his chattel mortgage before bringing his action against a stranger to the mortgage, as the defendant was. As to the defendant, the plaintiff was the owner of the chattels.

Motion and exceptions overruled.

ABNER R. SANFORD *vs.* MARSHALL KIMBALL.

York. Opinion January 31, 1910.

Bailment. Bailor's Negligence. Burden of Proof. New Trial. Verdict.

One suing for negligence of a bailee, not a common carrier, has the general burden to prove the negligence; proof of the bailment and failure to return on demand placing the burden on the bailee to explain the cause by showing loss by fire or theft, or injury by accident or otherwise, whereupon the bailor must show that the loss or accident resulted from the bailee's negligence.

The hirer of a horse, to avoid liability for its injury, was not bound to show how the injury was received; it being sufficient to show that the injury was mysteriously inflicted at night, whereupon the owner was bound to show the hirer's negligence.

Whether a horse was injured through the hirer's negligence *held* under the evidence, a question for the jury.

On motion for new trial, the instructions will be presumed to have been proper, in the absence of exceptions thereto.

A verdict on a properly submitted issue should not be lightly set aside.

On motion by plaintiff. Overruled.

Action on the case for negligence in the use and care of the plaintiff's horse. The writ contained a count in trover and also a count as follows:

"In a plea of the case, for that the said plaintiff, at said Kennebunk, heretofore, to wit, on the fifteenth day of August, A. D. 1908, did deliver to said defendant, a certain horse of the plaintiffs, called Prince, to work on said defendant's farm in Kennebunk, aforesaid, and the plaintiff avers that said Kimball thereafterwards, to wit, on the twenty-sixth day of August, A. D. 1908, at said Kennebunk, so carelessly and negligently used and cared for said horse, that said horse received a severe injury to his leg and that then and thereafterwards by reason of said injury and negligent use and care of said horse, and want of proper care thereof, by said defendant, after said injury, said horse thereafterwards by reason thereof, died, to the damage of said plaintiff, as he says, the sum of five hundred dollars."

Plea, the general issue. Verdict for defendant. The plaintiff then filed a general motion for a new trial.

The facts, so far as material, are stated in the opinion.

Asa A. Richardson, and George F. & Leroy Haley, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

CORNISH, J. Action on the case for negligence in the use and care of the plaintiff's horse by the defendant. The jury returned a verdict for the defendant and the case is before this court on the plaintiff's motion to set aside the verdict as against the law and the evidence.

The material facts are not in dispute. In the summer of 1908, the parties agreed to exchange work in haying, with teams and men. Under that agreement the plaintiff let the defendant have the horse in question on August 13. On August 25, the plaintiff went after the horse but as the defendant had not finished haying it was agreed that the defendant should keep him another day and return him on the afternoon of the 26th. The defendant used the horse in haying on the afternoon of the 25th, put him in the barn, fed him

about 6.30 P. M. and left him for the night unhitched in his sixteen feet square pen or box stall. The next morning the defendant found the horse in the same place where he had left him the night before with a clean cut three or three and one-half inches long and from one to one and a half inches deep, across the upper part of the off forward leg. The wound was not bleeding and there were no traces of blood on the floor of the barn or in the stall, although there were marks of blood on a pail, as if the wound had been washed by some one. The defendant testified that he carefully examined the barn to ascertain if possible the cause of the injury, but found nothing, and he was entirely ignorant as to how the injury was inflicted, whether by accident or design. The wound was treated once by the plaintiff and subsequently by the defendant and his hired man, but after about ten days death ensued.

It is settled in this State, whatever the doctrine may be elsewhere, that in an action of negligence against a bailee, not a common carrier, the general burden of proving negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he has ordinarily made a prima facie case and it is then incumbent on the bailee to explain the cause of the refusal, as by showing the loss of the property by fire or theft; or its injury by accident or otherwise. It then devolves upon the plaintiff to show that such fire or theft or accident was due to the failure of the bailee to use such a degree of care of the property as under the circumstances the law requires. The final burden is on the bailor to prove negligence, not on the bailee to prove due care, *Mills* v. *Gilbreth*, 47 Maine, 320; *Dinsmore* v. *Abbott*, 89 Maine, 373; *Buswell* v. *Fuller*, 89 Maine, 600; *Bradbury* v. *Lawrence*, 91 Maine, 457. The plaintiff, however, contends that it devolved upon the defendant to satisfactorily explain how the injury was received and in absence of such satisfactory explanation his liability follows. The law does not require so much, amounting in this case to an impossibility, because the cause or source of this injury is admitted to be a mystery. If the plaintiff's contention were true, the liability of the bailee in cases where the causes of the injury are unknown, would rise to that of an insurer. It was only incumbent upon the

defendant to explain the circumstances and to give the reason why the horse was not returned to the plaintiff. He need go no further. This was done and it then became the province of the jury, under proper instructions, to determine whether or not the defendant was negligent, either in connection with the injury or in its subsequent treatment. No exceptions were taken to the charge of the presiding Justice so that it may be assumed that proper instructions were given. On the facts, the jury have found in favor of the defendant and we see no reason to disturb their verdict. The matter was one peculiarly within their experience, and their judgment upon such a question should not be lightly set aside. A careful reading of the testimony in this case, however, approves rather than disapproves their conclusion.

Motion overruled.

STATE OF MAINE *vs.* ALBERT PELOQUIN.

Androscoggin. Opinion January 31, 1910.

Indictment. Criminal Law. Presumptions. Judicial Notice. Terms of Court. Intoxicating Liquors. Nuisance. Revised Statutes, chapter 22, section 1.

The "date of the finding" of an indictment is the date of its return and presentation to the court.

Where the record fails to show when an indictment was returned, it will be presumed to have been returned after the beginning of the term and before arraignment.

The Supreme Judicial Court being a court of general jurisdiction, its procedure is presumed to have been regular, in the absence of competent evidence to the contrary, and hence an indictment will be presumed to have reached the clerk through the proper channel.

Since a conviction or acquittal of maintaining a liquor nuisance during a given period bars subsequent prosecution based on the same period, an indictment must specifically allege the time relied on with certainty.

The court takes judicial notice of the dates of its terms.

An indictment is presumed to have been found at the first day of the term, in the absence of proof to the contrary.

The date of the finding of an indictment specified in its caption is not conclusive, and it may be shown by competent evidence, including other records of the court, that the indictment was found at a later date.

An indictment charging the keeping of a liquor nuisance between a specified date and the date of the finding of the indictment was sufficient to cover the period between the specified day and the first day of the term at which the indictment was found.

On exceptions by defendant. Overruled.

Indictment against defendant for keeping and maintaining a liquor nuisance in violation of Revised Statutes, chapter 22, section 1. Plea, not guilty. Verdict guilty, "and the defendant was sentenced to pay a fine of two hundred dollars and costs and to serve four months in jail and in default of payment of fine and costs to serve six months additional in jail." The defendant excepted to certain rulings made during the trial.

The case is stated in the opinion.

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

H. E. Holmes, for defendant.

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

CORNISH, J. The respondent was indicted at the September term, 1909, of the Supreme Judicial Court of Androscoggin County, for keeping and maintaining a liquor nuisance in violation of R. S., ch. 22, sec. 1. He was arraigned, pleaded not guilty, was tried and convicted. The indictment was in the usual form, and alleged that "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 nine, the grand jurors for said State upon their oath present that Albert Peloquin of Lewiston in said County of Androscoggin, on the first day of May, 1909, and on divers other days and times between that day and the day of the finding of this indictment, at Lewiston, etc., did keep and maintain," etc. The respondent objected to the admission of all evidence in support of the charge in the indictment, except evidence of doings on the first day of May, 1909, unless the State should first prove the date of the find-

ing of the indictment by the grand jury. To the overruling of this objection and the admission of evidence on the part of the officers as to conditions during the month of July, 1909, and to the instructions of the presiding Justice that the indictment covered the period between May 1, 1909, and the beginning of the September term of court viz, the third Tuesday of September, 1909, the respondent excepted and on these exceptions, which involve but a single question of law, the case is before this court.

The argument of the respondent is that as the time of finding an indictment by a grand jury is the time when it is returned and presented to the court, and as the grand jury is not shown to have made any report in this case, therefore there is no date at which the finding can be said to have been made, and none which could mark the end of the period covered by the indictment and therefor all evidence must be confined to May first, the beginning of the period. This contention is without merit, as the conclusion does not follow from the premise. It is true that the date of finding an indictment is the date of its return and presentation to the court, but independent of any record as to the precise date of such return, the presence of the indictment in court, for the arraignment and trial of the accused is sufficient evidence that it has been so returned at some time after the beginning of the term and prior to such arraignment. This court being a superior court of general jurisdiction, it is to be presumed, in the absence of competent evidence to the contrary, that the procedure has been regular and that the indictment has reached the hands of the clerk from the grand jury through the proper and legal channel. No such evidence has been introduced in this case and the presumption stands unassailed.

Was the construction put upon the allegation "the day of the finding of this indictment" exceptionable? It certainly was not prejudicial to the respondent. The first day of the term was fixed as the end of the period and no evidence could be introduced of acts done after that time, although the indictment may not in fact have been found until some days later. Any advantage was in favor of the respondent. But the ruling was correct as well as non-prejudicial.

In offenses like that charged in this case it is of course necessary to allege the time with certainty. Since a conviction or acquittal of maintaining a nuisance during a given period of time operates as a bar to a second prosecution for the same offense during the same period, it is essential to the rights of the respondent that the period be alleged with exactness. But the allegation in this case meets that requirement. May first, 1909, is the beginning of the period and "the day of the finding of this indictment" is the end. The court takes judicial notice of the dates of its terms. The grand jury may complete their work and report the first day or they may remain in session several days and report at a later date or they may make a special report of certain indictments before their final report is made. The indictment in this case purports to have been found on the first day of the term namely the third Tuesday of September, and there is no evidence in the case to show the contrary. In the absence of such evidence that date is to be taken as the date of the finding and makes certain the end of the period covered by the indictment. This precise question as to uncertainty was raised in *Commonwealth* v. *Wood*, 4 Gray, 11, where the court disposed of the objection in these words: "We are of opinion that, according to the uniform practice of our courts, where there is nothing on the record showing the contrary, the time of finding the bill is to be taken to be the first day of the term of the court. Such indeed is the form of the caption to all indictments. When therefore an averment is made, that an offense was committed between a day certain and the day of finding the indictment, and there is nothing on the record showing the day when the indictment was found, it is equivalent to an averment that it was committed between the first day alleged and the day on which the term of the court commenced."

The practice in the courts of this State has been as uniform as in Massachusetts in this respect, and the same reasonable construction should prevail.

The date in the caption is not however, conclusive. Competent evidence may be introduced, as by other records of the court, to show that an indictment was in fact found on a later day than the first.

Commonwealth v. *Stone*, 3 Gray, 453; *Commonwealth* v. *Colton*, 11 Gray, 1; *Commonwealth* v. *Hines*, 101 Mass. 33.

In accordance with this principle the certificate of the clerk of court was admitted in *State* v. *Brownrigg*, 87 Maine, 500, to show that an indictment for liquor nuisance found at the October term 1893, of the Supreme Judicial Court for Waldo County was in fact found, not on October 17, the first day of the term, and the date of its caption, but on October 31st, and therefore it was held that a subsequent indictment for the same offense found at the April term, 1894, and covering the period from October 17, 1893, to the date of its finding could not be maintained, a plea in bar having been interposed, because the second indictment covered a portion of the same period embraced in the first, namely, from October 17 to October 31. This decision is confidently relied upon by the respondent but it is in entire harmony with our conclusion in the case at bar. The admission of the testimony and the instructions in this case were free from error and the entry must be,

Exceptions overruled.

In Equity.

CANADIAN PACIFIC RAILWAY COMPANY

vs.

MOOSEHEAD TELEPHONE COMPANY.

Piscataquis. Opinion January 31, 1910.

Telegraphs and Telephones. Erection of Poles on Railroad Right of Way. Eminent Domain. Compensation. Injunction. Constitution of Maine, Article 1, section 21. Statute 1885, chapter 378; 1895, chapter 103. Revised Statutes, chapter 51, section 31; chapter 55, sections 11, 24.

1. The legislature has the power to authorize a telephone corporation to construct its lines upon the right of way of a railroad corporation.
2. The right of a telephone line to construct its lines upon the right of way of a telephone company is not to be presumed from a grant of a general power of eminent domain. Such a right exists only when granted expressly or by necessary implication.
3. When a telephone company is authorized by statute, as by Revised Statutes, chapter 55, section 24, to construct and maintain its lines "upon or along a railroad," it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose.
4. The location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner of the fee and the owner of the easement of the right of way are entitled to compensation. And the legislature cannot constitutionally authorize such a location unless it makes provision for that just compensation which the constitution secures when private property is taken for public uses.
5. Revised Statutes, chapter 55, section 24, provides that a telephone company "may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such company cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along or across the same, either party may apply to the railroad commissioners, who after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties," but it makes no provision for compensation to the owner of the fee or of the railroad right of way. Act-

ing under this statute, the railroad commissioners, upon the defendant's petition, granted it the right to construct its lines upon the plaintiff's right of way. The defendant's lines were constructed accordingly. The defendant had instituted no condemnation proceedings against the railroad land under Revised Statutes, chapter 55, section 11, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines," and that "land may be so taken, and damages therefor may be estimated, secured determined and paid for as in case of railroads." Upon these facts it is held that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way, and that the plaintiff is entitled to an injunction.

In equity. On report. Bill sustained. Permanent injunction to issue.

Bill in equity brought by the plaintiff to enjoin the defendant telephone company from maintaining its poles and wires upon the plaintiff's right of way. The defendant answered and the cause was then heard on bill, answer and evidence and at the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

E. C. Ryder, for plaintiff.

Hudson & Hudson, for defendant.

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

SAVAGE, J. By this bill in equity the plaintiff seeks to enjoin the defendant telephone company from maintaining its line of poles and wires upon the plaintiff's right of way. The defendant contends that it is so maintaining them under statute authority. The case comes up on report.

The defendant corporation was organized in 1900 under the general law for the organization of telephone companies, Stat. 1895, c. 103, but it does not appear to have taken any steps affecting the plaintiff's right of way until 1904. Its right to do so, therefore, must be determined by the statutes in force in 1904. Chapter 378 of the Public Laws of 1885, and chapter 103 of the Public Laws of 1905, which are cited by the defendant as the source of its authority, except so far as incorporated in the revision of 1903,

were expressly repealed by the general repealing act in the present Revised Statutes, page 1015. The defendant's right, if any, must be found in chapter 55 of the Revised Statutes. Section 24 of that chapter provides that "such (telephone) company . . . . may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such company cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along or across the same, either party may apply to the railroad commissioners, who, after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties."

In 1904 the defendant alleging that it could not agree with the plaintiff railway company as to the construction, maintenance and operation of its line along the plaintiff's right of way, and that the plaintiff had unreasonably refused its consent, petitioned the railroad commissioners, as provided in section 24, which we have quoted, to determine the manner in which its line should be constructed, maintained and operated along the plaintiff's right of way. Upon this petition, after hearing, the railroad commissioners, in terms, granted the defendant the right to construct, maintain and operate its telephone line upon the plaintiff's right of way between Greenville Junction and Holeb Station, and prescribed the manner in which the line should be constructed. Thereafter the defendant constructed and has since maintained a telephone line of poles and wires upon the plaintiff's right of way, in accordance with the decree of the railroad commissioners.

The plaintiff contends (1) that the right to construct and maintain a telephone line over its right of way can be acquired, in invitum, only by an express and explicit grant of the right of eminent domain for that purpose; (2) that section 24 of chapter 55 of the Revised Statutes under which the defendant justifies, does not contain any such express and explicit grant; and if it does, (3) that it makes no provision for compensation to the railroad for the land taken, and is therefore unconstitutional.

It is not denied that the legislature has power to enable a telephone corporation to construct its lines upon the right of way of a railroad corporation. *Eastern R. R. Co.* v. *Boston & Maine R. R.*, 111 Mass. 125; *Postal Tel. Co.* v. *Oregon, etc., R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705; Lewis on Eminent Domain, sect. 269. It should be observed that Mr. Lewis, when he says in the section just cited that "a telegraph may be established along a railroad right of way, it being no material interference with the use for railroad purposes," is speaking of the right of condemnation with compensation, and not of the right of using without condemnation or compensation. But it is claimed that the right in such cases is not to be presumed from a grant of a general power of eminent domain, and that it exists only when granted expressly or by necessary implication. Such is the general rule. *Housatonic, etc., R. R. Co.* v. *L. & H. R. R. Co.*, 118 Mass. 391; *Prov. & Worcester R. R. Co., Pet'r*, 17 R. I., 324; Lewis, Em. Dom. sect. 267; 15 Cyc. 623.

But we think that, so far as the question of authority is concerned, when a telephone company is authorized by statute to construct and maintain its lines "upon or along a railroad" it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose. The use of words like "take" or "take and hold" is not essential. If it so constructs its lines it necessarily so far takes the right of way, and authority to "construct" is necessarily an authority to "take." *St. L. & C. R. R. Co.* v. *Postal Telegraph Co.*, 173 Ill. 508; *Postal Telegraph Cable Co.* v. *Farmville & Powhattan R. R.*, 96 Va. 661; *So. Carolina, etc., R. R. Co.* v. *American Tel. Co.*, 65 S. C. 459; 15 Cyc. 625. This differs from the use of the general words "to take and hold" land, from which no necessary implication arises that the power may be exercised upon land already devoted by the State to public uses, in that the statute explicitly authorizes the using, and therefore, the taking, of a railroad right of way.

But while the power of the legislature is plenary in this respect, it cannot constitutionally exercise this power unless it makes provision for that just compensation which the constitution secures

when private property is taken for public uses. Const. Art. 1, sect. 21. The location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner is entitled to compensation. *At. & P. Tel. Co.* v. *Ch. R. I. & P. R. R. Co.*, 6 Biss. 158; *Am. Tel. Co.* v. *Smith*, 71 Md. 535; *Southwestern R. R. Co.* v. *Southern & A. Tel. Co.*, 46 Ga. 43; *Mercantile Trust Co.* v. *At. & P. R. R. Co.*, 63 Fed. 513; *Postal Tel. Co.* v. *Oregon, etc., R. R. Co.*, 23 Utah, 474; 90 Am. St. Rep. 705; Lewis, Em. Dom. sect. 141 a; 2 Wood on Railroads, 864. Though the railroad property is devoted to public uses, the owner of the right of way has a private right of property which is protected. *At. & P. Tel. Co.* v. *Ch. R. I. & P. R. R. Co.*, 6 Biss. 158; *Southwestern R. R. Co.* v. *Southern & A. Tel. Co.*, 46 Ga. 43. And this is true whether it owns the land in fee, or merely the easement of a right of way. Lewis, Em. Dom. sect. 141 a; 2 Wood on Railroads, 864; *At. & P. Tel. Co.* v. *Ch. R. I. & P. R. R. Co.*, 6 Biss. 158. The principle is the same as when a highway is authorized to be laid out across a railroad; *Old Colony & Fall River R. R. Co.* v. *County of Plymouth*, 14 Gray, 155; or when one railroad is authorized to cross another, *Mass. Cent. R. R. Co.* v. *B. C. & F. R. R. Co.*, 121 Mass. 124; *Lake Shore, etc., R. R. Co.* v. *Cincinnati, etc., R. R. Co.*, 30 Ohio St. 604; *Ch. & A. R. R. Co.* v. *Joliet, etc., R. R. Co.*, 105 Ill. 388, 44 Am. Rep. 799. It is not an objection to the application of the principle that the damages are merely nominal. The railroad company has a right to be heard upon that question.

It follows that the statutory authority to construct its line on the plaintiff's right of way, under which the defendant claims to have acted, was nugatory, unless the statute itself, or some other statute so connected with it as to be regarded as in pari materia with it made provision for compensation to the defendant. Lewis, Em. Dom. sect. 452; *Cushman* v. *Smith*, 34 Maine, 247; *Thatcher* v. *Dartmouth Bridge*, 18 Pick. 501.

It is very clear that section 24 of chapter 55 of the Revised Statutes upon which the defendant basis its authority makes no

provision for compensation. Under that section the railroad commissioners had power only to determine as to constructing the line, and the manner thereof. There is no word which relates to compensation.

The defendant, however, contends that this omission is supplied by section 11 of the same chapter, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines. Land may be so taken and damages therefor may be estimated, secured, determined and paid for as in case of railroads." The answer to this proposition is that it is manifest that the defendant had not proceeded, nor has it attempted to proceed, under section 11. It has not taken the land by any legal proceeding contemplated by that section, for it has not pursued any of the steps required in the case of railroads. R. S., c. 51, sect. 31. The general power to take lands granted by section 24 would not, as we have already seen, be sufficient to authorize the defendant to construct its lines upon the plaintiff's right of way. But if it is considered, which we do not decide, that section 24 is to be interpreted in connection with section 11, and that so interpreted, section 24 supplies the authority to construct upon the railroad's right of way, which is wanting in section 11, and that section 11 supplies the compensation features which are wanting in section 24, it still remains true that the telephone company must by proper condemnation proceedings under section 11 "take" the right of way, and pay the compensation to be ascertained as in the case of railroads. This it has not done and could not do under section 24, under which alone it has acted.

The result is that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way. And in such case, injunction is an appropriate remedy. Lewis on Eminent Domain, sect. 452, and cases cited. See also *Peirce* v. *Bangor*, 105 Maine, 413.

Lastly, it is contended that the plaintiff is barred by laches. If this point were otherwise tenable against the plaintiff's clear legal right, it is sufficient to say that the record in this case discloses no facts which warrant its application. The case does not show when

the telephone line was constructed. But it shows that at the hearing before the railroad commissioners in 1904 the plaintiff protested against the defendant's procedure under section 24. It objected to the construction of the line later. It does not appear to have slept upon its rights. Its claim is neither stale nor inequitable.

Bill sustained with costs.
Writ of permanent injunction to issue as prayed for.

STATE OF MAINE *vs.* SAMUEL D. CROCKER.

Penobscot. Opinion January 31, 1910.

Indictment. Demurrer. Perjury. Revised Statutes, chapter 123, section 4.

1. A demurrer does not oblige the court to assume to be true what is manifestly untrue.
2. When in an indictment for perjury is set out the entire testimony of the defendant and all of it is alleged to be material and false when parts of it are manifestly immaterial or not false the indictment does not sufficiently apprise the defendant of the real charge against him, and is therefore insufficient to require him to answer.

On exceptions by defendant. Sustained.

At the August term, 1908, Supreme Judicial Court, Penobscot County, an indictment was returned against the defendant for perjury. The defendant demurred to the indictment, the demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

H. H. Patten, County Attorney, for the State.

Fellows & Fellows, for defendant.

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

EMERY, C. J. This indictment for perjury, is as to form, substantially that permitted by the statute, R. S., ch. 123, sec. 4; but in setting "out the matter sworn to and alleged to be false" the entire testimony of the defendant in the proceeding referred to is set out from the statement of his name to the last answer upon the final cross-examination and occupying twenty-two printed pages. The indictment contains no assignment of perjury in any part of the testimony, but charges the whole to be material and false. If it be said that the demurrer admits all this testimony to be material and false, the answer is that much of the testimony so set out is upon its face immaterial, and no admission can make it material. It is the same as to the allegation of falsity. It cannot all be false. The demurrer does not require the court to assume to be true what is manifestly untrue.

It is evident that the indictment does not sufficiently apprise the defendant of the real charge against him, of what part of his testimony the State proposes to show to be material and false. It is bad for uncertainty. *State* v. *Ela*, 91 Maine, 309; *State* v. *Rowell*, 72 Vt. 28.

Exceptions sustained.
Demurrer sustained.
Indictment adjudged bad.

ANNETTE J. MCALLISTER

vs.

DEXTER AND PISCATAQUIS RAILROAD COMPANY.

Piscataquis. Opinion February 1, 1910.

Dower. Divorce. Action of Dower. Demand. Description. Detention. Damages. Statute 1895, chapter 157, sections 9, 11. Revised Statutes, 1883, chapter 51, section 16; chapter 60, section 9; chapter 103, sections 14, 19; 1903, chapter 105, sections 2, 3, 4.

1. A widow, in 1891, unless she had barred her right, was dowable in land, not taken by right of eminent domain, but purchased by a railroad company, during the coverture, from her husband, in a case where the land lay outside of the location of the railroad right of way, and was bought for and used as a gravel pit.
2. A woman divorced from her husband in 1891 for his fault, other than impotence, was dowable in his lands, and in lands owned by him during coverture, but conveyed previous to the divorce, and in which she had not barred her dower right, the same as if she had then become his widow.
3. Upon the granting of a divorce, in 1891, to a woman for the fault of her husband, other than impotence, her dower right became consummate. And even if it was not assigned, it became a vested property right of which she could not constitutionally be divested by a repeal of the statute which gave her that right.
4. A consummate right of dower existing either in a widow, or a divorced wife, when the statute of 1895, chapter 157, enlarging the dower right to an estate in fee, was enacted, was not destroyed nor in any way affected by that statute.
5. In an action of dower, non-tenure must be pleaded in abatement, and not in bar.
6. In an action of dower, the want of a sufficient demand must be specially pleaded.
7. When the tenant of the freehold is a corporation a demand for dower must be in writing. It is sufficient if such written demand of the dowress is signed in her name by her attorney.
8. The description of the land in a written demand for dower may be in terms, or by reference to a recorded deed under which the tenant claims.

9. A demand for dower in two parcels is not vitiated because the demandant is entitled to dower in only one of them, and sues for dower in that one only.

10. If an attorney having authority to make demand for dower in one parcel, makes demand for two, the demand is not vitiated as to the authorized parcel.

11. It is not necessary in a demand for dower that the demandant should state whether she claims dower in one-third of the premises or in one-half.

12. The damages to which a dowress is entitled for the detention of dower from the time of demand to the commencement of suit is not measured by the use which the tenant made of the land, but by the profits which would reasonably have accrued from its use during the period. It is not shown that the damages awarded by the jury in this case are clearly excessive.

On motion and exceptions by defendant. Overruled.

Action of dower. The declaration is as follows:

"In a plea of dower, wherein the plaintiff demands against the said defendant her dower of and in a certain lot or parcel of land situated in Dover in the County of Piscataquis and State of Maine, the same which was conveyed to said Dexter and Piscataquis Railroad Company by Frank B. McAllister of said Dover by his deed dated the fifteenth day of June, A. D. 1889, for a gravel pit for said Railroad Company, being the second parcel mentioned in said deed, and described as follows: (Description omitted in this report.)

"Whereupon she complains and says that heretofore, to wit, on the twenty-third day of September, A. D. 1885, said Frank B. McAllister was intermarried with the plaintiff; and that said Frank B. McAllister was seized in fee of the said premises during his coverture with said plaintiff. That at a term of the Supreme Judicial Court held at said Dover on the third Tuesday of September A. D. 1891, said plaintiff was granted a decree of divorce from said Frank B. McAllister from the bonds of matrimony for his fault, and that since said divorce was had, to wit, on the twentieth day of July, A. D. 1908, more than sixty days before the purchase of this writ, she demanded of the said defendant the Dexter and Piscataquis Railroad Company, then and ever since the tenant of the freehold of the said premises, in writing, by giving said written demand in hand unto L. P. Evans the Clerk of said Company, to assign and set out to her reasonable dower in said premises, which said defend-

ant refused to do, but has kept her out and still keeps her out of the same.

"The plaintiff also claims to recover in this suit reasonable damages for the detention of her dower, from the time of said demand to the time of the commencement of this action, which the plaintiff alleges amounts to one thousand dollars, all which is to the damage of the plaintiff as she says, the sum of ten thousand dollars.

"Yet though often requested, said defendant has not paid said sum nor any part thereof, but neglects and refuses so to do, to the damage of said plaintiff (as she says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein."

Plea, the general issue as follows: "And now comes the defendant and says that the demandant and the said Frank B. McAllister were never accoupled together in lawful matrimony, and this it is ready to verify." The defendant also filed a brief statement denying that the plaintiff had any right to dower, or any right to have dower set out. The plaintiff then filed a replication alleging that she was lawfully married to Frank B. McAllister and was afterwards divorced from him for his fault, and that she was entitled to have her dower in the premises described in the writ set out to her, etc.

Tried at the September term, 1909, Supreme Judicial Court, Piscataquis County. After the evidence was all in the Justice presiding ruled pro forma, as a matter of law, that the plaintiff was entitled to dower in the premises described in the writ, and submitted the question of damages to the jury, to which ruling the defendant excepted. The verdict was for the plaintiff for $100. The defendant also filed a general motion for a new trial.

The material facts are stated in the opinion.

Bartlett Brooks, for plaintiff.

J. B. & F. C. Peaks, for defendant.

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

SAVAGE, J. Action of dower. The case comes up on exceptions to the ruling of the presiding Justice upon the undisputed evidence

that the plaintiff is entitled, as a matter of law, to dower in the premises described in her writ, and, upon the defendant's motion for a new trial. Since the same questions arise on the exceptions, except the amount of damages, as upon the motion, they may be considered together.

The plaintiff was married to Frank B. McAllister in September, 1885, and was divorced from him for his fault, other than impotence, in September, 1891. No children were born of this marriage, nor of any other, contracted by Mr. McAllister. During coverture, Frank B. McAllister was the owner of the premises described in the writ. In 1889 he conveyed to the defendant a strip of land four rods wide, which is now its right of way. By the same deed, but as a distinct parcel, he conveyed to the defendant, "for a gravel pit for said railroad," the lot of land in which the plaintiff now claims dower. The plaintiff has never released her right of dower in the premises, to the defendant. Upon these facts, the defendant contends, that the plaintiff has no dower, (1) because the land was purchased for, and devoted to, public uses, and (2) because the statute in force at the time she secured her divorce, by which she became entitled to dower, R. S., 1883, c. 60, sect. 9, was repealed by Stat. 1895, c. 157, sect. 11, by which the right of a divorced wife was enlarged from dower to one-third in fee, in common and undivided, of all his real estate. We think neither ground is tenable.

Revised Statutes, (1883) chap. 51, sect. 16, in force when the defendant took its deed, authorized railroad companies to "purchase or take and hold, as for public uses, land for borrow and gravel pits." In the case of a purchase, it took the land in fee; but in case of a statutory taking, it exercised the right of eminent domain, and held only an easement. Not only are the processes different, but some of the consequences are different. It is well settled that a widow is not dowable of lands taken by the right of eminent domain for public use. The reason is well stated in *French* v. *Lord*, 69 Maine, 537. "In such cases a division of the estate thus taken would destroy it for the use to which it has been appropriated. Private interests must give way to the public convenience and neces-

sity, rights in dower, as well as any other interest in real estate." And there is authority to the effect that a widow is not dowable in lands purchased by a railroad company, for public purposes, in general. And all authorities agree that she has no right of dower in lands so purchased for a right of way. And this obviously is on the ground that public convenience and necessity require that the railroad company should be in the exclusive and undivided possession, control and use of its right of way. In pursuance of its public duties, it must occupy and use it. It cannot abandon it without liability to forfeiture. It cannot even change it without the permission of the State, granted through the railroad commissioners.

But none of these considerations apply to a gravel pit. While it may be purchased, as for a public use, the public use, so called, affects the public only incidentally and indirectly. The company need not use it all. It may abandon it. It may sell it, as a private person would sell his property. It owes the public no duty respecting it. While it is doubtless true that it is necessary, in the present stage of railroad development, that a railroad company should have gravel pits, it is not necessary, so far as the public is concerned, that it should have any particular one. If it should have to divide the pit, or contribute out of the rents and profits, it would not in any sense interfere with the public convenience or necessity. It would only affect the company pecuniarily in its private capacity. Therefore, since the reason for the rule of the exclusion of dower in lands devoted to public uses does not apply to a gravel pit purchased by the railroad company, outside its right of way, we hold that a widow, in 1891, was dowable of it, just as she was in any other land purchased by the company, and not devoted to technically public uses. For while it is true that all the property of a public service corporation is in one sense devoted to public uses, the use of a gravel pit is not of that kind of public uses which should debar a widow from claiming her right of dower.

This view is supported by *Nye* v. *Taunton Branch R. R. Co.*, 113 Mass. 277. In that case the railroad company had purchased land outside its location, for a freight station. The court held that

a widow who had not barred her interest was dowable of it. And after stating the two methods by which the railroad company might, under the statutes of that State, as under our own, take the land, namely, by purchase and by the exercise of the right of eminent domain, the court said:—"By the first method the corporation obtains a fee in the soil; by the second the land is condemned to a servitude, and an easement is created in the corporation, which may be permanent in its nature and practically exclusive. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. When it holds by the first, it derives its title solely from the deed; if the deed is without restriction, reservation or condition, the corporation may convey the land, if no longer necessary for its purposes; when it takes by the second, if the use is abandoned, the easement is extinguished, and the land reverts to the owner of the soil. The one is simply an authority to buy and hold land for certain purposes, as a natural person may do; the other puts the land into the possession of the corporation by the exercise of the power of eminent domain. The proceedings are entirely distinct, the rights acquired are different, and it does not change the character of the deed, because the land could have been taken against the will of the grantor.

But it is not necessary to consider that question here, or to decide what would have been the effect upon the demandant's right of dower, if the land had been taken, against the consent of the owner, on application to the county commissioners in the exercise of the power of eminent domain. As the statute authorized the purchase for the purposes therein named, the land did not pass to the tenant under the exercise of the right of eminent domain accompanied by such powers and limitations as the exercise of that right imposes, but by deed subject to all incidents attending that form of contract between parties.

The land was at that time subject to the demandant's inchoate right of dower, which is now consummate by the death of her husband, and the purposes to which the corporation has in the meantime devoted the land are immaterial, as it may change them at will, and sell the land if it desires." In this connection the vigorous dissent of the minority of the Supreme Court of Missouri, based

upon the Nye case, is of interest. *Baker* v. *Railway Co.*, 122 Mo. at page 400. See also *Venable* v. *Railway Co.*, 112 Mo. 103.

We have thus far treated the case as if the plaintiff became a widow in 1891. But she did not. She then became divorced for her husband's fault. But her rights, such as they were in 1891, were the same as if her husband had then died. The statute, R. S., 1883, c. 60, sect. 9, provided that "when a divorce is decreed to the wife for the fault of the husband for any other cause" than impotence "she shall have dower in his real estate, to be recovered and assigned to her as if he were dead." And such a divorce affected the right of dower precisely as would the husband's death. *Stilphen* v. *Houdlette*, 60 Maine, 447. Therefore, at the outset, we have only to inquire what would have been a widow's rights under the same circumstances. There is no controversy but that, if the husband had died in 1891, the plaintiff, as widow, would have been entitled to dower in all the dowable lands of which he had been seized during coverture, and of which she had not become barred. Under the statute, her right as a divorced wife was the same. *Lewis* v. *Meserve*, 61 Maine, 374. There being no issue of this or of any previous marriage of McAllister, living in 1891, his divorced wife was dowable, as commonly expressed, in one-half of his real estate. R. S., 1883, c. 103, sect. 14.

The defendant, however, contends that by the enactment of chapter 157 of the Laws of 1895 the dower provision for divorced wives was repealed. That chapter enlarged the right of widows in the real estate of their deceased husband from dower to an estate in fee. *Golder* v. *Golder*, 95 Maine, 259. It also provided in section 9, that when a divorce is decreed to the wife for the fault of the husband, for any other cause than impotency, "she shall be entitled to one-third in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead." The dower provision in the previously existing statutes, which has been referred to, was omitted. And while the dower right of widows which had become consummate by the death of their husbands, but which had not been assigned, was expressly saved to them by the terms of the statute, it is claimed that there was no such saving pro-

vision for the rights of divorced wives. Hence it is contended that the plaintiff's right of dower which she had in consequence of her divorce was lost by reason of the statute of 1895.

We deem it unnecessary to inquire whether the statute of 1895, upon fair interpretation, is open to this construction, because we think the legislature could not constitutionally deprive the plaintiff of the right to dower which she then had. Prior to 1895, when dower, by that name, was abolished, a woman, if she had not barred it, had an inchoate right of dower in the lands of which her husband was seized during coverture; upon his death, or upon the granting of a divorce to her for his fault, and prior to assignment, that right became consummate, and her right to demand and enter upon the enjoyment of her dower interest commenced; after assignment, her estate was said to be assigned or vested, and she entered into the possession of it for the term of her life. 14 Cyc. 882. Since dower does not result from contract, but by operation of law, it is within the power of the legislature to increase, diminish, alter or abolish it, while the right thereto is merely inchoate, and has not become consummated by the death of the husband, or by divorce. *Barbour* v. *Barbour*, 46 Maine, 9; 8 Cyc. 909. While a widow's right to dower does not become vested or fixed until it becomes consummate, yet a consummate right of dower, though, before assignment, it is a mere right of action, *Johnson* v. *Shields*, 32 Maine, 424, is nevertheless a vested property right, under constitutional protection. She has no vested interest in any of her husband's real estate, but she has a vested right to have a share of it assigned to her for life. Mr. Scribner, in his work on Dower, says:—"There seems to be no conflict of authority upon the point that after it (dower) has become consummate, whether there has been an assignment or not, it is so far a vested right as to be beyond legislative control." 2 Scribner on Dower, c. II, sect. 3; 8 Cyc. 909, and cases cited.

It remains to consider some minor defenses. The defendant says that its deed from McAllister, which is a quitclaim deed in form, is merely a "release deed" and "that it does not claim, and never has claimed that it had any fee in the land described," but that the

deed was only a release of the land "for a gravel pit." This is equivalent to saying that the defendant is not tenant of the freehold. But this defense is not open under the pleadings. They are the general issue and a brief statement denying that the plaintiff has any right of dower, or any right to have dower set out. That is a plea in bar. But it is provided in R. S., c. 105, sect. 4, that the defendant, in an action for dower, "may plead in abatement, but not in bar, that he is not tenant of the freehold." *Lewis* v. *Meserve*, 61 Maine, 374. The defendant therefore must be deemed to be tenant of the freehold.

Next the defendant contends that the plaintiff's demand for dower was insufficient to maintain the action. It has been held that the want of a sufficient demand must be specially pleaded in bar. *Ayer* v. *Spring*, 10 Mass. 80. Under our practice it might have been pleaded by way of brief statement. But that was not done in this case. Nevertheless, since much stress is laid upon it, we will briefly consider the merits. The statute R. S., c. 105, sect. 2, requires a dowress, before bringing suit, to demand dower of the tenant of the freehold, and, by section 3, in case the tenant of the freehold is a corporation, she must demand her dower in writing. In this case a demand in writing was made. The first objection is that there was not a sufficient description of the premises in the writing. They were in fact described as "the premises described in a certain deed to you the said Dexter & Piscataquis Railroad Company from said Frank B. McAllister . . . . said deed being dated June fifteenth 1889 and recorded in the Registry of Deeds for said Piscataquis County in Volume 101 on page 265 of said Registry. A reference to this deed shows that two parcels were clearly and definitely described therein, one of which is the parcel involved in this suit. We think the description in the demand is sufficient. It was held in *Ford* v. *Erskine*, 45 Maine, 484, that the description may be in terms or by reference to a recorded deed under which the tenant claims. See also *Baker* v. *Baker*, 4 Greenl. 67; *Atwood* v. *Atwood*, 22 Pick. 283. Furthermore it is objected that the demand embraced two parcels, while the suit is to recover dower in one only. We see nothing in this objection. The defend-

ant is neither embarrassed nor injured because the plaintiff has abandoned her claim for dower in one of the parcels. Whatever her demand, she may recover according to her right, not exceeding the demand. A demand is not vitiated because the widow demands more than she is entitled to. *Hamblin* v. *Bank of Cumberland*, 19 Maine, 66; *Williams* v. *Williams*, 78 Maine, 82; *Davis* v. *Walker*, 42 N. H. 482; *Fulton* v. *Fulton*, 19 N. H. 169.

The demand in this case was signed in the name of the plaintiff by her attorney. The defendant contends that it should have been signed by her personally, or that if signed by an agent or attorney, he should have had written authority therefor. We do not think so. The statute does not require either. It has even been held, and we think properly, that oral authority given to an attorney by a dowress to bring action for the dower was sufficient authority to make a written demand which the statute made a prerequisite to bringing suit. *Stevens* v. *Reed*, 37 N. H. 51. This case is not like *Sloan* v. *Whitman*, 5 Cush. 532, cited by the defendant, where an attorney had written authority to demand dower "in any and all the before mentioned premises or any other," but no premises had been mentioned. Nor is there any reason for saying, as the defendant does, that if the attorney, having authority to make demand for one parcel only, made demand for two, the demand was vitiated as to the authorized parcel.

The defendant further contends that the demand should have stated whether the plaintiff claimed the use and income of one-third of the real estate, or one-half, the right depending upon whether issue was living in 1891, or not. But that was not necessary. *Davis* v. *Walker*, supra; 14 Cyc. 977.

Without further discussion, we conclude that there was no error in the ruling that the plaintiff is entitled to dower in the defendant's gravel pit. We conclude further that the plaintiff has taken all the necessary steps to enforce her right. This disposes of the exceptions, and of all the grounds of the motion for a new trial, except the claim that the damages awarded by the jury for the detention of dower were excessive.

Considering this last claim, we find that the period for which the plaintiff was entitled to recover damages was three months. R. S., 1883, c. 103, sect. 19. The jury awarded one hundred dollars. The plaintiff's right is not to be measured by what was actually taken from the gravel pit during the period, but by what might have been taken, under existing circumstances, including the prevalent demand for gravel, the state of the market, and like considerations. She was entitled to the use, and to the profits which reasonably would have accrued from the use, of one-half of the pit, during the period. Her damages arise, under the circumstances of this case, not from any use or want of use which the defendant made of the pit, but from the prevention of her right to use it, which was a valuable right. The rule was correctly stated by the presiding Justice in this case, when he instructed the jury to "ascertain how much revenue or profit, by reasonable industry, reasonable care, the owner of that property, if owned as a gravel pit, could have obtained from the sale of sand and gravel from that pit during that time," and when they had found that sum, to "divide it by two, because she is only entitled to one half." There was evidence that the jury might well believe that there was a good demand for gravel at Dover during the whole period, that a team hauling from 25 to 35 bushels at a load could make four or five trips a day, and that the price of gravel delivered ranged from 5 to 8 cents a bushel. It is evident that the jury, after allowing for the expense of hauling, estimated that the reasonable profit which might have obtained was about $2.50 a day. We cannot say that this estimate is clearly wrong.

Motion and exceptions overruled.

STATE OF MAINE *vs.* THOMAS FORTIN.

Androscoggin. Opinion February 4, 1910.

Criminal Law. Evidence. Identity of Informer. Trial. Presumptions. Intoxicating Liquors.

1. The defendant in a criminal case is not entitled to know who gave information or made complaints which led to the prosecution.
2. The fact that an officer in testifying in a criminal case stated without objection that complaints had been made against the defendant, does not take the case out of the rule and entitle the defendant to the names of such complainants.
3. That immaterial evidence is given without objection does not entitle the opposite party to make an issue upon such immaterial evidence.
4. The fact that complaints were made against a defendant has no probative force against him, and evidence of such complaints given without objection does not entitle him to make an issue upon the truth of such evidence.
5. When immaterial or non-probative evidence has been received, if a party fears it may prejudice him with the jury he should request an instruction that the evidence is immaterial and should not be considered by the jury.
6. It is to be presumed that the jury will follow the direction of the court and reject all evidence the court instructs them is not to be considered.
7. A grocer on trial for maintaining a liquor nuisance is not entitled to show the amount of his weekly sales in the grocery business. Such evidence has no probative force in support of his innocence.

On exceptions by defendant. Overruled.

The defendant was indicted for keeping and maintaining a liquor nuisance and on trial was found guilty. He excepted to certain rulings of the presiding Justice during the trial.

The case is stated in the opinion.

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

Tascus Atwood, for defendant.

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

EMERY, C. J. The issue in this case was whether the defendant was guilty of maintaining a nuisance at the place named in the indictment. At the trial "the witness for the state" testified, without objection so far as appears, that complaints had been made to him against the place named. The defendant then asked the witness to name the complainants, but the court ruled that the witness need not answer. It is not explicitly stated in the bill of exceptions who "the witness for the state" was, but it is a fair inference that he was an officer, and as both counsel so assumed in argument we assume the same.

It is a well settled rule that a defendant upon the trial of an indictment against him is not entitled as of right to know who gave the information or made the complaints which started the prosecution. Such communications to officers of the law should ordinarily be regarded as privileged as to the identity of the informant or complainant on the ground of public policy, so that no one from fear of consequences to him personally shall hesitate to give information of offenses. *State* v. *Soper*, 16 Maine, 293; *U. S.* v. *Moses*, 4 Wash. C. C. 726; *Worthington* v. *Scribner*, 109 Mass. 487; *People* v. *Laird*, 102 Mich. 135; Wigmore on Ev. sec. 2374, and notes.

It is urged, however, that while a defendant may not himself bring out evidence of complaints and then require the names of the complainants, yet if it appears, as in this case, from the evidence for the prosecution that complaints were made, he is then entitled as of right to the names of the complainants. We do not see any distinction in principle. The reason of the rule, the encouraging the fearless performance of the duty of giving information, certainly includes this case. It cannot be that the immunity of the informant is destroyed by the mere statement that information was received or complaints made. Under such a rule no informant would be safe.

But the defendant argued that the statement that complaints had been made was prejudicial to him, and that he thereby became entitled to know the names of the complainants in order that he might con-

tradict the statement or bring out the motives for the complaints, however much the public might be injured by such a course. What might have been the right of the defendant had he objected to the testimony and his objection overruled, we have no occasion to say. The testimony appears to be entirely immaterial, of no probative force, and if objected to would doubtless have been excluded. A party is not entitled as of right to raise an issue upon immaterial statements made without objection. To acknowledge such a right would greatly prolong trials and obscure the real issue. In this case, if the defendant were entitled to know the names of the complainants for the purposes stated by him, he would be entitled to call all such persons, perhaps a dozen or more, and examine them as to the fact of their having made complaint, and as to their motives and grounds of complaint. This would give the State the right to rebut such evidence, and we should have the spectacle of a prolonged controversy over an immaterial issue which when finally determined brings the court and jury no nearer a solution of the question of the truth of the indictment. That complaints were made is no evidence of guilt; that complaints were not made is no evidence to the contrary.

If the defendant really feared he was prejudiced with the jury by the statement that complaints had been made, he had a remedy. He could have requested, and undoubtedly received, an instruction that the statement was immaterial, of no probative force, and should not be considered by the jury. It must be presumed that such an instruction would have effaced all prejudice, if any, resulting from the statement. *State* v. *Kingsbury*, 58 Maine, 238. With that remedy available, we do not think the defendant was entitled as of right to the names of the complainants. In *School District* v. *Etna Ins. Co.*, 62 Maine, 330, a paper was received in evidence against the objection of the defendant. The defendant contended that it tended to prejudice the defense; but the court held that the evidence being really immaterial, having no bearing on the real issue in the case, the exception to its admission should not be sustained.

The defendant was a witness and desired to state the amount of his weekly sales in the grocery business it appeared he was conduct-

ing, but he was not allowed to do so. The offered evidence was clearly immaterial. It had no probative force either way. All such evidence, though exceptions to its admission may not be sustainable, should ordinarily be excluded for economy of time and clarity of issue.

The other exceptions were abandoned at the argument.

Exceptions overruled.

STELLA R. MCKENZIE, Trustee, Beneficiary and Executrix of the Will of MOSES W. WEBBER, Appellant from the Decree of the Judge of Probate

vs.

THE WEBBER HOSPITAL ASSOCIATION.

York. Opinion February 5, 1910.

Executors and Administrators. Probate Petitions. Uniform Blanks. Accounts. Opening Settlements. Corporations. Authority of Officers and Agents. Evidence. Revised Statutes, chapter 47, section 68; chapter 65, section 43.

It is not necessary that a petition signed and presented to the probate court by the president of a corporation to require an executrix to settle her final account, should show his authority to sign and present it.

The authority of the president of a corporation to sign and present to the probate court a petition to require an executrix to settle her final account can be shown by the records of the corporation or even by oral testimony.

Authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection.

The statute, R. S., chapter 65, section 43, establishing uniformity in the use of blanks in the probate court is not to be so construed as to deprive the petitioner of his remedy if there is no prescribed form adapted to the existing situation. He is not prohibited from presenting a petition containing allegations appropriate to the facts of his case.

On the settlement of the final account of an executrix, former accounts settled by her may be opened on a charge of fraud in the inventory and in such accounts, although no appeals were taken from the decrees allowing the former accounts.

That an executrix regarded her second account as a final account does not make it a final account when it was not accepted by the Judge of Probate as a final account and no notice was given thereon as a final account.

On exceptions by plaintiff. Overruled.

Appeal from decree of the Judge of Probate, York County. The Webber Hospital Association filed a petition in the probate court praying that the plaintiff be cited into said court to settle her final account of administration as executrix of the estate of Moses W. Webber, deceased testate. The plaintiff then filed a motion in said court asking that the aforesaid motion be dismissed. The Judge of Probate refused to grant the motion and thereupon the plaintiff appealed to the Supreme Court of Probate. The Supreme Court of Probate dismissed the appeal and ordered the case remanded to the probate court for further proceedings, and the plaintiff excepted. (See *Hospital Association* v. *McKenzie*, 104 Maine, 320.)

The case is stated in the opinion.

James O. Bradbury, for plaintiff.

Edwin Stone, for defendant.

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

WHITEHOUSE, J. In August, 1899, the appellant was duly appointed executrix of the will of Moses W. Webber, late of Biddeford and returned to the probate court an inventory of the estate. Subsequently she presented to the court, a first and second account of her administration of the estate but has never presented her final account. In October, 1908, the defendant Association by its president, Robert McArthur, filed a petition asking that the appellant be cited into court to settle her final account. In this petition it is represented that the appellant filed a false and fraudulent inventory of the estate; that in her capacity as executrix, she assigned and delivered to herself as legatee under the will certificates

of stock belonging to the estate of the value of $8,694 in payment of a bequest to her of $5000, and assigned to herself stock of the value of $30,117 belonging to the estate to constitute a fund of $15,000 from which she was to receive the income during her life-time. The prayer of this petition necessarily involves a re-opening of the first and second accounts settled by the appellant, by reason of her alleged illegal, wrongful and fraudulent acts in the premises.

The appellant filed a motion in the probate court asking that this petition be dismissed, first, because it was not the legal petition of the defendant association; second, because it is contrary in form and substance to the rules and orders of the probate court; third, because it contains immaterial and defamatory matter and fourth, because it asks "for the doing of things already done and not appealed from."

The probate court refused to grant this motion to dismiss the petition and the appellant took an appeal from this refusal to the supreme court of probate.

This appeal was dismissed and the case ordered to be remanded to the probate court for further proceedings. The case comes to this court on exceptions to this ruling dismissing the appeal.

It is the opinion of the court that this ruling was correct and that the exceptions must be overruled.

1. Under the reasons of appeal it is contended in the first place by the appellant that the petition of the defendant association praying that the appellant be cited to settle her final account is not legally sufficient because it is not alleged that Robert McArthur was its president duly authorized to sign and present the petition. But such an affirmative allegation was not indispensable in a petition of this character. If objection had been made in the probate court that the petition was not authorized by the association, a question of fact would have been raised to be determined upon evidence introduced. The fact might have been proved by the records of the corporation or even by oral testimony. "Authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection, as well as in the case of individuals." R. S., ch. 47, sect. 68; *Sherman* v.

Fitch, 98 Mass. 59; *York* v. *Mathis*, 103 Maine, 67; *Fitch* v. *Steam Mill Co.*, 80 Maine, 34. Or if the petition were originally signed by the president without authority, his act might subsequently have been ratified and confirmed. The appellant was in no way prejudiced by the omission to append the allegation respecting the president's authority.

2. It is contended that the petition is contrary to law in form and substance, because it is provided by section 43 of chapter 65, R. S., that no other blanks shall be used in probate procedure than those approved by the Supreme Judicial Court, and that the defendant's petition is not in conformity with any blank so prescribed. It is insisted that the defendant should have used form No. 121 of the probate blanks. But this is the general form of the citation to settle an account in the probate court and not applicable to the special and extraordinary conditions alleged to exist in this case. The statute establishing uniformity in the use of blanks in the probate court is not to be so construed as to deprive the petitioner of his remedy if there is no prescribed form adapted to the existing situation. He is not prohibited from presenting a petition containing allegations appropriate to the facts of his case. The defendant's petition was sufficient in form and substance.

3. It is true that no appeals were taken from the decrees of the probate court in the settlement of the petitioner's first and second accounts but "it cannot be controverted, that on the final settlement of the administrator's account in the probate court, former settlements may be opened for the purpose of rectifying mistakes, whether originating in fraud practiced on the court or through a misapprehension of the true state of facts by the parties." *Coburn* v. *Loomis*, 49 Maine, 406. It has been seen that the defendant's petition contained allegations of "illegal, wrongful and fraudulent cts," on the part of the appellant respecting the inventory of the estate and the filing of her first and second accounts and that the granting of the prayer of the petition asking that she be cited to settle a final account involves the re-opening of the first and second accounts. *Bergeron* v. *Cote*, 98 Maine, 415.

4. The suggestion that the appellant's second account was regarded by her as a final account is immaterial, for it does not appear that it was accepted by the probate court as a final account nor that any notice was ordered and given thereon as a final account. There has been no final accounting by the appellant as executrix and it is manifest that the estate has not been legally and finally settled.

Exceptions overruled.

CHESTER D. HALL *vs.* URSULA M. HALL.

Lincoln. Opinion February 7, 1910.

Deeds. Construction. Fee Simple. Heirs. Exceptions. Reservations.

At common law the word "heirs" is necessary in order to convey a fee simple in land, it matters not how plainly the intention to do so may be expressed in words of perpetuity.

It is not essential to an exception from a conveyance of an easement appurtenant to other land of the grantor that the word "heirs" be used in order to make the exception perpetual.

An "exception" of an easement appurtenant to other land of the grantor operates to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title.

An "exception" is a part of the thing granted, and of a thing in being at the time of the grant.

A "reservation" vests in the grantor some new right or interest that did not exist in him before and operates by way of an implied grant and in the absence of words of inheritance, only an estate for the life of the grantor is created.

Whether a clause in a deed creates a reservation or an exception is not so much a question of words as of intention to be gathered from all the circumstances of the case so that the term "except" has been construed to create a reservation and the term "reserve" an exception.

Whether a clause in a deed is intended to operate as an exception or reservation is to be determined by its character, rather than by the particular words used.

Held: That a clause in a deed of land adjoining a road "reserving" to the grantor a right of way in common with the grantee "meaning a cart road to and from" the grantor's land, created an exception and not a reservation, where the road existed at the time of the deed and was necessary to the land retained by the grantor, and where the circumstances showed that the provisions were intended for the benefit of the land retained and not to be merely a personal right.

Held: That a right of way excepted from a conveyance to give the grantor access to a road from retained land was not extinguished by the erection of a building across the way where another route was substituted apparently by mutual agreement and acquiesced in for twenty-five years.

On exceptions by defendant. Overruled.

Action on the case to recover damages for the obstruction by the defendant of the plaintiff's alleged right of way over the defendant's land in Nobleboro, Lincoln County. Plea, the general issue. At the conclusion of the evidence, and on the plaintiff's motion, the presiding Justice ordered a verdict for the plaintiff and for "a nominal sum as damages" and thereupon the jury returned a verdict for the plaintiff with damages assessed at one dollar, and the defendant excepted.

The case is stated in the opinion.

Arthur S. Littlefield, and Howard E. Hall, for plaintiff.

Wm. Henry Hilton, for defendant.

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

CORNISH, J. On September 22, 1864, Horace Hall being the then owner of a tract of land in Nobleboro containing about forty-five acres, and bounded on the south by the West Neck Road so called, conveyed by warranty deed to Elbridge G. Hall, the portion of the same on which the buildings were located, lying next to the road, and comprising about five acres. This deed contained the following clause which is now before the court for construction: "Reserving to me, the said Horace Hall, a right of way in common with the said Elbridge G. Hall, to and from and acrost the above described premises, meaning a cart road to and from my land."

The portion retained by Horace Hall, the dominant estate, has come down by mesne conveyances in three lots, the lot next back from the Elbridge Hall lot being acquired by Mary A. Hall, the next by George L. Hall and the rear lot, sometimes called the Peter field, by the plaintiff. The defendant similarly acquired the servient estate, the portion conveyed by Horace to Elbridge G. Hall. Horace Hall died in 1880.

This right of way across the defendant's lot had been used to a greater or less extent by the plaintiff and his predecessors in title until the summer of 1908, when it was obstructed by the defendant, and the plaintiff brought this action on the case to recover damages for such obstruction. The presiding Justice directed a verdict for the plaintiff and the case is before this court on exceptions to this ruling.

Two questions are presented for consideration. First, did the clause in the deed above quoted create a reservation limited to the lifetime of Horace Hall as claimed by the defendant, or did it create an exception in favor of the grantor appurtenant to the remaining land, and passing to his heirs or assigns without words of inheritance, as claimed by the plaintiff? Second, was the easement extinguished?

A brief recital of long and firmly established legal principles will determine both questions in favor of the plaintiff.

It is an unyielding rule of the common law that the word "heirs" is necessary in order to convey a fee simple in land, it matters not how plainly the intention so to do may be expressed in other words of perpetuity. But this rule is not applicable to an "exception" of an easement appurtenant to other land of the grantor, which operates to retain in the grantor some portion of his former estate and whatever is thus excepted or taken out of the grant remains in him as of his former title. An exception is of a part of the thing granted and of a thing in being at the time of the grant. A reservation, however, vests in the grantor some new right or interest that did not exist in him before. It operates by way of an implied grant and in the absence of words of inheritance only an estate for the life of the grantor is created. See *Engel* v. *Ayer*, 85 Maine, 448 and cases cited.

Whether a given clause creates a reservation or an exception is not so much a question of words as of intention to be gathered from all the facts and circumstances of the case, so that the term "except" has been construed to create a reservation and the term "reserve" an exception. "Whether a particular provision is intended to operate as an exception or reservation is to be determined by its character rather than by the particular words used." *Perkins* v. *Stockwell*, 131 Mass. 529; *Ring* v. *Walker*, 87 Maine, 550.

In conformity with this broad and liberal rule of construction the following may be cited as examples of provisions which in terms were reservations but were held to create exceptions. "Reserving forever a right of way over a street which the grantee is to make, from the northwest corner of said granted lot to the road," *Bowen* v. *Conner*, 6 Cush. 132; "Reserving the passway at grade over said railroad where now made," *White* v. *R. R. Co.*, 156 Mass. 181; "Reserving the right to cross the track of said railroad on grade near the westerly line of our said lands at such place as said company can most conveniently provide," *Hamlin* v. *R. R. Co.*, 160 Mass. 459; "We reserve to ourselves the privilege of crossing and recrossing the said piece of land above described, or any part thereof within said bounds," *Chappell* v. *R. R. Co.*, 62 Conn. 195; "Reserving forever for myself the privilege of passing with teams &c. across the same in suitable places to land I own to the south of the premises," *Winthrop* v. *Fairbanks*, 41 Maine, 307; "I do reserve a driveway from the county road onto the east end of said lot &c. and another driveway on to the west end of said lot," *Smith* v. *Ladd*, 41 Maine, 314; "Reserving a passway from the road &c," *Bangs* v. *Parker*, 71 Maine, 458; "With the reservation of a road two rods wide over the northerly side of said lot," *Wellman* v. *Churchill*, 92 Maine, 193.

The provision under consideration merits as reasonable a construction as the foregoing. Look at the situation. By the conveyance of the front lot, the rear lot became inaccessible, except over land of other parties, unless a right of way were retained. The convenience and necessity of this way were as great to subsequent owners of the rear lot as to the grantor. It was a right which

could not have been intended as limited to the life of the grantor, because his heirs or grantees would be as helpless without it as he. It was designed to belong to the land itself and not to be merely a personal right. The way was marked out on the face of the earth and was a well defined road in actual use at the time of the conveyance. It was a thing in esse. Its use to a greater or less extent, continued for forty-five years unquestioned. Bars were constructed in the fences separating the various lots, and these had given place to gates, the change on the defendant's premises being made by her husband with her approval, as late as 1906. On July 26, 1884, four years after the death of Horace Hall, the administratrix of Elbridge G. Hall, who was his widow, conveyed the defendant's lot to her son, and expressly excepted "the right of way reserved to Horace Hall when sold to Elbridge G. Hall, which is still to be allowed to said Horace Hall," and when the son reconveyed the same to his mother October 27, 1884, he excepted "the right of way reserved to Horace Hall, when sold to Elbridge G. Hall, which is to still be allowed." This action on the part of the family of the original grantee admitting the existence of the easement four years after the death of the original grantor is significant as bearing upon the intention of the parties to the original deed. In view of all these circumstances and conditions a reasonable construction of the deed must treat this provision in the nature of an exception and not a reservation, and the easement thereby created to have been acquired by the plaintiff through the mesne conveyances of the rear lot.

But the defendant goes further and contends that even if this construction is correct, the way in question was extinguished by the erection in 1883 by the owner of the defendant's lot, and their maintenance until the present time, of an ell and woodshed across the way as used by Horace Hall. Such erection and maintenance are undisputed but it further appears that after this erection another way for a short distance around the ell was substituted by mutual arrangement, and therefore the way in its slightly changed course took the place of the former one. The new way at that point was used by all parties from 1883 down to 1908, and was recognized in

the deeds from the owners of the servient estate in 1884 before referred to. No definite way was reserved in the deed from Horace Hall. It was simply a way across the granted premises to the remaining land of the grantor, and if the defendant or her predecessors for purposes of convenience substituted a slightly different course for a portion of the way then in use and this was acquiesced in by the plaintiff and his predecessors, it fulfilled the calls of the deed, and no element of extinguishment exists. *Bangs* v. *Parker*, 71 Maine, 458; *Fitzpatrick* v. *R. R. Co.*, 84 Maine, 33; *Tabbutt* v. *Grant*, 94 Maine, 371.

Exceptions overruled.

CITY OF AUGUSTA *vs.* CITY OF WATERVILLE.

Kennebec. Opinion February 11, 1910.

Paupers. Settlement. Statutes. Aliens. Constitutional Law. Legislative Power. Support of Paupers. Statute, 1821, chapter 122; 1905, chapter 142, section 1. Revised Statutes, chapter 27, section 1, paragraph VI, section 33.

The statute of 1905, chapter 142, section 1, taking effect March 23, 1905, providing that "the Revised Statutes shall not be construed to make any town liable for relief furnished to an alien or his family since said statutes went into effect," does not deprive an alien who gained a pauper settlement before March 23, 1905, of any benefits previously acquired by such settlement."

The word "settlement" in reference to paupers is technical and is used exclusively in relation to the dispensing of public charity.

Under Revised Statutes, chapter 27, section 1, paragraph VI, giving a pauper settlement to "a person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly," an alien who has acquired such pauper settlement in a town

before the statute of 1905, chapter 142, section 1, went into effect is entitled to pauper support from the town when in need thereof.

The rule against retroactive legislation, in the absence of constitutional provisions forbidding it, does not apply unless it interferes with contract or vested property rights.

The legislature can impose upon the State itself or upon particular municipalities the support of paupers.

The obligation for pauper support results from positive law, and not from contract express or implied.

The statute of 1905, chapter 142, repealed the provisions of the Revised Statutes subjecting towns to pay for the support of aliens or their families on account of their poverty or distress and substituted a provision that the relief furnished such persons shall be as provided in case of persons having no legal settlement within the State.

In the case at bar, *held* that the settlement of the pauper was not material. It did not confer citizenship. When the relief was furnished him he was an alien, and the statute of 1905, chapter 142, brought it within the provisions of Revised Statutes, chapter 27, section 33.

On agreed statement of facts. Plaintiff nonsuit.

Action of assumpsit brought in the Superior Court, Kennebec County, by the plaintiff city against the defendant city to recover the sum of $54.10 expended by the plaintiff city for the relief of a pauper whose pauper settlement was alleged to be in the defendant city. When the action came on for trial, an agreed statement of facts was filed and the case reported to the Law Court for determination with the stipulation that if judgment should be for the plaintiff, it should be for $54.10 and costs; otherwise plaintiff should become nonsuit.

The case is stated in the opinion.

Thomas Leigh, City Solicitor, for plaintiff.

Carroll N. Perkins, City Solicitor, for defendant.

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

PEABODY, J. This is an action authorized by statute brought by the City of Augusta against the City of Waterville to recover the amount expended by the overseers of the plaintiff city for the relief of a pauper alleged to have a settlement in the defendant city.

The case comes to this court for decision on the following agreed statement of facts and stipulations:

"STATE OF MAINE.

Kennebec, ss. Superior Court.

CITY OF AUGUSTA *vs.* CITY OF WATERVILLE.

Agreed Statement of Facts.

The account sued for in this case, amounting to $54.10, was for pauper supplies furnished by the City of Augusta to one Peter Vigue, and said supplies were received by the said Peter Vigue with full knowledge on his part that they were furnished as such. It is further agreed that these supplies were necessary and reasonable. It is also agreed that proper notice was given to the City of Waterville and denial made by City of Waterville, as required by statute.

Peter Vigue is an alien, born in Canada, never having been naturalized. He lived in Canada until after he became of age. Later he moved to Waterville and for ten consecutive years next prior to January 1, 1907, made Waterville his home. During this time he received no pauper supplies. In May, 1909, he fell in distress in Augusta and received the supplies sued for.

If on these facts judgment shall be for the plaintiff, it shall be for $54.10 and costs, otherwise plaintiff should become nonsuit.

CITY OF AUGUSTA,
by THOS. LEIGH,
City Solicitor.

CITY OF WATERVILLE,
by CARROLL N. PERKINS,
City Solicitor."

The decision of the case depends upon the legal construction of chapter 142 of the Public Laws of 1905, approved March 23, 1905, which is as follows:

"Section 1. The revised statutes shall not be construed to make any town liable for relief furnished to an alien or his family since

said statutes went into effect, but relief furnished any such person shall be within the provisions of section thirty-three of chapter twenty-seven."

The Revised Statute referred to is chapter 27, section 1. Paragraph VI of this section is essentially the same as the following provision in chapter 122 of the Laws of 1821, relating to the relief of the poor and pauper settlements:

"Any person of the age of twenty one years, who shall hereafter reside in any town within this State for the space of five years together, and shall not during that time receive directly or indirectly, any supplies or support as a pauper from any town, shall thereby gain a settlement in such town."

The statute of 1821 repealed all former laws "made enacting and ascertaining what shall constitute a legal settlement of any person, in any town within this State, so as to subject and oblige such town to support such person, in case of his becoming poor and standing in need of relief, so far as they relate to the manner of gaining a settlement in future."

It was construed by the court in the case of *Knox* v. *Waldoborough*, 3 Maine, 455, to embrace aliens as well as citizens, and the doctrine of that case was reaffirmed in *Calais* v. *Marshfield*, 30 Maine, 511.

Before the statute of 1905 was enacted and went into effect, the alien pauper had gained a settlement in the City of Waterville, and the statute, though by its application to a section of the Revised Statute referred to therein is for some purposes retrospective, cannot be construed as to deprive him of any benefits which he had previously acquired by such settlement. 2 Lewis' Sutherland Statutory Construction. Secs. 641, 642. But the word "settlement" in reference to paupers is technical and is used exclusively in relation to the dispensing of public charity. 7 Words and Phrases, 645.

By his settlement the pauper had the right in case of need to support from the inhabitants of the City of Waterville in which he had his settlement. *Inhabitants of Jefferson* v. *Inhabitants of Washington*, 19 Maine, 293; *Inhabitants of Warren* v. *Inhabitants of Thomaston*, 43 Maine, 406. In other words he had the

right to have the support provided by law furnished to him by that city. It is now necessary to consider whether a change by statute of the burden of support from that municipality to the State impaired his rights.

The rule against retroactive legislation in the absence of constitutional provisions forbidding it does not apply unless it interferes with contract or vested property rights. 2 Lewis' Sutherland Statutory Construction, sec. 647.

The legislature has the power to impose upon the State itself or upon particular municipalities the support of paupers as it may choose. 22 Am. & Eng. Enc. 1000.

The obligation for support results from positive law and not from contract express or implied. *Davis* v. *Milton Plantation*, 90 Maine, 512; *Augusta* v. *Chelsea*, 47 Maine, 367; *Blakesburg* v. *Jefferson*, 7 Greenleaf, 125.

When the alien pauper had need of support the obligation to provide it by the provisions of the new statute rested solely upon the State and was as adequate as when by statute it prospectively rested upon the city in which he had acquired his settlement.

Chapter 142 of the Public Laws of 1905 legally repealed the provisions of the Revised Statutes subjecting towns to pay for the support of aliens or their families on account of their poverty or distress, and substituted a provision that the relief furnished such persons shall be as provided in case of persons having no legal settlement within the State.

The settlement of Peter Vigue is not material in this case. It did not confer citizenship. When the relief was furnished him he was an alien and the statute brought it within the provisions of section 33, chapter 27 of the Revised Statutes.

Plaintiff nonsuit.

STATE OF MAINE *vs.* WILLIE A. DAVIS.

Lincoln. Opinion February 12, 1910.

Intoxicating Liquors. Search and Seizure Process. Sufficiency. Revised Statutes, chapter 29, section 52.

In a search and seizure process issued under section 52, chapter 29, R. S., the allegation "being satisfied by evidence presented to me" is sufficient to satisfy the requirements of the statute that the magistrate should allege in the warrant that he "is satisfied by evidence presented to him."

State v. *Whalen*, 85 Maine, 469, distinguished.

On exceptions by defendant. Overruled.

Search and seizure process issued by a trial Justice, Lincoln County, under Revised Statutes, chapter 29, section 52. The record does not show how the case reached the Supreme Judicial Court, but presumably on appeal by defendant. The defendant demurred to the complaint and warrant, the demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

Cyrus R. Tupper, County Attorney, for the State.

Rodney I. Thompson, for defendant.

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

KING, J. Search and seizure process brought before this court on exceptions to the overruling of defendant's demurrer to the complaint and warrant.

Revised Statutes, c. 29, § 52, provides: "No warrant shall be issued to search a dwelling-house occupied as such, unless it, or some part of it, is used as an inn or shop, or for purposes of traffic, or unless the magistrate before whom the complaint is made, is satisfied by evidence presented to him, and so alleges in said warrant, that intoxicating liquor is kept in such house or its appurtenances, intended for sale in the State, in violation of law."

The magistrate before whom this complaint was made used the following words in the warrant: "Being satisfied by evidence presented to me that intoxicating liquors are kept and deposited in the dwelling house and its appurtenances above described, intended for sale in this State in violation of laws" etc.

The only contention made in support of the demurrer is that this language of the warrant does not sufficiently allege as a fact that the magistrate *was satisfied*. Or, to be more specific, the contention is that the magistrate should have alleged that "I am Satisfied" instead of "being satisfied." The contention is not sustainable. "Being satisfied" as used in the warrant imports the meaning of "since I am satisfied," or "inasmuch as I am satisfied," and the fact that the magistrate was satisfied is thereby expressed with as much clearness and certainty as it would have been if the fact had been stated in the form of a declarative sentence. *State* v. *Dunning*, 83 Maine, 178.

The defendant relies upon the case of *State* v. *Whalen*, 85 Maine, 469, but that case is clearly distinguishable from the case now before us. In that case the language was "Satisfactory evidence being presented." It did not allege that the evidence was presented to the magistrate. The court there said: "This is not sufficient to meet the explicit requirement of the statute that the magistrate should allege that he is 'satisfied by evidence presented to him.'" In this case the allegation is "being satisfied by evidence *presented to me*."

The entry will be,

Exceptions overruled.

EUGENE E. POMEROY *vs.* FREDERICK M. PRESCOTT.

Androscoggin. Opinion February 25, 1910.

Compromise and Settlement. Attorney and Client. Attorney's Authority. Judgment. Partial Recovery. "Splitting" Cause of Action. Revised Statutes, chapter 84, section 59.

Revised Statutes, chapter 84, section 59, provides as follows: "No action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small." In an action where it was alleged in defense that the plaintiff's attorney had waived and released certain items in the plaintiff's writ, *held* that this statute was not available in defense, first, because there was no settlement of the demand "in full discharge thereof," and, secondly, because it did not appear that there was any valuable consideration whatever for "waiving and releasing" the items.

An attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. He may do all things incidental to the prosecution of the suit and which affect the remedy only and not the cause of action. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right.

An attorney cannot compromise a demand without special authority for that purpose, nor discharge it without satisfaction.

Where in an action on an account annexed, the plaintiff's attorney without the knowledge or consent of the plaintiff, agreed to waive and release certain items in the account, *held* that the plaintiff was not bound by the agreement

By agreeing to strike out items from an account on which suit has been brought, the plaintiff precludes himself from a subsequent suit on such items.

A judgment for a part of an entire demand is a bar to any other suit for another part of the same demand.

A claim which is in its nature entire cannot be split up into several causes of action, and if suit is brought for a part only of the items constituting an entire claim, recovery for that part will bar recovery in any subsequent suit for the residue or any other items of the same demand.

On exceptions by plaintiff. Sustained.

Assumpsit on an account annexed wherein the plaintiff sought to recover from the defendant the sum of $283.00 for services in decorating the auditorium at Portland, preparatory to holding an automobile show in February, 1906. Plea, the general issue, with the following brief statement: "That, as to the second, third, fourth, fifth, sixth, seventh, eighth and ninth items of the account annexed in the plaintiff's writ, the defendant says that any promise to pay said amounts was not in writing, or evidenced by memorandum in writing, and within the statute of frauds, being a promise to pay the debt of another, and further, that said claims and charges were specifically waived by written waiver of _____, attorney of record."

The verdict was for the plaintiff for $138.19 only. The plaintiff excepted to certain rulings made during the trial, and it was stipulated that if the exceptions were sustained judgment should be for the plaintiff for the full amount of his claim with interest from the date of the writ.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Guy H. Sturgis, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit on an account annexed, wherein the plaintiff seeks to recover from the defendant the sum of $283.00, for services in decorating the auditorium at Portland, preparatory to holding an automobile show in February, 1906.

It appears that the claim in suit comprised thirteen items. The first four amounted to $120, and the remaining nine aggregated $163. The defendant pleaded the general issue with a brief statement in which it was alleged that any promise on the part of the defendant to pay the last nine items in the account was a promise to pay the debt of another; that it was not evidenced by any memorandum in writing signed by the defendant and that under the statute of frauds no recovery could be had as to those items. It

was further alleged in the brief statement that all of the claims and charges contained in those nine items were specifically waived in writing by the former attorney of record who brought the suit.

The instrument purporting to be a written waiver and release of the last nine items was introduced in evidence subject to the plaintiff's objection, and is of the following tenor:

"Portland, Maine, January 11, 1908.

"I, Eugene E. Pomeroy, formerly of Lewiston, Maine, do hereby waive, relinquish and release all claims and rights whatsoever, which I now have, or may hereafter acquire, against Frederick M. Prescott, of Boston, Massachusetts, on account of any balances due me for decorating Auditorium in Portland, Maine, during the automobile show in February 1906, from:" (the persons named in the last nine items of the account).

"Meaning and intending to waive all claims whatsoever against Frederick M. Prescott for an account of said balances alleged to be due me from the parties above mentioned, as above set forth, and waiving all rights whatsoever, which I now have, or may hereafter acquire, against said Frederick M. Prescott under and by virtue of the capias writ of myself vs. said Prescott, dated March 1, 1907, returnable the third Tuesday of April, 1907, before the Supreme Judicial Court for the county of Androscoggin, in the State of Maine, being any and all charges or items therein set forth relating to above balances, claiming under said writ and in said suit only recovery for the following items, to wit:

To decorating Auditorium in Portland, Maine, 1906,	$ 75.
To balance due me from F. M. Prescott, personal booth on main floor,	9.
To balance due me from F. M. Prescott, personal booth on basement,	20.
To balance due me from F. M. Prescott, personal booth on basement,	16.

Amounting altogether to the sum of $120.

EUGENE E. POMEROY,

By_____his Attorney."

No evidence was introduced of any authority in the attorney to execute the waiver beyond his general authority as attorney of record in the suit, or that any consideration was received for the same, except as correctly stated by the presiding Justice in his charge. But the facts stated by the presiding Justice as the basis of his ruling on the question of waiver did appear.

The presiding Justice instructed the jury in relation to the waiver, as follows:

"Now it seems that since this writ was brought, counsel (not the counsel who are trying the case, but counsel in Portland who represented the plaintiff and brought the suit) undertook to make an arrangement with counsel for the defendant in regard to certain of these items. It was stated by counsel, and perhaps in your presence (I think you were present this forenoon) that in anticipation of this trial, in making various arrangements about taking testimony and depositions and one thing and another, preparatory to the trial, that in order to accomplish some purpose, the attorney who was then counsel for the plaintiff undertook to waive any claim as to certain of the items. So far as the case is now concerned, it matters not whether he acted under misapprehension or not, or whether he was wise in doing it, or not. He did it, and a question of law has arisen as to what the effect of it was,— whether he had, as a lawyer, and as counsel in the case, authority to so act and to bind his client. And I have intimated to counsel, and I now instruct you, that at least for the purposes of this trial that the act of that attorney was within his authority under the circumstances as conceded to be true. He did have authority to waive certain items of the account, and to say that when the case came on to be tried, the plaintiff would rely only on certain other items which are the four items at the top of this specification, being the first four items in the account annexed. And when I speak of the account annexed I mean this later one. It seems that there has been an amended account, which has the items a little more in detail. So that the attorney undertook to waive the last nine items, but to retain the first four items. The last nine items relate to these various booths

around on the floor, where men would not pay the full price, and where Mr. Pomeroy says that Mr. Prescott agreed to make it up to the full price.

"As I say, I think that under the circumstances of the case that the attorney, whether wise or unwise, was acting within his authority—that he had a right to do it—had the power to do it—and that his client is bound by his action, and that therefore the last nine items of this account annexed the plaintiff cannot now recover for, in any event. And if you find for the plaintiff, and the plaintiff's version is the true one, by a fair preponderance of the evidence, then you will return a verdict for the plaintiff for the amount of the first four items."

The presiding Justice instructed the jury to make a separate finding in relation to the last nine items in the amended bill of items, and propounded to the jury the following question? "When this action was commenced, was anything due to the plaintiff on account of the last nine items, in the amended bill of items in the plaintiff's writ, namely, for decorating booths occupied by the parties named in the last nine items.

And, to this query, the jury answered in the affirmative, and, in addition rendered a verdict for the plaintiff in the sum of one hundred thirty-eight dollars and nineteen cents ($138.19).

The case comes to the Law Court on exceptions to the ruling admitting the waiver in evidence and to the instructions given by the presiding Justice in the charge to the jury.

It is stipulated that if the exceptions are sustained, judgment shall be ordered for the plaintiff for the full amount of his claim with interest from March 1, 1907, the date of the writ.

It is provided by section 59 of chapter 84, R. S., that "no action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

It is obvious that this statute is not available in the defense of this action, first, because there was no settlement of the demand "in full discharge thereof," and secondly because it does not appear from any facts stated in the charge or elsewhere in the exceptions,

that there was any valuable consideration whatever for "waiving and releasing" the last nine items in the plaintiff's account.

Indeed this statute is not relied upon or invoked by the counsel for the defendant, but it is contended in his behalf that in attempting to "waive and release" the nine items in question, the attorney of record at that time was acting within the scope of his authority as an attorney at law retained by the plaintiff to collect the claim entrusted to him; that by virtue of his employment he had the implied power to elect and control the remedy and to avail himself of such mode of procedure as he deemed most effectual in accomplishing the purpose of his employment, and that the "waiver" of the nine items in question was simply incident to the conduct of the suit and the control of the remedy, and as such was within the general authority of an attorney.

But in *Jenney* v. *Delesdernier*, 20 Maine, 183, cited by counsel on both sides, in which it was held that an attorney without any special authority therefor may approve of the receipt taken by the officer for personal property attached by him, the court, quoting from the opinion in *Gaillard* v. *Smart*, 6 Cow. (N. Y.) 385, thus speak of the authority of an attorney. "His general power does not extend to a retraxit, or release, because they relate to the cause of action itself; not merely to the remedy, which he is retained to conduct. And here is disclosed the true principle relative to the extent and limitation of the power of an attorney. He may elect and control the remedy, and all the arrangements arising out of and connected with it, but cannot release or discharge the cause of action without receiving payment, or do anything which will have that effect."

Accordingly in *Wilson* v. *Wadleigh*, 36 Maine, 496, (a case not embraced by the provisions of the statute of 1851, now section 59 of chapter 84, R. S., above quoted) it was held that an attorney by virtue of his general employment to prosecute a suit has no authority to discharge the judgment or execution which he may recover unless upon payment of the amount due. In the opinion the court said of the power of an attorney: "He is necessarily vested with great discretion in the management of a cause during its progress to

final judgment, but he is not authorized to assign or transfer that judgment when obtained. Such authority is not necessary for the discharge of his duty, and would leave the interests of his client to his mercy. In *Penniman* v. *Patchin*, 5 Vt. 352, Phelps, J., says, "'he cannot compromise a demand without special authority for that purpose, nor discharge it without satisfaction. Much less can he assign it for his own benefit; such an act being not only foreign to the purpose of his employment, but inconsistent with it. A power so liable to abuse, (which indeed could hardly be exercised without abuse), can with no propriety be admitted.'" See also *Lewis, Admr.*, v. *Gamage*, 1 Pick. 346, and *Shores* v. *Caswell*, 13 Met. 413. In the last named case it was held that an attorney by virtue merely of his retainer to prosecute or defend a suit, had no authority to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client.

But it is unnecessary to consider further the general authority of an attorney, for the law is too well settled and familiar to admit of discussion that an attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. He may do all things incidental to the prosecution of the suit and which affect the remedy only and not the cause of action. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right. *Derwort* v. *Loomer*, 21 Conn. 244; *Messick* v. *Ledergerber*, 56 Mo. 465; *Waldron* v. *Bolton*, 55 Mo. 405; *Davis* v. *Hall*, 90 Mo. 659; (3 S. W. 382) *Lewis* v. *Duane*, 141 N. Y. 302, (36 N. E. 322), 4 Cyc. L. & P. 945; 3 Am. & Eng. Encyc. of Law, 358.

It is not in controversy that the written instrument in this case declaring that the plaintiff does "hereby waive, relinquish and release all claims and rights whatsoever" against the defendant for any balances due on account of the nine items in question, was an apparent attempt on the part of the attorney who executed it, not only to waive recovery of those nine items in this particular suit, but to execute a final discharge of those items and forever bar

recovery upon them. It has been seen, however, that an attorney without special authority, cannot thus make a compromise settlement which involves a release of the cause of action, or any substantial part of his client's rights.

But it is insisted in behalf of the defendant that the waiver of recovery in this suit was within the authority of the attorney, and therefore valid, and that its operation is not defeated by combining with it an attempt to make a final discharge of that part of the cause of action. It is suggested that if the instrument in question is not effectual as a discharge, it may still be held a waiver for this suit, and the plaintiff has the right to institute a new action for the items waived. And in determining whether the waiver of the nine items in question would necessarily operate as a final surrender of a part of the plaintiff's cause of action, it is important to inquire whether a new action could have been maintained for the items waived.

The plaintiff's cause of action was a claim against the defendant for services rendered in decorating the Auditorium at Portland. It was obviously the plaintiff's contention that his cause of action arose from one bargain and one entire contract or single job as between him and the defendant. The attempted waiver by the former attorney was repudiated by the plaintiff and under instructions of the presiding Justice to which no exceptions were taken by the defendant, the plaintiff's contention that the entire claim was due, appears to have been adopted in the special finding of the jury. The defendant filed no motion to have this finding set aside, but entered into a stipulation with the plaintiff that if the exceptions to the charge upon the question of waiver were sustained, "judgment, if for the plaintiff in any amount, shall be for the full amount of the plaintiff's claim with interest from the date of the writ."

Under these circumstances the law is well settled that if the items which the attorney attempted to waive had been stricken from the account by authority of the plaintiff himself, no further action could ever have been maintained for their recovery. In *United States* v. *Throckmorton*, 98 U. S. 65, it is said by the Federal Court that "There are no maxims of the law more firmly established, or of

more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, 'interest rei publicae ut sit finis litium,' and 'nemo debet bis vexari pro una et eadam causa.'" Hence the principle is uniformly and inflexibly maintained that a judgment for a part of an entire demand is a bar to any other suit for another part of the same demand. A claim which is in its nature entire cannot be split up into several causes of action, and if suit is brought for a part only of the items constituting an entire claim, recovery for that part will bar recovery in any subsequent suit for the residue or any other items of the same demand. In *Foss* v. *Whitehouse*, 94 Maine, 491, it was held that judgment in an action of assumpsit for money paid to obtain a release from unlawful imprisonment, is a bar to a subsequent action of tort to recover any other damages resulting from the same imprisonment. "It is common learning" said the court "that a plaintiff cannot thus split up a cause of action and bring several actions for the different items of damage resulting from the one cause of action." In *Willoughby, Ex'x*, v. *Atkinson Furnishing Co.*, 96 Maine, 372, it was held that recovery of damages in a former suit for a breach of the defendant's obligation under a lease to replace certain partitions "in as good condition as they found them" was a bar to a recovery in the pending suit for the loss of rent resulting from the same breach, which might have been included in the former suit.

In *Burritt* v. *Belfy*, 47 Conn. 323, a suit for several months' rent was pending in a city court, and another suit was brought before a justice of the peace for an additional month's rent which was due when the former suit was brought; it was held that judgment in the second suit was a bar to the first suit.

In *Secor* v. *Sturgis*, 16 N. Y. 548-558, it is said in the opinion: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as safe and simple a test as the subject admits of, by which to

determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action." See also *Knowlton* v. *N. Y. & N. E. R. R. Co.*, 147 Mass. 606; *Clark* v. *Baker*, 5 Met. 452; *Rosenmueller* v. *Lampe*, 89 Ill. 212, and 23 Cyc. L & P. 1174.

The conclusion is therefore irresistible that the nine items of the account sued which the plaintiff's former attorney attempted to "waive and release" and which the jury found to be actually due, constituted a part of the plaintiff's single cause of action, and that judgment for the first four items would have been a bar to any subsequent action for the items waived. In agreeing to eliminate those items from the account without the knowledge and consent of his client, the former attorney exceeded his authority and the certificate must be,

Exceptions sustained.
Judgment for the plaintiff for $283 with interest from March 1, 1907.

LILLIAN J. WASHBURN *vs.* UNITED STATES CASUALTY COMPANY.

Somerset. Opinion February 25, 1910.

Insurance. Accident Policies. Renewal. Acts of Agent. Contracts. Evidence. Revised Statutes, chapter 49, section 93.

Under Revised Statutes, chapter 49, section 93, providing that a duly appointed insurance agent shall be regarded as in the place of the insurance company in all respects regarding any insurance effected by him, *held* that a letter written by such an agent acknowledging the receipt of a proof of loss and renewal agreement under an accident policy, bound the company, and the fact that the agent was forbidden by the company to make any agreement in relation to the matter after the death of the insured was wholly immaterial.

Where an insurance agent had had charge of all the insured's insurance business for several years, under directions not to let a policy expire unless told to do so, and under an arrangement whereby the insured paid the premiums only on presentation of bills therefor, and the agent had a pigeon hole in his safe devoted to the exclusive custody of the insured's papers, *held* that there was a valid renewal of an accident policy by the agent attaching a renewal receipt to the original policy, charging the renewal premium to the insured, and crediting the insurance company with the amount.

The contract of insurance is to be tested by the principles applicable to the making of contracts in general.

On exceptions by plaintiff. Sustained.

Action of assumpsit upon an accident insurance policy issued to Henry Washburn, by the terms of which the defendant became liable to pay to the plaintiff as beneficiary the sum of $5000 in event of the death of the insured resulting from "bodily injury effected by external, violent and accidental means." Plea, the general issue with brief statement alleging that the policy was not in force at the time of the death of said Washburn, that the representations and warranties in the schedule of statements in said Washburn's application for insurance were false, etc., etc. The plaintiff filed a replication to the defendant's brief statement.

At the conclusion of the evidence for the plaintiff, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

George W. Gower, and Turner Buswell, for plaintiff.

Merrill & Merrill, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit upon an accident insurance policy issued to Henry Washburn, by the terms of which the defendant became liable to pay to the plaintiff as beneficiary the sum of $5000 in the event of the death of the insured resulting from "bodily injury effected by external, violent and accidental means." The insured came to his death on the 21st day of February, 1908, as the result of such a bodily injury sustained on the 19th of the same month, and in this action the plaintiff seeks to recover the amount of the indemnity for the loss of the life of the insured, as stipulated in the policy. At the close of the evidence for the plaintiff, the presiding Justice directed a nonsuit and the case comes to the Law Court on exceptions to this ruling.

The liability of the defendant under the original policy commenced January 16, 1907, and terminated January 16, 1908, a month before the death of the insured, unless the policy had been renewed. The plaintiff claims that the policy had been renewed according to the regulations and practice of the company and the established course of business between its agent and the insured. The defendant contends that no valid contract of renewal had been made. Thus the real question involved in the exceptions and argued by counsel is whether the policy was in force at the time of the accident.

The original policy was issued to Mr. Washburn upon the solicitation of John C. Griffin of Skowhegan, who at that time and at the time of the trial, and for ten years prior thereto, was the general agent of the company in the State of Maine. Mr. Griffin was called as a witness for the plaintiff in this case and testified fully in regard to all of the facts and circumstances connected with

the issuing of the original policy and its renewal and his method of dealing with Mr. Washburn in the transaction of insurance business at that time. In consideration of the force and effect of his testimony and the significance to be attached to his attitude in the matter, it is proper to be reminded that by section 93 of chapter 49, R. S., duly appointed insurance agents in this State "shall be regarded as in the place of the company in all respects in regard to any insurance effected by them."

It satisfactorily appears from the testimony of Mr. Griffin, the defendant's general agent, and from the documentary evidence in the case, that for "ten or fifteen years prior to the date of the policy in suit, Mr. Griffin had been entrusted with the absolute charge of Mr. Washburn's insurance business, and for that purpose had a pigeon hole in his safe devoted to the exclusive custody of Mr. Washburn's papers. All of his insurance policies were deposited and kept in that pigeon hole and nothing else was kept there. He never was required to pay cash for a policy but paid the premium only on presentation of a bill therefor, a reasonable time after the policy had been deposited in the pigeon hole. Mr. Griffin further states that he had "explicit instructions" from Mr. Washburn "never to let a policy expire unless he was told to" and that under this general instruction all of his policies had been renewed. It is true that prior to January 16, 1907, the date of the life and accident policy in question, all of the policies taken out by Mr. Washburn had been for fire insurance, but the original life and accident policy here in question was issued and deposited in the same pigeon hole, without the payment of any cash at the time, and the premium actually paid on presentation of a bill therefor seven months afterward, in pursuance of the same course of business that had been observed in respect to the fire insurance policies. At the time of depositing the original policy in the pigeon hole, Mr. Griffin charged the premium to Mr. Washburn and gave the company credit for the amount, and he testifies that he understood that the deposit of the policy in the pigeon hole used exclusively for Mr. Washburn was a delivery of the policy to Mr. Washburn and that from that moment there was a valid contract of insurance. Indeed it is not

controverted by the defendant that this transaction constituted a valid contract of insurance under the original policy from January 16, 1907, and would have been binding upon the defendant company in the event of the death of the insured before the actual payment of the premium by him. But the question now is whether this policy of insurance was in force at the time of the accident, February 19, 1908. The plaintiff contends that the original policy had been renewed according to the established rules and usages of the company and the previous course of business with the insured. About a month before January 16, 1908, the date fixed for the expiration of the term of one year named in the original policy, according to the uniform custom, Mr. Griffin received from the company a renewal receipt to continue the policy in force another year. Before the expiration of the policy Mr. Griffin duly countersigned this renewal receipt and attached it to the policy then in Mr. Washburn's pigeon hole in the safe, and on January 16, 1908, charged the renewal premium of $25 to Washburn and credited the amount to the company, and also attached a copy of it to his policy register. It is not in controversy that Mr. Griffin understood by the "explicit instructions" from Washburn never to let a policy expire unless told to," he had the same authority to renew the policy in question that he had to renew fire insurance policies. Mr. Washburn was presumed to know when his policy would expire. He knew what instructions had been given by him respecting the renewal of his policies, and he knew that those instructions had not been countermanded. It is a reasonable inference that he expected the policy to be renewed. Mr. Griffin understood that he was expected to renew it, and from the whole tenor of his evidence, and especially from his letter of May 12, 1908, acknowledging the receipt of the plaintiff's proof of loss, it is manifest that Mr. Griffin understood that the policy had been renewed and was in full force as a valid contract of insurance after as well as before January 16, 1908. In the letter of May 12, above mentioned he says: "We would acknowledge receipt of proof of loss under policy No. X 12680, and renewal agreement No. A 29650 insuring Henry Washburn of Bingham, Maine in the U. S. Casualty Company of

New York." In writing that letter he must be deemed under the statute to have been "in the place of the company in all respects regarding the insurance effected by him," and his acts and declarations in that behalf were the acts and declarations of the company. The letter was not introduced as a new and independent agreement by which the company would be bound, but as evidence of the agent's understanding of the purpose and effect of the transactions upon which the plaintiff's claim of renewal is based; and the fact that the agent was "forbidden by the company to make any agreements in relation to the matter" after the death of the insured is entirely immaterial. No instructions to the agent from the home office of the company either before or after the death of the insured, could have the effect to defeat the operation of the statute under which the agent is made to stand in the place of the company.

It is contended by the defendant, however, that the "explicit instructions" from Washburn "never to let a policy expire" must be restricted in their application to then existing insurance contracts, and that they cannot be extended to new contracts of insurance that might afterward be made. But there is nothing in the language of the instructions which calls for such a limited interpretation. They would undoubtedly have been held applicable to a new and original policy of fire insurance; and they may with equal reason be held applicable to a policy of life or accident insurance. As already shown they were unquestionably so understood and acted upon by Griffin, and in view of the course of dealing between him and Washburn and the existing situation and circumstances the language of Washburn's instructions justified Griffin in so understanding and acting.

It is undoubtedly true that "the contract of insurance is to be tested by the principles applicable to the making of contracts in general." *Clark* v. *Insurance Co.*, 89 Maine, 26; and that the obligation in such case is correlative. *Insurance Co.* v. *Young*, 23 Wall. 85. Measured by this test, there was a valid contract of insurance subsisting at the time of the accident. The renewal receipt to continue the policy in force another year had been received by Mr. Griffin from the home office and deposited by him in Mr.

Washburn's pigeon hole in the safe. In so doing he dealt with this evidence of renewal precisely as he dealt with the original policy and with all other policies issued to Mr. Washburn. He had performed his duty as agent of the defendant, and as custodian of the policies and evidences of renewal he was acting as agent and trustee of the insured. There was no incompatibility between these separate and distinct duties. The renewal receipt as well as the original policy was legally delivered to the insured. *Hallock* v. *Com. Ins. Co.*, 26 N. J. Law, 268; *Hamm Realty Co.* v. *N. H. Fire Ins. Co.*, 80 Minn. 139 (83 N. W. 41); *Davis Lumber Co.* v. *Hartford F. Ins. Co.*, 95 Wis. 226 (70 N. W. 84); 22 Cyc. L & P. 1445.

A bill for the renewal premium, which had been credited to the defendant by Mr. Griffin before the original policy expired, was mailed to Mr. Washburn the day before the accident, and if he had lived to receive it, his legal obligation to pay the renewal premium would have been as clear as it was to pay the premium on the original policy. The element of mutuality in the contract undoubtedly existed. The opposite conclusion would be an unwarranted assumption.

The agent testifies, it is true, that if Mr. Washburn had lived and answered his letter containing the bill for the renewal premium, stating that he did not wish to have the policy renewed, he should have returned the renewal receipt to the home office, and the defendant argues that this is an admission by Mr. Griffin that he did not understand that there was a completed contract of renewal. But such a construction of his testimony would be contrary to the whole tenor of his evidence and give his language a meaning obviously not intended by him. It is expressly provided by the terms of the policy that it may be cancelled by the company upon notice and return of the unearned part of the premium if any; and by his contract of agency with the company, Mr. Griffin had express authority to "return to the home office within fourteen days of the date of its issue any policy refused by an applicant, in which event the agent shall receive full credit therefor; but unless the policy so refused is received at the home office within fourteen days of the date of its

issue, the agent shall pay the company the pro rata premium earned from date of issue to the date the policy is received at the home office." It will be remembered that he had for many years been entrusted with the entire charge of Mr. Washburn's insurance business, and if upon the receipt of a bill for the renewal premium Mr. Washburn had notified him that he had changed his mind and did not wish to renew this policy, he would have promptly returned the renewal receipt to the home office, not on the ground that there had been no valid renewal of the policy, but as an act of accommodation to an old and valued patron of his office. In his testimony in question he was not speaking of the legal rights of the insured, but of his own personal attitude in the matter.

The conclusion thus reached that a valid contract of renewal had been made in this case, is in conformity with the substantially uniform course of business governing the practical relations between the insurer and the insured respecting the renewal and delivery of insurance policies, and is in harmony with the previous methods of dealing that had been established between the defendant's general agent and the insured in this case. It involves a recognition of the reasonable and practical usages and methods which have long prevailed in that branch of business, and been found well calculated to do justice to all parties and injustice to none.

Exceptions sustained.

ANNIE E. W. COBE *vs.* HERBERT J. BANTON.

SAME, IN Equity, *vs.* SAME.

Waldo. Opinion February 26, 1910.

Ways. Discontinuance. Obstruction. Special Damage. Revised Statutes, chapter 22, section 13.

Where under a petition therefor, the county commissioners laid out a county way which included a part of a town way legally established, *held* that such laying out by the county commissioners did not by necessary implication discontinue another part of the town way leading into the county way.

Where the defendant obstructed a town way by building a fence across the same, and the plaintiff was entitled to use the fenced portion of the way for egress and ingress to her premises, and in a special manner not common to the public travel, *held* that the plaintiff had sustained special damage and was entitled to recover therefor.

On report. Judgment for plaintiff.

Two cases, one an action at law to recover damages for obstructing a town way leading to the plaintiff's summer residence in Northport, Maine, and the other a bill in equity to restrain the defendant from further obstructing the way, and on which a temporary injunction was issued. An agreed statement of facts was filed and both cases were reported to the Law Court for determination.

The material facts are stated in the opinion.

Dunton & Morse, for plaintiff.

William P. Thompson, for defendant.

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

SPEAR, J. This case involves an action at law and a bill in equity; the action for the recovery of damages for the alleged obstruction of a public way; the bill to restrain the defendant from acts of further obstruction. It comes up on the following statement of facts.

1. In 1879 a town way was legally laid out and built in the town of Northport, extending from the old county road leading to the Bluff, north 60 degrees east 53 rods to the west line of a lot of land owned by Alfred Cowans thence south 26¾ degrees east 19 rods and 13 feet to southerly corner of G. E. Brackett's land, etc. These lines are the northerly and easterly boundaries of the road and the road is two rods in width.

2. In 1898, the plaintiff acquired title to the lot of land mentioned in the description of the town way as of Alfred Cowans, and built a summer residence on this lot on the easterly side of said town way and has occupied it every season since, and was occupying it in June, 1908.

3. The only road to and from plaintiff's residence was that laid out and built by the town in 1879, and she used this road continuously in going to and from her residence without interruption down to June, 1908.

4. In 1890, the County Commissioners of the County of Waldo, laid out a county road which covers a part of the town road above described. A copy of the description of the county road, and plan showing the relative location of the two roads, are made a part of the case.

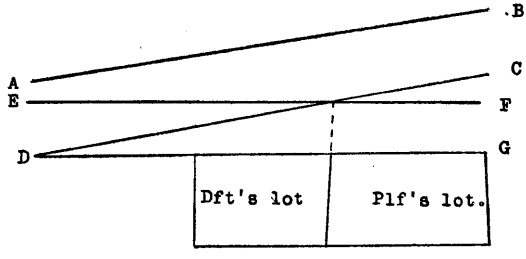
5. In 1898 the plaintiff, by consent of the Municipal Officers of Northport and without any vote of the town, graded that part of the town way leading westerly from the gravel drive in front of her residence to the traveled part of the county road, and put in steps leading up to the traveled part of the county road, closing that part of the town road to travel with teams and leaving that part of the town road extending southerly to the county road, as the only means of access to her residence with teams and vehicles.

6. The defendant owns the lot of land next southerly of the plaintiff's lot on which he has a cottage, and in June, 1908, at the time he built the fence, owned the fee in the land over which the town way passes as far north as the plaintiff's lot.

7. In June, 1908, the defendant claimed that the plaintiff had no legal right to pass over this way to and from her house, and stretched a rope across the way to obstruct and hinder her from

passing over it. She cut the rope, or caused it to be cut, and used the way as before. On the 26th day of June, 1908, the defendant built a high board fence entirely across the travelled way which was a continuation of the line fence between the lots of the plaintiff and defendant. A few days later this fence was removed by order of the Municipal Officers of Northport.

It then appears that the town way alleged to have been obstructed was legally established in 1879; that it has never been discontinued in accordance with any method prescribed by statute; that in 1890 the County Commissioners laid out a road which entirely covered a small section of the town way but not, as the plan shows, that part where the obstruction occurred. The accompanying sketch, taken substantially from the plan, gives a practical idea of the relative position of the new and old way with reference to displacement, and the relative situation of the premises of the plaintiff and defendant to each.



A, B, C, D, new county road. E, F, G, D, old town way. G, D, F, Part of old way not displaced. Dotted line, Fence across old way.

It should here be observed that the alteration, widening or discontinuance of the old town way, by any statutory proceeding, is not involved. Only a new way is prayed for. Under the latter prayer the commissioners had neither the power nor the jurisdiction to act with respect to the former matters. The distinction which differentiates the rights and duties of the commissioners with respect to these two methods of procedure is clearly stated in *Sprague* v. *Waite*, 17 Pick. 309, in an opinion by Shaw, C. J.

Therefore but two questions are involved in this controversy. (1) Did the laying out of the county way, by necessary implication, discontinue the old town way in front of the defendant's premises, so that the location reverted to him with a right to fence it. (2) If not, was the fencing the way such a nuisance as to inflict special injury upon the plaintiff. The negative of the first question upon the facts agreed, seems to be well established. The rule enunciated in *Sprague* v. *Waitt*, supra, appears to be conclusive upon this point. In this case the petition "not seeking the 'alteration' or discontinuance of any old road there was no notice to the public that any such alteration or discontinuance was contemplated, no adjudication of the court authorized any such discontinuance, and therefore the committee had not power to discontinue any portion of the existing highway."

"But it does not appear, from the proceedings of the locating committee, that they had any such intention; none such is expressed, and indeed the result is claimed rather as a legal implication from the act of the committee, than from any manifestation of such an intent. The effect of the location, as made by the committee, was to straighten and fix the easterly line of the highway in this part; and as the old highway in that section, was of somewhat irregular width, if any corner or portion of the land of any private individual on the westerly side, came within three rods of the line thus fixed, it would thereby be cut off and set apart for the use of the public as a highway, so that the way should be at least three rods wide upon the section thus fixed. But if, by location, usage or otherwise, there was an existing highway, lying westerly of the three rod way thus fixed, it was left unaffected by their proceedings." From this case it is manifest that the new road practically covered the old road, leaving only a margin of the old way between the west line of the old, and the west line of the new, way.

In *Chadwick* v. *McCausland*, 47 Maine, 342, an analogous case, it is held, "the court cannot necessarily treat the latter, (the old way) as discontinued thereby, when the record is silent upon that subject, consequently the public easement would remain as before." The record in the case at bar is silent upon the question of discontinuance.

In *re Railroad Commissioners*, 91 Maine, 135, is to the same effect. The court say: "The highway was located along the general line of the prescriptive way, and at the railroad crossing, which is the point in question, the latter way was entirely within the location." Here it was rightly held that the new way necessarily extinguished the old one, as the public could not occupy the same space at the same time by two equivalent but entirely distinct rights of travel.

The plan and the admissions in the case at bar clearly disclose that the location of the county way was coincident with the old town way only at the place of beginning many rods away from the point of obstruction, and continued in a diverging line until at the fence complained of the whole width of the old way was left unincumbered. It is therefore apparent that the location of the county road in 1890 did not, by necessary implication, merge and thereby extinguish the town way in front of the defendant's premises.

2. Did the plaintiff by the erection of the fence, sustain special damage, different in degree from that suffered by the general public? That a fence erected across a highway is a public nuisance is not controverted. R. S., chap. 22, sec. 13, provides: "Any person injured in his comfort, property or the enjoyment of his estate by a common and public, or a private nuisance, may maintain against the offender an action on the case for his damages, unless otherwise specially provided." It is apparent that the plaintiff was entitled to use the fenced portion of the way for egress and ingress to her premises, and in a special manner, not common to the public travel. To reach the county way from the south she was obliged to pass over the fenced section of the town way; the public were not.

As every conclusion, in this class of cases, depends upon the particular facts involved, it is difficult to cite precedents, yet it is quite obvious that *Smart* v. *Lumber Co.*, 103 Maine, 37, is closely analogous to the case at bar, in which it is said: "The plaintiff has, in a legal sense, clearly suffered special damages from the acts of the defendant company in obstructing the Presque Isle stream, not because he has had occasion more than others for its use, but in a particular way as means of ingress and egress to and from his

summer cottage a use and benefit differing from that required by the public at large." See also *Norcross* v. *Thoms*, 51 Maine, 503.

In accordance with the stipulation of the parties, the entry must be,

Judgment for the plaintiff for $10.
Temporary injunction made permanent.

CHARLES W. HAYES, Judge of Probate,

vs.

EDGAR M. BRIGGS, et als.

Piscataquis. Opinion February 26, 1910.

Executors and Administrators. Probate Bonds. Remedies. Repeal. Retroactive Effect. Constitutional Law. Obligation of Contracts. Repealing Act, 1903. Revised Statutes, 1883, chapter 72, section 16; 1903, chapter 74, sections 10, 16.

Revised Statutes, chapter 74, section 10, authorizes suit on a probate bond for individual benefit, and section 16 authorizes such suit for the benefit of the estate. *Held*, that an attempt to proceed under one section cannot be sustained by the other.

Section 16, chapter 72, R. S., 1883, authorized a Judge of Probate to empower any interested party to commence suit on a probate bond. Section 16, chapter 74, R. S., 1903, permits the Judge of Probate to "expressly authorize or instruct an administrator or administrator de bonis non, on the petition of himself or any party interested," to commence such suit. *Held:* That section 16, chapter 72, R. S., 1883, was repealed in 1903 and section 16, chapter 74, R. S., 1903, substituted therefor.

The process prescribed in Revised Statutes, chapter 74, section 16, which permits the Judge of Probate to "expressly authorize or instruct an administrator," etc., to commence suit on a probate bond, is retroactive and applies to a suit on a probate bond given while section 16, chapter 72, R. S., 1883, was in force.

While the Constitution carefully guards the rights of private property, yet it does not prohibit the legislature from passing such laws as act retrospectively if they effect only the remedy.

Revised Statutes, chapter 74, section 16, which permits a Judge of Probate to "expressly authorize or instruct an administrator," etc., to commence a suit on a probate bond and which applies to suit on a probate bond given while section 16, chapter 72, R. S., 1883, was in force, is not unconstitutional as to its retroactive effect as impairing the obligation of the contract evidenced by the bond as it affects the remedy only and does not impair the rights of the party interested.

On exceptions by plaintiff. Overruled.

Action of debt upon an administrator's bond brought in the name of the Judge of Probate for the benefit of the estate of Orlando M. Briggs, late of Parkman, in the county of Piscataquis, and against Edgar M. Briggs, the administrator of said estate, and Cyrus I. Barker and Charles F. Safford, the sureties on said bond. Bond dated June 1, 1897. Writ dated September 7, 1909.

The defendants demurred to the declaration, the demurrer was sustained and the plaintiff excepted.

The case is stated in the opinion.

Hudson & Hudson, and Manson & Coolidge, for plaintiff.

Foster & Foster, for defendants.

Fred V. Matthews, for Charles F. Safford.

Edgar M. Briggs, pro se.

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

SPEAR, J. This is an action of debt upon a probate bond brought in the name of the Judge of Probate for the benefit of the estate of Orlando M. Briggs, late of Parkman, in the county of Piscataquis. The writ was entered at the September term of court, 1909. At this term a demurrer to the declaration was filed and sustained. To this ruling the plaintiff excepted. The declaration and demurrer make up the case. It is conceded in argument that this action was brought against the principal and sureties on an administrator's bond given in the estate of Orlando M. Briggs, late of Parkman, deceased, and that Francis W. Briggs, mentioned in the declaration, is a grandson of Orlando M. Briggs and claims to be interested in the estate. R. S., chap. 74, prescribed two methods of procedure by virtue of which an action may be brought against the principal and surety upon a probate bond. Section 10 provides: "Any

person interested personally, or in any official capacity, in a probate bond, or in a judgment rendered thereon, whose interest has been specifically ascertained by a decree of the Judge of Probate, or by judgment of law, as hereinafter provided, may originate a suit on such bond, or scire facias on such judgment, without applying to the judge whose name was used in the bond or judgment, or to his successor." Section 16 provides: "The Judge of Probate may expressly authorize or instruct an administrator or administrator de bonis non on a petition of himself or any party interested to commence suit on a probate bond for the benefit of the estate, or any party interested therein, and such authority shall be alleged in the process." Under section 10 a party who has complied with the requirements therein prescribed, may institute an action in the name of the Judge of Probate in his own behalf and recover judgment for his individual benefit. The remedy under this section is based upon the theory that when an interest in an estate in his favor has been ascertained and the administrator has failed to adjust it, the party interested has a personal remedy against the bond.

Under section 16 the procedure is for the benefit of the estate and not for that of the person interested. Although authorized to petition for the commencement of the suit, and become the agency to set the process in motion, yet he has no direct benefit in the result, not common to all interested in the settlement of the estate. For any failure on the part of the administrator to perform the duties required of him in the administration of the estate the latter remedy may be invoked.

Therefore it will be observed that the remedies prescribed by these two sections of the statute are entirely distinct and that an attempt to proceed under one section cannot possibly be sustained under the provisions of the other. It is not in controversy that this action is brought for the benefit of the estate, but under sec. 16 of the old statute. But this section of the statute as it stood in 1897, when the bond was given, was repealed in 1903, Repealing Act, R. S., page 1018, and the present section enacted. The case at bar could have been maintained under the old statute, but it is admitted by the plaintiff in his brief that it cannot be sustained under the present

statute, inasmuch as it would require the administrator to institute a suit against himself, a procedure absurd upon its face.

Therefore two questions arise: 1. Is the statute of 1903 retroactive? 2. If retroactive, is it constitutional? The general repealing act made necessary by the adoption of the revision of 1903 reads: "The public acts, passed during the years hereafter named and herein designated, are repealed, except so far as they are preserved or excepted in the following sections;" Under this section "An act to amend Section 16 of chap. 72 of the Revised Statutes relating to suits on probate bonds is expressly repealed." From this course of legislation it is manifest that the legislature intended to repeal the old section as amended, and substitute therefor the present section as it appears in the statute. By this repeal, if no new legislation had been enacted, no procedure whatever, for the benefit of the estate could have been instituted, as, without statutory authority such procedure could not be maintained. Therefore it is apparent that, by enacting section 16 as it now stands, the legislature did not intend to take away all remedy that had existed under the section repealed, but to make the process prescribed in the new enactment retroactive.

But the plaintiff contends that this section of the statute, if construed to be retroactive, is unconstitutional, as the remedy existing at the time the bond was given has been so changed by the new statute as to impair the obligation of the contract, evidenced by the bond. We think the contention untenable. "There is no vested right to a particular form of remedy." *Poor* v. *Chapin*, 97 Maine, 295. In *Oriental Bank* v. *Freese*, 18 Maine, 109, the court holds, "While the constitution carefully guards the rights of private property, it does not prohibit the legislature from passing such laws as act retrospectively if they affect only the remedy." In this case the statute when the debt was contracted authorized the creditor to arrest the body of the debtor. The authority to arrest was repealed after the debt had been contracted. It was contended that the new statute acted retroactively and was therefore unconstitutional: but the court said; "The legislature must necessarily possess the power . . . of making such alterations and such laws as the

change of circumstances, for the public good, may require. And in doing this he may be deprived of the right which he has by the existing laws to arrest the body or to attach or seize certain descriptions of property without infringing any constitutional provision." In the same case it was held that the legislature "possessed the power to take away by statute, what was given by statute, except vested rights."

In *Bangor* v. *Goding*, 35 Maine, 73, it was held, as appears from the head note which fairly states the case: "The repeal of the statutory provision, giving a lien upon property, defeats the lien remedy, although, at the time of the repeal, the proceedings, prescribed by the statute for enforcing the lien, had been instituted and were rightfully pending in court. A lien created by the provisions of a statute in favor of a contract creditor is but a part of the remedy afforded for collecting the debt. The repeal of such a provision, is merely a change in the remedy and does not impair the obligation of the contract." The general doctrine laid down in these cases is too thoroughly established to require further citation.

The plaintiff, in support of his contention, cites several authorities, but a fair analysis of the case at bar shows that they do not apply. The principle upon which these cases proceed seems to be fairly stated in *Phinney* v. *Phinney*, cited by plaintiff, 81 Maine, 450, in which the court say that when "a subsequent statute so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract," it is unconstitutional. We think the rule here enunciated is in full accord with that stated in *Banks* v. *Freese* and *Bangor* v. *Goding*, supra.

Upon examination it will appear that all the cases supporting the plaintiff's contention are predicated upon the existence of privity of contract on the part of the person claiming that his contractual rights have been impaired. *Phinney* v. *Phinney*, is clearly such a case. The mortgagee had taken a mortgage with reference to a specific time prescribed for the running of the equity of redemption. The statute undertook, without the consent of the mortgagee, to extend this period of time for the benefit of the creditors of the mortgagor. In this matter, the mortgagee was directly interested

and a material right was manifestly impaired. The legislature might as well have undertaken for the benefit of some third party to extend the time for the payment of a promissory note.

But an analysis of the interest in the bond of the party who, under the statute of 1897, might be authorized to bring suit in the name of the Judge of Probate, for the benefit of the estate, shows that he sustained no relation of privity to the contract upon which he might be so authorized "to commence a suit." The probate bond upon which the administrator was principal, constituted a contract with the Judge of Probate, eo nomine, and with no other person either directly or by inference. Without the provisions of the statute neither the administrator, nor any person interested in the estate, could possibly bear any such relation of privity to a probate bond as to enable him to bring suit upon it. But it was competent for the legislature to prescribe any method it saw fit for the enforcement of the conditions of this kind of a bond. It could have said that the Judge of Probate under certain conditions could institute proceedings on his own motion; but undoubtedly recognizing the more probable vigilance of direct interest, saw fit to confer upon the party interested the right to petition the Judge for authority to commence an action against the administrator. This was simply another form of remedy but had no tendency to establish any relation of privity between the party interested and the contract.

This legislation neither enlarged nor diminished the rights of any party interested in the estate. It simply said that such party might do the things prescribed by statute. The legislature could have said that a brother, a cousin or an uncle should have the right to petition the Judge of Probate to bring suit, etc. Yet it could not be contended that this in any way could have made any of these parties privy to the contract. But the results to be accomplished by the Judge of Probate, if the power had been conferred upon him, or the uncle or cousin if the power had been conferred upon them, would have been precisely the same and for the same purpose, the benefit of the estate.

If we now revert to the statute as it stood in 1897, and as it is now, we shall readily discover that the latter statute affected the

remedy only. The earlier statute read: "The Judge of Probate may expressly authorize any party interested to commence suit," etc. The present statute reads: "The Judge of Probate may expressly authorize or instruct an administrator or administrator de bonis non on the petition of himself or any party interested to commence a suit," etc. In other words, the latter statute simply changes the description of the person authorized to commence a suit. After the suit is instituted every feature of the proceeding; the rights of every party interested in the estate; the rights of the particular party who might have been authorized "to commence a suit;" the result of the suit; the distribution of the estate; are all precisely the same under one statute as under the other.

The repeal of the old and the enactment of the new statute affected only the remedy, and in no way impaired "the rights of the party interested" in the obligation of the contract contained in the conditions of the bond.

Exceptions overruled.

In Equity.

LUCY C. FARNSWORTH, Admx.,

vs.

GEORGE F. WHITING, ISABELLA A. MARTIN AND DAVID N. MORTLAND.

SAME

vs.

GEORGE F. WHITING, ISABELLA A. MARTIN, DAVID N. MORTLAND AND SECURITY TRUST COMPANY.

Knox. Opinion March 1, 1910.

Equity. Appeal. Decree. Gifts Causa Mortis. Equity Cases. Right to Jury Trial. Verdict on Issues in Equity Cases. Constitution of Maine, Article I, section 20.

A decree in equity will be affirmed on appeal, unless it is shown to be clearly wrong.

To establish a gift causa mortis the law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift, perfected by as complete a delivery as the nature of the property will admit — a delivery actual and complete, such as deprives the donor of all further control and dominion.

The provision of the Constitution, Article I, section 20, that in all civil suits and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced, is a declaration of the common law right to trial by jury and in no way inconsistent with the establishment of a court of chancery having general jurisdiction, as it was at the time of the adoption of the Constitution and proceeding in accordance with its fundamental rules of practice as then existing.

A bill in equity for restitution of bonds and stock certificates and of a key to a box in a safe deposit vault is within the chancery jurisdiction as it existed at the time of the adoption of the Constitution, and in such cases the defendant does not have a constitutional right to trial by jury. Such trial can be had only at the discretion of the court.

The verdict of a jury upon an issue framed in equity, when a jury trial is not a constitutional right, is merely advisory and, if it be not satisfactory to the conscience of the court, it is discretionary with the court either to disregard the verdict wholly or to set it aside and order a new trial.

Larrabee v. *Hascall*, 88 Maine, 511, reaffirmed in part.

In equity. On appeal, exceptions and motion by plaintiff. In first case, decree affirmed. In second case, verdict set aside and decree reversed in part.

Two bills in equity in the nature of equitable replevin, brought by the plaintiff in her capacity as administratrix, with the will annexed, of the estate of James R. Farnsworth, deceased, to compel the defendants to return to her as administratrix aforesaid, certain notes, bonds, etc., alleged to belong to said James R. Farnsworth, and to deliver to her in her said capacity the keys to a certain safe-deposit box rented by the said Security Trust Company to the said James R. Farnsworth, etc. (For a more full and complete statement of the facts see *Farnsworth, Admx.*, v. *Whiting et als.*, 104 Maine, 488.) The defense in the answers to both bills was a claim of title in the defendants Whiting and Martin by reason of a gift causa mortis to them by said deceased, James R. Farnsworth.

Both causes were tried together and in the first entitled cause the following issues were submitted to the jury:

1. "Did the said James R. Farnsworth, on the sixth day of May, A. D. 1905, or at any time, give to George F. Whiting the personal property enumerated and described in paragraph 3 of plaintiff's bill, to be equally divided as stated in defendants' answer thereto?

2. "Did the defendants, Whiting and Martin, take or sequester any of said property or effects belonging to the estate of said James R. Farnsworth?"

The jury answered the first question in the affirmative and the second question in the negative.

In the second entitled cause the following issues were submitted to the jury:

1. "Did the said James R. Farnsworth on the sixth day of May, A. D. 1905, or at any time before his death, give to the said George F. Whiting the personal property and securities mentioned

in paragraph 4 of plaintiff's bill, marked and described therein as "Schedule A," in box No. 41 in the vault of the Security Trust Company in Rockland, to be equally divided as stated in defendant's answer to said paragraph?

2. "Do the property and securities mentioned in plaintiff's bill, paragraph 4, marked and described as "Schedule B," belong to the estate of said Helen A. Farnsworth, deceased?"

The jury answered both questions in the affirmative.

Final decrees were made by the presiding Justice in accordance with the findings of the jury.

In each cause, the plaintiff filed a general motion for a new trial and appealed from the decree and also excepted to certain rulings made during the trial.

The cases are further stated in the opinion.

Heath & Andrews, for plaintiff.

David N. Mortland, Rodney I. Thompson, and Arthur S. Littlefield, for defendants.

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

BIRD, J. Two bills in equity brought by complainant, in her capacity of administratrix with the will annexed of the estate of James R. Farnsworth, deceased, against the same defendants, save that in the second case the Security Trust Company is also made a defendant. The relief sought is in the nature of equitable replevin. The defense in the answers to both bills is claim of title in defendants Whiting and Martin by reason of a gift causa mortis to them by deceased.

In both cases, among other issues framed and submitted to a jury, was the question whether in the respective cases deceased did in his lifetime make a gift to defendants Whiting and Martin. In each case the question was answered in the affirmative and following the verdict the sitting Justice entered a decree in favor of defendants. In each case plaintiff seasonably filed a general motion for new trial and appealed from the decree. Plaintiff took sundry exceptions to the admission and exclusion of evidence and to certain

instructions and refusals to instruct of the sitting Justice. In reference to the exceptions, it need only be said that they have received due consideration from this court in arriving at its conclusions: *Redman* v. *Hurley*, 89 Maine, 428, 434.

In the first case, after careful examination of the record, we are of the opinion that the decree appealed from must be sustained. It is not shown that it is clearly wrong: *Young* v. *Witham*, 75 Maine, 536; *Proctor* v. *Rand*, 94 Maine, 313, 318; *Herlihy* v. *Coney*, 99 Maine, 469, 471; *York* v. *Mathis*, 103 Maine, 67, 74-5.

In the second case, in which it is sought to recover the contents of the box in the safe deposit vault of the Security Trust Company occupied by the testator in his lifetime, and the keys of the box we feel that the decree cannot be sustained.

More than half a century ago this court declared that "donations made, not in conformity to the statute of wills and frauds, but suited to contravene them are not favored by the law, but are admitted with the greatest caution:" *Dole* v. *Lincoln*, 31 Maine, (1850) 422, 433. See also *Goulding* v. *Horbury*, 85 Maine, 227, 234. In express recognition of this doctrine, it was later held, in a case where it was unsuccessfully sought to support a gift causa mortis of money and bonds, by showing delivery of the key of the trunk containing them, that to establish a gift causa mortis the law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift, perfected by as complete a delivery as the nature of the property will admit of—a delivery actual and complete, such as deprives the donor of all further control and dominion: *Hatch* v. *Atkinson*, 56 Maine, 324, 327, 331. The doctrine of this case has been repeatedly recognized with approval since its enunciation: *Drew* v. *Hagerty*, 81 Maine, 231, 242, 243; *Goulding* v. *Horbury*, 85 Maine, 227, 234; *Larrabee* v. *Hascall*, 88 Maine, 511, 518, and, save as it may be modified by *Goulding* v. *Horbury*, ubi supra, is reaffirmed.

A careful examination of the record by no means satisfies us, that either an intention to give or a delivery of the keys with an intent to give either them or the contents of the box are shown by that clear and

unmistakable proof which the law requires: *Hatch* v. *Atkinson*, ubi supra; *Goulding* v. *Horbury*, 85 Maine, 227; see also *Liberty* v. *Haines*, 103 Maine, 182, 191-193. It is apparent that the jury must have labored under a misconception of the law or of the nature and degree of the proof required to uphold the contention of the defendants. The decree of the sitting Justice is based upon the verdict (*Young* v. *Witham*, ubi supra) and must be reversed. See *Metcalf* v. *Metcalf*, 85 Maine, 473, 481.

It is, however, strenuously contended by the defendants that, inasmuch as the controversy between the parties is one concerning property, trial by jury is a right given by the Constitution of Maine and that a verdict in such case cannot be set aside save as, and upon the same grounds that, a verdict at common law is set aside and that, as a necessary corollary if the verdict be set aside, a new trial must be ordered.

The provision of our Constitution invoked, Article I, section 20, is as follows: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced." . . . It is in all substantial particulars the same as that of Massachusetts. The Supreme Court of that Commonwealth in a recent case, had occasion to consider the same proposition now maintained by defendants and concludes its clear and learned discussion of the subject, as follows:—"The article as it now stands is a declaration of the common law right to a trial by jury, and in no way inconsistent with the establishment of a court of Chancery having general jurisdiction, as it was at the time of the adoption of the Constitution, and proceeding in accordance with its fundamental rules of practice as then existing. One of these rules was that trial by jury should be at the discretion of the Court. The case before us is one of alleged fraud and undue influence, in which the plaintiffs among other things ask that the defendant be ordered to account for and to deliver to the plaintiffs personal property and real estate which he wrongfully obtained. Both as to subject matter and the remedy sought, the case is well within chancery jurisdiction, as it existed at the time of the adoption of the Constitution and had for a long time there-

tofore existed. It follows, that the defendant has not a constitutional right to trial by jury, and that he can have such a trial only at the discretion of the Court:" Per Hammond, J., *Parker* v. *Simpson*, 180 Mass. 334, 344, 355; see also *Culbert* v. *Hall*, 181 Mass. 24, 25.

The case under our consideration is one of equitable replevin (*Farnsworth* v. *Whiting*, 104 Maine, 488, 493-495) a subject within the jurisdiction of courts of full equity jurisdiction long before the adoption of our Constitution: *Clarke* v. *White*, 12 Pet. 178, 187-88; *Somerset* v. *Cookson*, 3 P. Wms. 390 (1735); *Pusey* v. *Pusey*, 1 Vern. 273 (1684); *Saville* v. *Tankred*, 1 Ves. 101; (1748); *Jackson* v. *Butler*, 2 Atk. 306 (1742); *Tells* v. *Read*, 31 Ves. Jr. 70; (1796); *Osborn* v. *U. S. Bank*, 9 Wheat. 737, 845, 846; 1 Mad. Ch. Pr. 232; see also *Farnsworth* v. *Whiting*, 104 Maine, 488, 493; *Holden* v. *Hoyt*, 134 Mass. 181, 184, 186.

Where, as in the present case, the right of trial by jury is not a constitutional right, this court always has considered that a verdict in an equity cause is merely advisory and that, if it be not satisfactory to the conscience of the court, it is discretionary with the court, either wholly to disregard the verdict or to set it aside and order a new trial: *Larrabee* v. *Grant*, 70 Maine, 79, 83-85; *Metcalf* v. *Metcalf*, 85 Maine, 473, 477; *Ben. Asso.* v. *Parks*, 81 Maine, 79, 84; *Redman* v. *Hurley*, 89 Maine, 428, 434; *Duffy* v. *Insurance Co.*, 94 Maine, 414, 417; *Rolfe* v. *Insurance Co.*, 105 Maine, 58, 60. A different rule apparently prevails in Massachusetts: *Crocker* v. *Crocker*, 188 Mass. 16, 18, 19.

The entry must therefore be, in the first case decree affirmed with costs upon appeal and in the second case verdict set aside, decree reversed, except as to the securities in box No. 41 standing in the name of Helen A. Farnsworth, with costs.

Decree accordingly.

DAVID C. NORTON *vs.* UNIVERSITY OF MAINE.

Penobscot. Opinion March 5, 1910.

Contracts. Customs and Usage. Local Usage. Verdict.

One employed to excavate to a specified grade at a stated price per cubic yard cannot recover for excavation below that line, incidental to performance of the contract.

A local usage does not affect a contract, unless known to the parties, so that they may be presumed to have contracted with reference to it.

One relying on a local usage as affecting a contract has the burden to show knowledge thereof by the parties.

Knowledge of a local usage may be established by showing its existence to have been so uniform, general, and of long standing that one might be presumed to know it.

Under the rule that a local usage cannot be shown to contradict or vary a contract, one employed to excavate to a specified grade at a stated price per cubic yard cannot show a local usage entitling him to recover for excavation below that grade, incidental to performance of the contract.

That a defendant did not object to the direction of a verdict against him for a specified sum, less than the amount claimed by plaintiff, for an excavation below a specified grade to which he was employed to excavate, does not show the defendant's liability for such extra excavation.

On exceptions by plaintiff. Overruled.

Assumpsit on account annexed brought to recover the sum of $635.50, and interest, for labor in excavating 205 cubic yards of ledge below grade for the foundation of the Agricultural Building at Orono. Plea, the general issue. At the conclusion of the plaintiff's testimony the presiding Justice directed the jury to return a verdict for the plaintiff for $132.65 and no more, the amount conceded to be due by the defendant, and a verdict was so returned. The plaintiff excepted to the aforesaid order.

The case is stated in the opinion.

Louis C. Stearns, and Louis C. Stearns, Jr., for plaintiff.

Wm. T. Haines, and John E. Nelson, for defendant.

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

CORNISH, J. This is an action of assumpsit on an account annexed wherein the plaintiff seeks to recover the sum of six hundred and thirty-five dollars and fifty cents for labor in excavating 205 cubic yards of ledge below grade for the foundation of the Agricultural building of the University of Maine at Orono. The plaintiff in August or September, 1907, made an oral contract with a representative of the defendant for excavating the cellar of this building, the price agreed upon being sixty cents per cubic yard for all dirt, and three dollars and ten cents per cubic yard for all ledge removed. Work was begun at once and as soon as the soil was removed and the ledge laid bare, the plaintiff asked for a plan, which was furnished by an instructor in the university who was the engineer in charge of the work. This plan or cross section showed the depth desired. The plaintiff continued this work in his own way by blasting the ledge so that he reached the designated grade in some places and went below it in others. He has been paid for all dirt and ledge excavated and removed to grade, and this controversy involves his claim to compensation for the ledge excavated below grade. At the conclusion of the testimony for the plaintiff the presiding Justice directed a verdict for the plaintiff for $132.65, the amount conceded by the defendant to be due, and the case is before this court on plaintiff's exceptions to this ruling, as he claims that he is entitled to the full contract price of $3.10 per cubic yard for the entire 205 cubic yards excavated below grade. He rests his claim on two grounds, first, an implied liability arising of necessity out of the contract itself; second, a local usage. Neither ground is tenable.

1. The plaintiff contends that he had a right by implication under the contract to excavate and remove as he did and to receive pay for such excavation below grade because such excavation was necessary and incidental to the reaching of the grade required by the defendant's engineer.

The reason assigned works against his contention rather than in its favor. Under his contract he was obliged to reach a certain

depth fixed by the plan, and to remove all earth and ledge to that level. He could not stop short of that, he was not obliged to go below it. Such lower level could be of no advantage to the defendant, was not within the terms of the contract and could not have been within the contemplation of the parties. If the excavation below grade was necessary and incidental to the reaching of the required grade, it was necessary "as a means to an end and not as the end itself;" it was the method employed by the plaintiff to perform his contract and as he testified, was not the only practicable method but the easier and more economical one. If in blasting he had not set the holes so deep, many so called hummocks would have been left which would have required drilling and would have involved greater expense. It was immaterial to the defendant what method the plaintiff adopted if the required level was reached, and the deeper blasting and consequent removal were as much a necessary incident to the performance of the contract in one case as the shoaler blasting and the consequent drilling would have been in the other. For neither by itself was the defendant liable. It engaged to pay only for the excavation of a cube of certain dimensions. The plaintiff undertook to do the work, was as familiar with the situation as the defendant and simply did in his own way what he contracted to do.

In *Voorhis* v. *Mayor*, 62 N. Y. 498, the plaintiff entered into a contract for regulating and grading a street the entire width, with a specified price for rock excavation, and he claimed to recover for rock excavation made outside the lines of the street, in sloping the sides, which was necessary to effect the excavation within the street.

The court in disallowing the claim state reasons that apply with equal force to the case at bar: "The plaintiff concedes that if he had excavated the rock upon perpendicular lines, at just the width of the avenue and down to the grade, he would have performed his contract fully and could not have been compelled to have done more. It follows that the excavation of it with slopes was not within the terms of the contract, nor so in the contemplation of the parties as that the city could insist that it should be done, or the contractor

insist upon doing it at the expense of the city. It is found by the learned referee to have been necessary to effect the excavation that the slopes should be made. But it was necessary as a means to an end, not as the end itself. It was more convenient, more easy, cheaper to the appellant, to blast as it were at random, than with strict observance of the exterior lines of width of the street. Unless the making of the slopes was called for by the terms of the contract, or was within the intention and contemplation of the parties, it is not to be said that because they were a necessity to the contractor as a mode of excavation, the city is to be charged with the cost of removing the rock from them, no more than with the expense of other means necessary for him to employ therein." *Gallick* v. *Ebling*, 102 N. Y. Supp. 803, 52 Misc. Rep. 533, decided in 1907, is even more strikingly in point. In that case the court held that when a contractor agreed to make an excavation of rock for a cellar for a certain price per cubic yard, to the satisfaction of the defendant's architect and he blasted in such a manner that rock below the required level was broken up and the architect required such loose rock to be removed in order to obtain a solid foundation, the contractor was not entitled to recover for the excavation of such broken rock. In point also are *Stuart* v. *Cambridge*, 125 Mass. 102; *Leavitt* v. *Dover*, 67 N. H. 94; and *Ashley* v. *Henahan*, 56 Ohio St. 559, 47 N. E. Rep. 573.

2. USAGE. The plaintiff further relies upon an alleged usage in the business under which the contractor is entitled to compensation for excavating the extra amount below grade in order to reach grade, and this was the main issue at the trial. The evidence to prove the existence of such a usage was meagre and indefinite. It came from only one witness, a civil engineer, while one Sawyer, a contractor, of large experience, also called by the plaintiff was unable to state that such a general and uniform usage prevailed even in that vicinity.

But admitting that in the absence of evidence to the contrary a jury might have been justified in finding that such usage did exist, certain insuperable obstacles prevent its application in this case.

In the first place it was not claimed to be other than a local usage and as such it could have no effect unless known to both parties so that they might be presumed to have contracted with reference to it. If not known to the parties their rights and liabilities could in no event be affected by it. *Nonotuck Silk Co.* v. *Fair*, 112 Mass. 354; *Fowler* v. *Pickering*, 119 Mass. 33; *Sawtelle* v. *Drew*, 122 Mass. 228; *Marshall* v. *Perry*, 67 Maine, 78. The burden rested upon the plaintiff to prove such knowledge. This burden might be met by the introduction of evidence showing the existence of the usage to have been so uniform, general and of such long standing that a party might be presumed to know it, but such a presumption is one of fact. Here there is no evidence that could sustain such a presumption, and as to actual knowledge, there was no evidence that the defendant's representative had ever heard of such a usage, while the plaintiff admitted that he himself knew nothing of it until after the contract was made. Under these circumstances it is impossible to read any such usage into the contract.

In the second place the alleged usage is of no effect because it is repugnant to the express contract made by the parties and is unreasonable. This court in *Marshall* v. *Perry*, 67 Maine, 78, after a careful analysis of the decided cases stated the doctrine in these words: Page 82. "The current of authorities in this country, both state and federal, establishes the proposition that local usage cannot be shown to contradict or vary the terms of a contract express, or implied by law, or control its legal interpretation and effect." See also *Randall* v. *Smith*, 63 Maine, 105, and *Ulmer* v. *Farnsworth*, 80 Maine, 500. In compliance with this principle where stone cutters contracted to furnish stone for a building according to plans and specifications of an architect, and in carrying out their contract it was necessary to have wooden patterns made, it was held in an action brought by the contractors to recover the amount paid for these patterns, that evidence of a usage for stone cutters in cutting stone for a building to procure such patterns and recover cost from the owner was inadmissible. *Davis* v. *Galloupe*, 111 Mass. 121.

Rogers v. *Hayden*, 91 Maine, 24, involved a contract for stone sold and delivered on the premises for building a cellar wall. The plaintiff claimed that by reason of a local usage the stone were to be measured as solid wall after they were laid, while the defendant claimed that they should be measured when and where delivered according to the contract. The court rejected the local usage and said: "The contract fixed the price per cubic yard delivered. That meant cubic yards of stone, not of masonry. That meaning cannot be varied by local usage, unless it be uniform, reasonable and known to the parties, so they may be presumed to have contracted with reference to it. *Marshall* v. *Perry*, 67 Maine, 78; *Schooner Reeside*, 2 Sum. 567. The measure in the wall was over 102 cubic yards, on the dump about 58. Certainly a usage that might nearly double the quantity of goods sold must be unreasonable. Better have honest measure and fair price."

A similar increase of liability would obtain in the case at bar if this local usage is injected into the contract, for while the cost of removing the ledge above the designated level as contracted for was $1072.60, that of removing the ledge below the level if governed by usage would be $635.50 additional. Such a result emphasizes the unreasonableness of the claim contended for.

The fact that the defendant did not object to a verdict against it for the amount ordered by the presiding Justice, has no probative force upon the legal issues between the parties. It may have been regarded as compensation for removing the rock below grade after it was blasted in accordance with additional instructions from the defendant, or it may have been in the nature of a concession to end litigation. Whatever the reason the result was favorable to the plaintiff, more favorable perhaps than a strict construction of the contract would have permitted.

The ruling of the presiding Justice was without error and the entry must be,

Exceptions overruled.

CHARLOTTE T. JONES *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion March 10, 1910.

Railroads. Fires. Cause. Evidence.

Where in an action to recover damages caused by a fire alleged to have been set by the defendant's locomotive, *held* that the question involved was one of reasonable inference from all the facts and circumstances and that the evidence should be of such a character that a reasoning mind could see the connection between cause and effect.

Where in an action to recover damages caused by a fire alleged to have been set by the defendant's locomotive, *held* that the jury were warranted in adopting the plaintiff's theory that the fire was set from a locomotive, instead of the defendant's theory that it was communicated from a bog fire admitted to have been smouldering for nearly a month.

Where the defendant having introduced expert evidence that its locomotives, equipped as they were with a wire netting over the smokestack could not in the opinion of the witnesses throw a spark beyond thirty feet from the rail, *held* that it was not error to permit the plaintiff in rebuttal to introduce testimony of specific instances where fires had been set by these locomotives at distances varying from 95 to 152 feet. The objections raised by the defendant that the evidence was too remote in time and place, and that the conditions were not shown to be similar to those surrounding the fire for which this action is brought, go to the weight of the testimony and not to its admissibility.

On motion and exceptions by defendant. Overruled.

Action on the case brought under Revised Statutes, chapter 52, section 73, to recover damages caused by a fire on the plaintiff's land, alleged to have been caused by sparks communicated by one of the defendant's locomotives. Plea, the general issue. Verdict for plaintiff for $1623. 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.

John A. Peters, for plaintiff.

Oscar F. Fellows, and Hale & Hamlin, for defendant.

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

CORNISH, J. On September 17, 1908, a fire ran over three hundred and twenty-seven acres of land adjoining the defendant's location on the south and owned by the plaintiff. This action on the case was brought under R. S., ch. 52, sec. 73, to recover damages therefor, and the jury having found in favor of the plaintiff for $1623, the defendant brings the case to this court on motion and exceptions.

MOTION. No question of negligence on the part of the defendant is involved. The single question to be considered under the motion is whether the jury were justified in finding that the fire was communicated by one of the defendant's locomotives. The origin of the fire was the single issue of fact and two theories were presented: the plaintiff's, that the fire was set from a locomotive of the regular train which is admitted to have left Ellsworth at 11.07 A. M. running easterly; the defendant's, that it was communicated from a bog fire which was located a considerable distance easterly of the burned tract, and is admitted to have been smouldering since August 19. No other possible source is even suggested.

The jury adopted the plaintiff's theory and while in this class of cases they are somewhat apt to confuse post hoc with propter hoc, and to attribute too readily the cause of a fire to the prior passage of a train, yet in this case the verdict rests upon substantial grounds. It is a question of reasonable inference from all the facts and circumstances, and the evidence should be of such a character that a reasoning mind shall see the connection between cause and effect. The connection is here made plain.

No eye saw the spark or cinder that started the blaze but all the tests which should be applied in such a case combine to trace it to the smokestack and not to the fire in the bog. The extreme dryness of the season, the direction of the wind, the capacity of the defendant's engines to set fires along the road, the large number that had been admittedly set by the engines for several weeks prior to the time in question, the absence of any others, set by the bog fire, the distance from the track at which fires had caught, the discovery of

this fire within a half or three-quarters of an hour after the passage of the train, its location and condition when first observed, its nearness to the railroad and its distance of more than a quarter of a mile from the bog fire, the two fires burning independently with a clear space of more than twelve hundred feet between the two, the green land that partially separated them, the smothered and sluggish manner in which the bog fire continued to burn, and the rapidity with which and the direction in which the new fire was driven over the plaintiff's land and the lots of adjoining owners, all these facts were shown by evidence that compels the same conviction in the mind of the court that it did in the mind of the jury. Moreover, the jury had the benefit of a view of the premises, in compliance with the request of both parties, and were therefore able to gather such additional information as the locus afforded. Of this the court is deprived. The view must, however, judging from the verdict, have confirmed the effect of the testimony in favor of the plaintiff's contention.

A critical examination of all the testimony fails to show error in the jury's conclusion and the motion cannot be sustained.

Exceptions. The defendant introduced the evidence of the assistant superintendent of motive power to the effect that the engines on this road, equipped as they were with a wire netting over the smokestack, could not in his judgment, throw a spark beyond thirty-five feet from the rail. In rebuttal, the plaintiff was allowed to contradict this by introducing witnesses who testified to specific instances where fires had been set by these engines, at distances varying from 95 to 152 feet. The defendant excepted to this on the ground that it was too remote in time and place, that the conditions were not shown to be similar to those surrounding the fire for which this action is brought and that there had been no sufficient establishment of preliminary facts to give the measurements any probative force.

These objections, however, go to the weight of the testimony and not to its admissibility. One of the most effective ways in which to combat a theory is to meet it with a fact. That was done here and whether the facts were weak or strong was a matter of argument before the jury but could not render the evidence itself inadmissible.

Motion and exceptions overruled.

JULIUS C. JENSEN *vs.* HARRY H. CANNELL.

Cumberland. Opinion March 10, 1910.

Officers. Sheriffs and Constables. Attachment. Exemptions. Waiver. Revised Statutes, chapter 83, section 64, paragraph VI.

Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith.

Where in an action against a deputy sheriff for making an excessive attachment on a writ and it appeared that the ad damnum in the writ was $50.00 and the officer attached goods claimed to be worth $73.25, but before, making the attachment the officer was informed by a well known and reliable merchant that the value of the goods was much less than $73.25, *held* that the attachment was not excessive.

A debtor's right to claim attached property as exempt under Revised Statutes, chapter 83, section 64, paragraph VI, *held* to have been waived by the debtor's attorney telling the officer "to go ahead."

Where it was contended that an officer was oppressive in refusing to attach goods other than those attached or to take a bond, *held* that there was no adequate evidence to support the contention.

On exceptions by plaintiff. Overruled.

Action of trespass brought in the Superior Court, Cumberland County, against the defendant, a deputy sheriff, alleging the illegal attachment by him of certain personal property. The writ contained two counts, one for goods taken and carried away, and the other in trover. Plea, the general issue, with brief statement as follows: "That he, on the eighteenth day of June, A. D. 1909, and for a long time prior thereto, was, and still is a duly appointed and qualified officer in and for said County of Cumberland and State of Maine, duly authorized and qualified to serve precepts, writs, etc., in said County of Cumberland, and that at the time of the alleged trespass complained of he was then and there qualified and authorized as above set forth, he being then and there a deputy sheriff, of said County of Cumberland. That on said day he then and there, by virtue of a writ issued from the Municipal Court of the City of Portland, in said County of Cumberland, attached

certain personal property of the plaintiff, and then and there made proper return on said writ, which writ was then and there properly returned to the court. That he was then and there commanded by said writ to attach the goods and estates of the said Julius C. Jensen to the value of fifty (50) dollars, and that he then and there, by virtue of said writ, and in answer to the command then and there contained in said writ, attached the goods and estate of the defendant to the value, in his judgment, of fifty (50) dollars, and attached, removed or exercised dominion over no other goods. That he was then and there acting in his capacity as an officer, to wit, a duly qualified deputy sheriff, and he then and there had in his possession, duly issued from said Municipal Court, a writ directing him to attach the goods and effects of said defendant to the value of fifty (50) dollars, and that he did then and there by virtue of said writ attach the goods and effects of the defendant to the value, in his best estimation and opinion, of fifty (50) dollars, and attached no other goods. That said return was then and there properly made, and said writ by him returned to court at the return day thereof, to wit, the sixth day of July, 1909 the court then and there being said Municipal Court."

At the conclusion of the evidence, the presiding Justice, on motion of the defendant, ordered a verdict for the defendant and the plaintiff excepted.

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

Connellan & Connellan, for defendant.

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

SPEAR, J. This is an action of trespass against an officer alleging the illegal attachment by him of personal property. The facts are these: The plaintiff was a baker. The 19th day of June, 1909, was Saturday. Upon this day in the afternoon he had in stock in his place of business six and one-half barrels of flour, which

he alleges were procured by him and necessary for carrying on his trade or business as a baker. Between four and five o'clock in the afternoon, the defendant, a deputy sheriff, upon a writ properly issued, with order to attach, entered the plaintiff's place of business for the purpose of making an attachment of personal property. Omitting the evidence of immaterial matters, which transpired while the officer was in the plaintiff's shop, we may proceed upon the theory assumed by the plaintiff in the present action that he, at the time of the attachment, was the owner of the flour attached. The ad damnum in the writ upon which the defendant was directed to attach was fifty dollars; the value of the flour attached is alleged by the plaintiff to have been seventy-three dollars and twenty-five cents. There is also testimony tending to show that the plaintiff, while the officer was in the shop, requested him to attach goods other than the flour, and offered him a bond as security in place of the attachment. Upon this state of facts the plaintiff claims that the attachment of the flour made by the defendant was illegal in three respects: 1. Because the officer was oppressive in refusing to attach other goods or take a bond. 2. Because the attachment was excessive. 3. Because the property was exempt under the provisions of R. S., chap. 83, sec. 64, Art. 6.

With respect to the first contention it may be dismissed with the observation that there is no adequate evidence upon which to sustain it. In regard to the second it appears that the ad damnum in the writ was fifty dollars and the amount attached seventy-three, upon the plaintiff's own estimate of value. Upon the evidence the value placed upon the flour by the plaintiff might be subject to material modification. The defendant telephoned a well known and reliable merchant and was informed that the flour was worth much less than $73.25. Upon the fair value of the evidence the attachment was not excessive. It is said in *Strout* v. *Pennell*, 74 Maine, 260: "Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith. Shear. & Red. Neg. Paragraph 523 and cases."

The third proposition involving the question of exemption would present a more difficult problem were it not for the fact that the

right of exemption was not only not claimed, but expressly waived. It appears from the testimony that the defendant was in the plaintiff's place of business discussing the question of attachment for nearly an hour. While the flour had been taken into custody by the officer, it had not been carried away so it could not have been immediately restored upon demand. During this time the plaintiff communicated over the telephone with his attorney, and, in view of the interview whatever it may have been, put the officer also in communication with him. Upon the happening of this event, the inference should be inevitable that the plaintiff was then represented by an attorney in fact and that, whatever his attorney said or did with respect to the execution of the attachment, should be binding upon him. While the plaintiff does not directly admit that he talked with Mr. Meaher, and put him in communication with the defendant, yet the evidence upon this point is overwhelming, and the plaintiff was obliged to answer when asked if he heard the officer talking with Mr. Meaher, "Yes, sir, I heard him talking with him." Now it should be observed that Mr. Meaher was also the plaintiff's counsel in the trial of this case. The following, relating to Mr. Meaher's instructions, is found in his cross-examination of the defendant. Q. Do you remember telephoning to me that Mr. Connellan would not take Enemark as surety? A. I do not remember making that statement in that manner, no, sir. Q. And that he could not get any surety that Connellan would accept? A. I do not remember making any such statement at all to you. Q. Do you remember my telephoning back to you that if he could not get a bond, to make an attachment but not to attach too much? A. Not in those words. Q. What were the words? A. After I had stated the case to you you told me to go ahead but do not take too much. I asked you if you were coming down there and you said no. Q. You told me your instructions were to do so and so, did you not? A. My instructions were to attach under the writ, yes, sir. Q. You told me, did you not, that you could not help attaching and I told you to go ahead? A. Yes, sir. Q. But not to take too much? This same testimony is practically repeated on the cross-examination of another witness.

From this evidence, undisputed and conceded by Mr. Meaher in his cross examination to be true, it is evident that exemption was expressly waived by the plaintiff's attorney in fact, who instructed the officer "to go ahead" but not to take too much.

Upon the question of waiver it is said in *Clapp* v. *Thomas*, 5 Allen, 158, "It is not reasonable that a debtor, for whose benefit an exemption of his necessary family provisions from seizure is made should by his silence or obstinacy, subject an officer to the payment of damages for doing what it is to be presumed he would not have done but for the debtor's fault. A debtor may always waive his privilege and consent that his exempted property may be applied to the payment of his debts; and it is not necessary that such waiver should be expressed in words. It may be made by acts or by neglect to act." The last part of the above quotation is adopted with approval in *Smith* v. *Chadwick*, 51 Maine, 515. We can hardly conceive of a case to which the doctrine of waiver could more fitly apply. While the officer and the plaintiff are presumed to know the law with respect to exemption, it yet may be true that neither of them had any actual knowledge whatever of such a law. But when the defendant was put in communication with the plaintiff's attorney, it is to be assumed that he had actual knowledge of the exemption provided by statute, and that his instructions were entitled to be regarded by the officer as coming from authority upon which the officer had a right to rely and act. There is every presumption that the officer, if he had been informed that the flour to the amount of $50 was exempt, and that exemption to that amount was demanded, would have refrained from attaching as he did. It would appear, therefore, that the officer from the instructions given him by the attorney felt authorized, if he was not induced, to attach all the flour that was necessary to satisfy the demands of his writ, and warned only against an excessive attachment.

Exceptions overruled.

FRANCENA LEIGHTON, Admx., *vs.* WILLIE LUTHER WHEELER.

Hancock. Opinion March 12, 1910.

Negligence. Railroads. Injury to Section Man. Liability of Engineer.

1. Actionable negligence is a breach of duty owed to the party injured. Breach of duty owed to other parties than the party injured is not actionable by him.
2. A locomotive engineer on a regular railroad train owes no duty to section men to keep a lookout for them, to anticipate that they may be on the track. He can rightfully assume they will perform their duty to him of looking out for, and keeping clear of, regular trains.
3. If, as soon as he does see a person on the track in such situation that he may not seasonably leave the track, the engineer does all in his power to stop the train, though unsuccessfully, he is not guilty of negligence.
4. In this case in which a section man lying prostrate and motionless on the track was run over and killed by a regular train the evidence does not show actionable negligence on the part of the engineer.

On motion by defendant. Sustained.

Action on the case under Revised Statutes, chapter 89, sections 9 and 10, brought by the plaintiff in her capacity as administratrix of the estate of her husband, Hollis Leighton, against the defendant to recover damages for causing the death of the plaintiff's intestate by wrongful act, neglect or default. Plea, the general issue. Verdict for plaintiff for $2000. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Daniel E. Hurley, for plaintiff.

Hale & Hamlin, for defendant.

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

EMERY, C. J. The defendant Wheeler was the locomotive engineer in charge of the locomotive drawing the regular morning west bound passenger train on the Washington County Railroad from Calais to Washington Junction on Dec. 25, 1908. A little

east of a highway crossing known as the Eastbrook crossing was a switch track, or side track, some 500 feet long with a switch at each end. The eastern whistling post for this Eastbrook crossing was 1085 feet east of the east switch. In approaching this crossing from the east the locomotive ran over the prostrate body of a man lying motionless on the track at or near the east switch. This man proved to be the plaintiff's intestate, Mr. Leighton, who was then a section man in the employ of the Washington County Railroad Company, and whose duty was to care for the road bed and track within that section.

It is not known when, why or how Mr. Leighton came to be lying prostrate and motionless on the track at that time, about 10.35 A. M., the time for the regular passenger train from the east to pass that point. No one saw him there until he was seen by the defendant engineer. Indeed, no one saw the incident of his being run over except the engineer and fireman of the locomotive. Their account of what occurred is the only one we have, and must be taken as true except so far as it is contradicted or too improbable for belief. The engineer's account is substantially as follows:— He whistled as usual at the eastern whistling post for the Eastbrook crossing, the train being on time and running at its usual speed at that place thirty-five miles an hour. On nearing the east switch and when within 200 or 300 feet of it he saw for the first time a dark object on the track on the left hand side and near the switch. At the first glance he thought it was where the section men had been digging out ties, but at a second glance within a "fraction of a second," he sounded the alarm whistle, shut off steam, applied the emergency brakes, and opened the sand valves, these being all he could do to stop the train. The fireman testified that after the whistling for the crossing, he was down fixing the fires, when he heard the alarm whistle sounded, the emergency brakes applied, etc., and immediately straightened up and looking out of his window saw a dark object on the track about 100 yards ahead,—the train running at the usual speed of 35 miles an hour.

Passing other questions, we come directly to the question of the defendant's negligence. There was no evidence that he failed to

do all things possible to stop the train after applying the emergency brakes, but the plaintiff contends that there was sufficient evidence of his negligence to warrant the verdict, in that, first, he did not discover the body on the track as soon as he could and should; and, second, he did not as soon as he could apply the emergency brakes, etc., after he did discover it.

As to the first contention, there was evidence that had the engineer been on the lookout for persons or bodies on the track ahead he could have seen the body of Mr. Leighton more than a thousand feet away assuming it was then there, and by then applying the emergency brakes, etc., he could have stopped the train short of the body. This evidence raises the question whether the engineer was guilty of negligence in not being on the lookout for, and discovering, the body of Mr. Leighton that thousand feet or more away.

Whatever the defendant's negligence as to others, he was not negligent as to Mr. Leighton unless he violated some duty owed to him. 23 Am. Eng. Ency. of Law, 732. Granting, as argued, that it is the duty of a locomotive engineer to his employers and all persons on the train to be on the lookout for persons and things on the track, it does not follow that such is his duty to the persons who may be on the track, that it is his duty to them to anticipate their presence there. It does not follow, even, that he must stop or slow his train as soon as he does see a person on the track. That duty does not arise until he has reason to apprehend that such person will not himself seasonably leave the track. *Garland* v. *Maine Central R. R. Co.*, 85 Maine, 519.

Unquestionably, as the cases cited by the plaintiff hold, under some circumstances and conditions the engineer would be bound to assume the probability that persons might be on the track ahead, as when he approaches a highway crossing at grade, or passes through a village or city street. In such cases, of course, it would be his duty to them to keep a lookout. Under other circumstances and conditions he would not be bound to assume any such probability, as when running through a sparsely settled country distant from dwellings and at places where there is no crossing. In such cases it

would not be his duty to keep on the lookout for them. He could lawfully assume that his train, especially if a regular train, has in such places the exclusive right of way over the track and that all persons will keep themselves and their property off the track or out of the way. In *Woodruff* v. *No. Pac. R. Co.*, 47 Fed. 689, it was alleged that the engineer could have seen the plaintiff's child on the track in time to stop the train, and that this failure to see the child was negligence. On demurrer it was held that such failure to see the child was not negligence. In *Sheehan* v. *St. P. & D. Ry. Co.*, 76 Fed. 201, there was evidence that the engineer could have seen the plaintiff caught in a cattle guard in season to have stopped the train before reaching him. The court, however directed a verdict for the defendant, and speaking of the duty of the company toward a person on its tracks, the court said, "There is no constructive notice upon which to base the obligation of constant look out for his presence there, and no actual notice up to the moment the train men had discovered the fact of his peril." In *Truedell* v. *G. T. R. Co.*, 126 Mich. 73, 85 N. W. 850, the trial court instructed the jury in effect, that if the engineer could have seen the plaintiff's intestate on the track at a sufficient distance to have stopped the train and failed to do so, the jury might find that to be negligence. Held error, on the ground that the engineer had no reason to expect to see him. In *C. C. C. & St. L. Ry. Co.* v. *Tarrt*, 99 Fed. 369, it was said, "Even if those employed on the engine which killed the plaintiff's intestate, could have seen him when he was 2400 feet from the train, their failure to discover his presence, or that of his son, until the train was a little more than 700 feet from them would give no right of action. There was no evidence offered upon behalf of the plaintiff below to prove that the employees on the train actually discovered the presence of the deceased or his son on or near the track until just before the accident happened." Held that a verdict should have been directed for the railroad company. In *Craddock* v. *L. & R. R. R. Co.*, 116 Ky. 900, 77 S. W. 174, the plaintiff's intestate, a boy eleven years of age, was lying on the railroad track between the rails. A brakeman who was in the engine cab on the opposite side from the engineer testified that he

saw an object about 150 yards ahead which looked like a piece of paper but when the engine had approached within 30 feet of the object he discovered the deceased lying on the track between the rails; that the engineer immediately applied the brakes but it was too late and the train ran over the boy. There was evidence that the boy could have been seen from the engine at a point some 230 yards distant. The court, however, directed a verdict for the railroad company, upon the ground that no duty to stop the train arose until the peril to the deceased was actually discovered. In *Price* v. *P. W. & B. R. R. Co.*, 84 Md. 506, 36 Atl. 263, the plaintiff while intoxicated was asleep or unconsciously sitting on the track when run over by the train. The evidence showed that the point where he was sitting could be seen for a distance of three or four miles down the track in an easterly direction, but there was no evidence which tended to show that a man was in fact seen on the track by any of the trainmen, though one of the trainmen was reported to have said he saw something on the railroad track, but could not say what it was. Judgment for the company was affirmed.

The foregoing citations sufficiently illustrate the principle that where a locomotive engineer has no reason to anticipate that persons may be on the track in such condition that they cannot leave it before the train reaches them, it is not his duty to them to be on the watch for them, and his failure to see them and their condition as soon as he could had he been on the watch, is not negligence as to them.

It remains to apply the principle to the circumstances and conditions disclosed by the evidence in this case, and to determine whether it was the duty of the defendant engineer to Mr. Leighton to anticipate that he might be lying prostrate, where he was on the track, in a helpless condition, and hence to be on the watch for him. The place was distant from any crossing, not a place where any person would have occasion to be on the track at the time for a regular passenger train to pass. True, Mr. Leighton was not a mere trespasser. He was in the employ of the company and could lawfully be on the track between trains, to make repairs, remove obstructions, etc. In this respect the case is different from many

of those above cited. It was his duty, however, to be himself on the watch for trains, and seasonably leave the track clear for their passage, and not delay them by sitting, lying or even standing on the track. Especially was it his duty to be on the watch for regular passenger trains running rapidly on schedule time. He owed this duty to the engineer charged with making that schedule time.

The engineer had other duties and responsibilities. He could not always be on the lookout to see whether section men were lying helpless on the track. He had the care of his engine and train, was bound to keep watch of the water and steam guages, to note the working of the engine, to keep up its efficiency, to note whether all was well with the running of the train. He could lawfully assume that Mr. Leighton and every other section man would on his part do his duty, would be on the watch for trains, especially regular passenger trains on time, and seasonably leave the track clear for them. He had no reason to anticipate that Mr. Leighton would remain on the track or would be unable to leave it when the train was due. We think it clear, therefore, that he owed Mr. Leighton no duty to keep on the watch for him, to anticipate that he might be helpless on the track. It follows that the defendant's failure to see Mr. Leighton and his condition as soon as he could had he been on the watch for him is not actionable negligence.

As to the second contention (that the defendant did not as soon as he could, apply the brakes, etc., when he did discover the body) there was evidence that the train went some 300 feet west beyond the east switch before it came to a stand still, indicating, as claimed by the plaintiff, that the train moved 500 or 600 feet from the point where the engineer said he applied the brakes. It also appeared that the grade was "very slightly ascending." The train consisted of engine, tender, baggage car and two passenger cars. It had rained in the night before and the rails were wet and slippery. The plaintiff's argument is that the fact that the train ran 300 feet west beyond the east switch shows that the defendant did not apply the brakes, etc., as soon as he saw the object and saw that it might be the body of a man, taking his own story that he saw it when he was some 200 or 300 feet east of the switch.

We find no evidence, however, from railroad men, other than those for the defense, as to how far such a train under all the proven circumstances and conditions would run after applying the emergency brakes, shutting off steam and opening the sand valves and no expert evidence whatever that it would come to a stand still in less than 500 feet. Three passengers on the train (not railroad men) testified that in their opinion the train ran only some 200 or 300 feet after the brakes were applied. It does not appear, however, that either of them at the time noticed or had occasion to notice the time or distance, or was at all accustomed to judge of them on railroad trains. They were only giving an opinion formed after the event. They undoubtedly were startled, if not alarmed, by the alarm whistle, brakes, etc., and were more intent on learning the cause than in estimating the time or distance. It is also to be borne in mind that at the time the brakes were applied, the train, moving at 35 miles an hour, was covering 300 feet in six seconds. It should be evident we think that such testimony is not sufficient for a verdict against the positive testimony of the engineer and fireman, and the great, almost overpowering probability, that the brakes were applied, instinctively, as soon as the danger was seen.

The defendant stated at the coroner's inquest that he thought the train ran "the length of ten or twelve cars" after he saw the body and sounded the whistle. He stated at the trial, however, without contradiction that railroad men, in measuring distances by car lengths, always have in mind freight cars, and that he used the phrase in that sense. Measured by freight car lengths, the difference between his estimate given at the inquest and that given at the trial is not enough to invalidate either. The whole matter of distance was one of estimate. The train was moving rapidly, fifty feet per second, and any estimate, however careful, might be many feet out of the way. That of the engineer and fireman, accustomed to estimate distances on railroad tracks, is much the more likely to be correct.

Upon the whole evidence we are satisfied the jury would not have been warranted in finding that the engineer negligently delayed endeavoring to stop the train when he saw the danger.

The plaintiff, however, further urges that the defendant engineer should have slowed his train instantly, when he saw the dark object on the track, that he should have assumed at once that it might be the body of a man, and have brought his train under control for quick stop. Upon this contention see *Craddock* v. *L. & R. R. R. Co.*, cited above. The evidence, however, does not show that there was any unnecessary time between the first sight of the object and the application of the brakes. The second look when the brakes were applied was within "the fraction of a second." The application of the brakes at the first sight would not have averted the catastrophe.

The consequence of the disaster to Mr. Leighton, his widow and children are very distressing, but the evidence does not show that the defendant is legally responsible for them. The case appears to be one of those where the consequences, however grievous, must, so far as the law is concerned, remain where they fell.

Motion sustained.
Verdict set aside.

EDWIN O. TRASK *vs.* HALLOWELL GRANITE WORKS.

Kennebec. Opinion March 23, 1910.

Negligence. Wharves. Duty to Employees of Others. Injury to Employee of Another. Defective Appliances. Ordinary Care. Damages.

The owner of a wharf was bound to use ordinary care to see that it was reasonably safe as to a stevedore employed by another in unloading coal at the wharf.

Evidence *held* to sustain a finding that a stevedore, injured by a hoisting apparatus falling upon him, was not guilty of contributory negligence.

The term "ordinary care," as applied to one's duty to provide reasonably safe appliances furnished a third person for the use of his employees, is a relative term; diligence commensurate with the danger being required.

Evidence *held* to show that the owner of a wharf was negligent toward a stevedore employed by another in unloading coal at the wharf in selecting the material used in hoisting apparatus which fell upon the employee.

The duty of one to use ordinary care to provide reasonable safe appliances furnished a third person for the use of his employees, cannot be delegated.

Held: That $1,750 was not excessive recovery for personal injuries involving a compound fracture of one of the bones of the left forearm, slight injury to the foot, and various bruises, where the fracture united slowly, the rotary motion of the arm was impaired, and the injured person may not be able to resume his occupation as a stevedore, and incurred $132 medical expenses.

On report. Judgment for plaintiff.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for determination with the stipulation "that if a verdict for the plaintiff would be allowed to stand upon the law and the evidence, the court are to render judgment for the plaintiff and assess the damages with powers of a jury; otherwise, judgment for the defendant."

The case is stated in the opinion.

Heath & Andrews, and W. H. Fisher, for plaintiff.

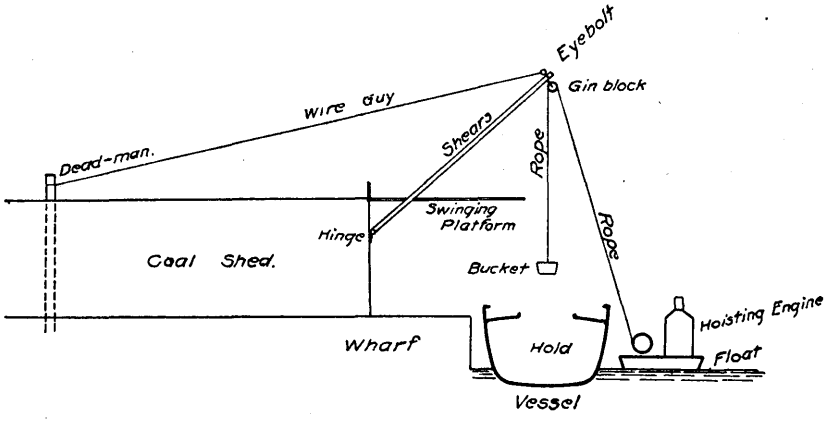
Orville Dewey Baker, and Anson M. Goddard, for defendant.

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

CORNISH, J. This is an action of tort for personal injuries sustained by the plaintiff on November 15, 1905, while unloading coal on defendant's wharf in Hallowell. At the close of the evidence the case was reported to this court with the stipulation "that if a verdict for the plaintiff would be allowed to stand upon the law and the evidence, the court are to render judgment for the plaintiff and assess damages with powers of a jury; otherwise judgment for the defendant." The effect of this stipulation is to make it incumbent upon the court to determine whether a verdict, assumed to have been rendered for the plaintiff, would be manifestly wrong. The following facts, necessary to a clear understanding of the case are admittedly true.

The defendant was the owner of the wharf which was equipped with staging, platform and shears for the unloading of coal from vessels and at the time of the accident a cargo was being unloaded for the Street Railroad Co., on a cooperative plan by one Jones, a stevedore, and his helpers, among whom was the plaintiff. The staging, platform and shears were permanent structures and a part of the wharf property. The staging was thirty feet long and built at a sufficient height to allow coal hoisted from the vessel to be wheeled and emptied into the top of the coal sheds. A suspended platform projected from the staging to a point above the hold of the vessel, to enable the unloader to catch the hoisting rope and swing in and empty the bucket. The hoisting apparatus was known as shears, performing the office of a derrick but differently constructed. They consisted of two pieces of hard pine timber each thirty-eight feet long, ten feet apart at the base and fitted together at the point so as to form a V. The base of each timber was hinged to uprights on the staging, while the point of the V, which is the top of the shears, rested at an incline over the platform and over the hold, and was held in suspension, when in use, by two guys each extending from a so-called dead man on the shore to an eyebolt near the junction of the timbers. These bolts passed through the timbers

with a plate and nut on the lower side. Beneath the point of the shears was a gin block, over which ran the hoisting rope controlled by a stationary engine on a near-by float. The following diagram giving a side view, may be of assistance.



While the plaintiff was standing on the platform, beneath the shears, attending to his duty as the unloader, both eyebolts broke simultaneously, precipitating the shears upon him and causing the injuries for which this suit was brought. The breaking of the eyebolts was admittedly the proximate cause of the accident and the question at issue is whether such breaking was due to the negligence of the defendant. The jury having assumedly said yes, is it the duty of the court under the law and the evidence to reverse their finding? It is not seriously claimed by the defendant that because the plaintiff was at work under a contract with the Railroad Company, he cannot recover in this action. The case does not show clearly what the arrangement was between the two companies, but the fair inference is that the Railroad Company was using the wharf under some sort of contract with the defendant and if so, the defendant as owner owed to the Railroad Company the duty of reasonable diligence in seeing to it that its wharf and fixtures were in a reasonably safe condition, a duty which it also owed to the employees

of the defendant whether such employees were receiving wages or working under a contract. *Johnson* v. *Spear*, 76 Mich. 139, 15 Am. St. Rep. 298; *Nickerson* v. *Tirrell*, 127 Mass. 236; *Moore* v. *Stetson*, 96 Maine, 197.

In this connection it should also be said that the evidence would justify a finding by a jury that the plaintiff was not guilty of contributory negligence.

This brings us back to the single question of the defendant's negligence, and whether the defendant fulfilled its duty in the selection of the material used in the construction of the eye bolts. Was the quality of the iron what it should have been?

These shears were constructed in the spring of 1905, a few months before the accident occurred. The defendant's general superintendent Mr. Hunt, employed one Kelley, a carpenter of long experience, to build them, the company paying for all labor and materials and dictating neither as to specific materials nor cost, but instructing him "to use the best of everything." Kelley employed one Dick, an experienced blacksmith to do the iron work, and to make the bolts of the same grade as used in several other sets previously constructed, that is, refined iron, but to make them one inch in diameter instead of seven-eighths,— because the timbers were of hard pine and therefore heavier than usual. These directions were carried out and Dick made them of ordinary refined iron that he had on hand. The trade knows three qualities of refined or wrought iron, refined, best refined and Norway, varying in tensile strength from 20,000 to 60,000 pounds to the square inch. The amount of strain to which these bolts were subjected was not definitely stated as it varied somewhat, and depended not only on the weight of the shears and of the bucket with its contents, but on the velocity with which the load was started and the strains caused by the catching of the bucket on parts of the vessel in its upward course.

The plaintiff claims that the use of this untested refined iron under the circumstances was not consistent with the defendant's duty. The measure of the defendant's liability was ordinary care, a relative term and dependent upon many considerations.

"Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them." *Caven* v. *Granite Co.*, 99 Maine, 278. The greater the danger, the greater the vigilance required to meet the standard of ordinary care. Precaution must increase as the peril increases. Where life and limb are at stake due care requires that everything be done that gives reasonable promise of the preservation of such life or limb. Under some conditions the best material may be none too good, and what under less perilous surroundings would be deemed extraordinary diligence, may be but ordinary care where the dangers are imminent. *Raymond* v. *Railroad Co.*, 100 Maine, 529. The rule itself is simple, its application is sometimes attended with difficulty. Applying it here, however, we think the standard has not been met. The peril was grave and apparent. Upon the strength of these eyebolts depended the safety of men working on the platform beneath. Commensurate care and foresight were demanded of the defendant. The superintendent Mr. Hunt was aware of it. He was accustomed to the use of derricks at the quarries and he directed Kelley to "use the best of everything." Had Kelley followed these instructions a jury might well find that due care had been observed. But he did not. The poorest grade was used instead of the best and the defendant took no pains to ascertain the fact. It apparently assumed that its orders would be carried out and made no further inquiries or inspection.

An examination of the broken bolts shows a clean break, without a flaw, but its cause is in controversy. The plaintiff claims the break to have been caused by crystallization, which is produced by use, strain and vibration, and which goes on more rapidly in ordinary refined iron than in best refined or Norway. The poorer the iron the more rapid the crystallization. The defendant contends that the break was due not to crystallization after manufacture but to a latent defect, known as cold shorts, produced in manufacture, and for such defect it ought not to be held liable. The evidence

would warrant a jury in adopting the plaintiff's theory rather than the defendant's and intelligent and credible witnesses testified that such a low grade of iron was not suitable for such work. But assuming the defendant's theory to be true, it also appeared that cold shorts were much more likely to exist in the lower grades, and further, that their presence could be detected by simple and practicable tests. No tests whatever were applied to the iron of which these bolts were made and witnesses on both sides agreed that these particular pieces were of a very poor quality, even of ordinary refined. Taking either theory it is difficult to escape the conclusion that the defendant's care was not proportionate to the risk. Kelley claimed to have used ordinary refined iron in many other shears constructed by him and without ill results, but in precisely how many of the same plan, was in controversy. While his claim if granted, would have weight on the question of due care, it would not be controlling. If the material was in fact unsuitable as the plaintiff's witnesses contended, its previous use would not make it suitable, and accidents may have been avoided because good fortune had selected better samples from the lowest grade. *Carlson* v. *Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750, is strongly relied on by the defendant, but the vital element present in that case and lacking in this, marks the distinction, for the iron there purchased was the "best refined" the best grade then in the market.

The defendant also contends that its duty was fulfilled when it employed a competent and experienced man to do the work. But its responsibility could not be so easily shifted, because the duty resting upon it could not be delegated to another. Kelley was the servant of the defendant, employed to do this work and for that work the defendant itself was responsible. His work was its work.

A clear and wide distinction separates this case from a line of decisions where competent machines have been bought in the market from reputable manufacturers. No corporation is obliged to manufacture all the machines used by it. It may go into the open market and purchase from a manufacturer, and if reasonable care is used, negligence will not attach to the purchaser although it may

later develop that the maker was careless and used unsuitable materials or did imperfect work. Under this rule fall many of the cases cited by the defendant, as the defective block in *Roughan* v. *Boston and Lockport Block Co.*, 161 Mass. 24; the dynamite caps in *Shea* v. *Wellington*, 163 Mass. 364; the duster machine in *Reynolds* v. *Merchants Woolen Co.*, 168 Mass. 501. Such cases bear no analogy to the case at bar, nor do the other cases cited by the defendant, where the question involved was whether the owner of a building or an independent contractor was liable to injuries caused during the construction or repair of a building, as *McCarthy* v. *Second Parish of Portland*, 71 Maine, 318; *Keyes* v. *Second Baptist Church*, 99 Maine, 308. Kelley and Dick were not independent contractors but employees, and the accident did not occur while the shears were in process of construction but after their completion. For the completed machine the master was responsible. *Moynihan* v. *Hills Co.*, 146 Mass. 586.

A careful study of all the evidence leads to the conclusion that a verdict for the plaintiff should not be set aside.

The plaintiff's injuries consisted of a compound fracture of one of the bones of the left forearm, a slight injury to the foot and various bruises. The fracture was slow in uniting and was attended for a considerable time by a suppurating wound. The rotary motion has been somewhat impaired. It appeared that the plaintiff might not be able to follow his occupation as stevedore, but could do other kinds of labor. Considering the medical expenses which amounted to $132, and all other legal elements of damage, it is the opinion of the court that a verdict for $1,750 would have been compensatory.

Judgment for plaintiff for $1,750.

In Equity.

JAMES M. W. HALL *vs.* MERRILL TRUST COMPANY et als.

Penobscot. Opinion March 26, 1910.

Corporations. Stockholders' Trust Agreements. Validity. Waiver. Revocability. Good Faith.

Two sets of stockholders transferred their shares to a trust company to prevent a third set from acquiring control, under an agreement that new certificates should be issued to the trustee, that the stock should be voted as three specified stockholders or a majority should direct, that the dividends should be sent to the owners, and that the trustees should sell the shares for such price and at such time as the named stockholders, or a majority of them, might direct, provided that sufficient shares be sold to constitute a majority of the outstanding stock.

Held: 1. That the agreement was valid, creating a power of sale with incidental provision for voting, and not a voting trust with incidental power of sale, and that it authorized a sale of stock at public auction.

2. That one of the specified stockholders waived the right to be consulted as to the advisibility of selling the stock, by repudiating the agreement.

3. That the agreement was more than a mere power of attorney, and not revocable at the pleasure of the parties.

4. That the evidence showed that the power of sale was exercised in good faith.

In equity. On report. Bill dismissed.

Bill in equity to enjoin the sale of 1282 shares of the capital stock of the Machias Lumber Company and held by the Merrill Trust Company in trust, and to determine the rights of the parties under a certain trust agreement. A preliminary injunction was issued. A motion to dissolve this injunction was filed by the defendants and at the hearing thereon, it was ordered that the preliminary injunction be dissolved unless the plaintiff, James M. W. Hall, file a stipulation agreeing that the cause should be prosecuted to final decree, etc., which said stipulation was duly signed and filed by the plaintiff.

Heard on bill, answers, replication, motion to dissolve the preliminary injunction, the order of court thereon, including stipulation by James M. W. Hall, and evidence. At the conclusion of the evidence the cause was "reported to the Law Court to be heard upon the said pleadings, motion, stipulation, and so much of the foregoing evidence as is legally admissible; the Law Court to determine the law and fact and enter decree accordingly."

The case is stated in the opinion.

Symonds, Snow, Cook & Hutchinson, Tyler & Young, H. E. Bolles, and R. Frothingham, for plaintiff.

Heath & Andrews, for defendants.

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

CORNISH, J. The Machias Lumber Company is a corporation existing under the laws of the State of Maine, engaged in the manufacture and sale of lumber, and owning and operating valuable timber lands on the Machias River and mills at Machias, with an issued capital stock of 2552 shares. The plaintiff is the largest individual stockholder, and since its organization has been the president of the corporation which is admittedly a prosperous concern.

In January, 1905, the ownership was divided, broadly speaking, into three parts; the Hall interest, held by the plaintiff and his family, and business associates, representing 390 shares; the Ames interest held by the estate of John K. Ames, members of the Ames family and their friends, representing 892 shares; and the Oak and Simpson interest representing 787 shares. Other shares, amounting to 483 in number, may be termed miscellaneous, with a somewhat scattered ownership among outside parties, although some of these were also held by the Hall and Ames interests. The Oak and Simpson holding was in fact controlled by the American Realty Company, which is allied with the International Paper Company and which was, to quote the language of the plaintiff's brief, "a rival for the ownership and control of the timber lands operated by the Machias Lumber Company and which was seeking to acquire such lands through further purchases of stock of the Machias

Lumber Co." "In order to prevent Oak and Simpson" quoting further from the same source, "from acquiring the shares held by Hall and his associates, and thereby obtaining control of the corporation, or from acquiring the shares held by Ames and his associates thereby obtaining control of the corporation," an agreement was entered into between the several holders of the Hall and Ames interests, being nine in number and owning 1282 shares, a majority of the entire stock issued, whereby their several shares were transferred to the Merrill Trust Company to be held by it as trustee, under the terms of the following letter which was sent to it by each of these nine stockholders:

"To the Merrill Trust Company of Bangor Maine.

The certificates for two hundred and fifty-four (254) shares of the capital stock of the Machias Lumber Company issued to James M. W. Hall and duly assigned by me, and sent to you, you are to deal with as follows:

Said shares are to be transferred to you as Trustee and you are to take out a certificate to you as Trustee for the same. While it stands in your name as Trustee you are to vote said shares or cause them to be voted at all meetings of the stockholders of said Company upon all questions, and especially upon all questions of a lease or sale of the Company's property and franchise, as Jas. M. W. Hall of Cambridge, Mass., Alfred K. Ames of Machias, Me., and Wilson D. Wing, of Bangor, Me., or a majority of them direct.

In case of death or permanent disability of either Wilson D. Wing, Jas. M. W. Hall or Alfred K. Ames, herein mentioned, during the continuance of this agreement the authority vested in them in connection with and as mentioned in this trust shall continue up to the time of the expiration of this agreement by the following named successors: David L. Wing of New York City, in place of Wilson D. Wing; Frank S. Ames of Machias, Me., in place of Alfred K. Ames; James R. Hall of Cambridge, Mass., in place of James M. W. Hall.

While you hold such stock you are to pay to me all dividends which you may receive on said stock by forthwith sending to me a check to my order for the same.

You may thus hold said stock as Trustee until the expiration of December thirty-first, nineteen hundred and six, at which time if you shall not have sold the same as herein provided you are to re-transfer said shares to me.

You may sell and transfer said shares for such price and at such time as said Hall, Ames and Wing, or a majority of them may direct, provided, however, you shall sell at the same time sufficient shares of the capital stock of said Company as, reckoning my said shares in, shall be at least a majority of the shares of the capital stock of said Company then outstanding. You are thus to deal with said shares without any risk or liability on your part, excepting that you are to be responsible for the safe keeping of the same. This shall bind me, my heirs, executors and administrators and inure to my and their benefit whenever the context so requires or admits."

This agreement was renewed at its expiration and continued in force two years longer or until December 31, 1908.

No change was made in the personnel of the management, the plaintiff continuing as president and general manager, and his son, James R. Hall as treasurer; nor was there any change in the business policy of the company. In fact the corporate affairs were controlled by the same persons and in the same manner after this agreement was made as before.

In April 1908, the Oak and Simpson interest, being unable to obtain control of a majority of the stock, concluded to sell its own shares. Various interviews and negotiations were had between Oak and Simpson on the one side and the plaintiff on the other, the latter ostensibly representing Ames and Wilson as well as himself, and holding himself out to his associates, who reposed the utmost confidence in him, as desirous of purchasing this outstanding interest for the joint benefit of the three. At the final interview, however, held in Bangor on April 17, 1908, the plaintiff declined to accede to the exact terms required by Oak and Simpson and the trade fell through. Within fifteen minutes after the plaintiff declined to purchase, Mr. Oak took the matter up by telephone

with James R. Hall, the plaintiff's son in Cambridge, Massachusetts, in accordance with a previous request from the son that this should be done in case the proposed trade with the father was not consummated. The son was informed of the terms designated by Oak and Simpson, and before two hours had elapsed he had bought this outstanding interest, at the precise figure which had been declined by the father.

The plaintiff studiously delayed giving Ames and Wilson any information in regard to the transaction, professing utter ignorance of the situation, and as late as April 23, wrote Mr. Ames that he had not learned the details but would know who the purchasers were as soon as the stock certificates came in for transfer. A careful reading of the evidence and especially of the correspondence, leads to no other conclusion than that the plaintiff intended to have his own negotiations with Oak and Simpson fail, and the stock bought in by his son, so that it might be wholly controlled by his own friends, making the Hall interest a practical majority provided that portion covered by the trust agreement could be withdrawn. The plaintiff's contention that he was acting in good faith and that the sale to his son and his associates came as a surprise, overtaxes the credulity of the court.

The 787 shares belonging to Oak and Simpson were duly transferred to the purchasers, and then, the trust agreement having outlived its usefulness so far as the plaintiff was concerned, although only two days before the Oak and Simpson stock was purchased, he had suggested to Ames that it be continued for a further term of five years, he repudiated it in a letter to the Merrill Trust Company, dated May 9, 1908, in the following language:

"Referring to instrument under which your Trust Company purports to have received and to hold certain capital stock of the Machias Lumber Company, I beg to give you notice that I have been advised that the instrument in question is illegal and that your Trust Company has no authority granted it thereby and will make itself responsible for any damage which may accrue by reason of any attempted actions thereunder.

I give you this notice in order that you may act at your peril and with full knowledge of my position concerning the instrument in question.

Without waiving the foregoing notice, I further so far as I legally can, revoke any authority I may have granted by depositing with you three hundred and sixty-one (361) shares of the stock of the Machias Lumber Company."

Disregarding this repudiation or revocation on the part of Hall, except in so far as it operated as a waiver of any right of consultation as a member of the committee of three, Messrs. Ames and Wilson as a majority of that committee on November 2, 1908, directed the trustee to sell the 1282 shares held in trust, at public auction on November 25, 1908, after due notice thereof by publication and by sending a copy of such notice to all the equitable owners of the stock including the plaintiff. Thereupon the plaintiff brought this bill in equity to enjoin said sale and to determine the rights of the parties under the trust agreement. On November 23, 1908, a preliminary injunction was granted on bond. A motion to dissolve this injunction was filed by the defendants on December 15, 1908, and at a hearing on December 23, 1908, it was ordered that the preliminary injunction be dissolved unless the plaintiff on or before December 28, 1908, file a stipulation agreeing that the cause should be prosecuted to final decree, that in the meantime the Merrill Trust Company should not vote the stock held in trust, that no new stock should be issued and "that if the bill is dismissed on final decree, said shares may be sold under the trust agreement, provided there shall be sold at the same time sufficient shares as, reckoning in said three hundred and sixty-one shares, shall be at least a majority of the shares of the capital stock of the Machias Lumber Company then outstanding." This stipulation was duly signed and filed by the plaintiff. Under this stipulation, and on report of the evidence the cause is before this court. The decision involves a construction of the so-called trust agreement and its revocability.

The plaintiff's chief contention is that the agreement constituted a voting trust, irrevocable by its terms before December 31, 1908,

and as such was illegal and void as contrary to public policy. Assuming the premise, the learned counsel elaborately discusses all the decided cases involving the validity or invalidity of voting trusts, and places the one under consideration in the category of the illegal and void.

The assumption, however, is unwarranted. The appellation is a misnomer. The instrument was not designed for the purpose of creating a voting trust and does not purport to be such. The plaintiff would construe it as a voting trust with an incidental provision in regard to the sale of the stock, while in fact it is just the reverse and should be construed as creating a power of sale with an incidental provision in regard to voting. It is an agreement to guard against the sale of either the Hall or the Ames interest to an adverse third party, namely, the Oak and Simpson interest, and to provide for the sale of the entire stock held in trust, if deemed advisable, to which the right of voting, while so held by the trustee, was merely an unimportant incident. Upon this theory and this alone the bill in equity is framed. It neither expressly nor by implication labels the agreement as a voting trust nor assails it on that ground. The attack in the bill is based on grounds utterly inconsistent with the attack in the argument. The purposes are stated in these words:

"That said agreements were entered into under a peculiar existing state of facts, and for the purpose of protecting the interests of all the stockholders of the Machias Lumber Company from an adverse interest which was then seeking to acquire control. . . . That the principal purpose of said instruments of trust was to provide a means, if the occasion should arise, by which the properties and franchises of the Machias Lumber Company could be sold as an entirety for the benefit of all of its stockholders, majority and minority alike."

The grounds of complaint as stated in the bill are three:

1. "That said agreements contemplated only a sale by private treaty and did not contemplate a sale by public auction."

2. "That a majority of the committee has not directed said sale in the manner contemplated by the trust agreements."

3. "That all real reason for the existence of said agreements has ceased to exist, and no necessity or reason for a sale exists at the present time."

"That at the present time the plaintiff and those associated with him hold and claim to control the majority of the capital stock . . . and that a sale as advertised, if consummated, will deprive him and those associated with him, of such control." In other words, the material allegations in the plaintiff's bill, which are presumed to recite his claims for equitable relief are; the making of the trust agreement for a legal purpose and for the protection of all the stockholders of the company, including those outside as well as those inside the trust, and the illegality of the proposed sale by the trustee for two reasons, first, because it was to be at auction when the agreement contemplated a private sale, and second, because the plaintiff as one of the committee of three was not consulted by his associates prior to their directing the trustee to make the sale, with the further claim that the plaintiff having acquired control of the adverse interest, the trust agreement had come to an end. These are the substance of the grievances set forth in the bill and they may well be regarded as all that then existed in the mind of the plaintiff. The idea of a voting trust is not even hinted at, much less alleged. The evidence was also developed along the same lines. There was no complaint of any wrong past or present, to stockholders assenting or non-assenting by the exercise of the voting power. The same officers had been continued in control, the same business policy had been pursued. In fact the voting power had apparently ceased to be of any moment as the elections for the year were over, and the contemplated sale of stock required no exercise of that power whatever. It was to be made under the terms of the agreement when directed by a majority of the committee. So that the wrong complained of did not involve a stock vote or the voting power in the slightest degree. It is apparent that the learned counsel for the plaintiff, in drafting the bill and developing the evidence, kept in mind the true issue, whether the requirements of the trust agreement had been complied with in the proposed sale. It is also

apparent that the idea of a voting trust was conceived much later for the purpose of injecting into the agreement a taint that might possibly vitiate it ab initio.

The inconsistency of the two positions taken by the plaintiff is well illustrated in that part of the plaintiff's argument which claims that the alleged voting trust was "a scheme for the benefit of the participating stockholders and in fraud of the minority," while the bill avers that it was entered into "for the purpose of protecting the interests of all the stockholders of the Machias Lumber Company."

In short, the plaintiff's rights in the bill and on the facts, are based upon the validity of the agreement and non-compliance with its conditions, while the argument would treat it as invalid from the beginning.

The court adopts the plaintiff's first conception of his own case and regards the agreement as not constituting a voting trust. It is therefore relieved from considering the question of the legality of such a trust, a question most interesting in itself but quite outside the case at bar and therefore purely academic. Let us discuss the plaintiff's rights under the agreement as it is.

It is not contended that the transfer of shares of stock to a trustee to sell the same in compliance with the specifications of the trust agreement is invalid. Such an agreement violates no principle of law and no rule of public policy. It is in effect giving the trustee a power of attorney to sell on certain conditions. This instrument therefore in itself is valid. In what respect have its conditions been violated? The plaintiff's contention that this agreement contemplated only a private sale is untenable. Such is not its fair and reasonable interpretation. True it is silent on the question whether the sale shall be private or public. The direction is to "sell and transfer said shares for such price and at such time as said Hall, Ames and Wing or a majority of them may direct." It is for the committee or a majority of them to dictate the price and time of sale and inferentially at least the mode. Either a private or an auction sale might be within the power of that committee, but if the committee were to be limited to one method, that at auction would certainly be fairer to all concerned, especially where, as here,

notice was given to the public through newspaper advertisements and personally to each equitable owner. The letter of the agreement was not violated and its spirit was carefully observed.

The plaintiff's second contention is that the proposed sale was invalid because he was not consulted by his associates prior to the order of sale. This contention is also untenable. Whatever may have been the plaintiff's rights in this respect under the agreement, he had expressly waived them in his letter of May 8, 1908, to the Trust Company in which he ignored the contract and revoked any authority he had given thereunder. It would have been a useless proceeding for Ames and Wilson to have attempted to confer with him in regard to carrying out the terms of an agreement which he had repudiated in toto. The law does not require such idle and useless ceremony. The plaintiff cannot complain because he was taken at his word. *Milliken* v. *Skillings*, 89 Maine, 180; *Bowden* v. *Dugan*, 91 Maine, 141; *Pitcher* v. *Webber*, 103 Maine, 101.

Nor is there any virtue in the allegation that the plaintiff and his associates hold and claim to control a majority of the outstanding capital stock and to allow the sale to proceed might throw the majority into the hands of the defendants. If the plaintiff and his associates hold such a majority it can only be through the purchase of the Oak and Simpson interest, which was acquired under such circumstances as disclosed bad faith on the part of this plaintiff as we have already said, and if the sale of the trust stock is to be at public auction the plaintiff has the same right to bid for its purchase as have the defendants.

A single point remains, that of revocation. The plaintiff admitting for the sake of argument, that the agreement was not per se invalid, vigorously contends that it is at least revocable and has been revoked by him.

Had the plaintiff alone given the trustee the naked power to sell his shares under certain conditions and no other parties were involved, that power, if not coupled with any interest, might be revoked. But that is not this case. Here in order to effect a common purpose, an agreement was entered into between the nine stockholders each agreeing to transfer his stock to be held by the

trustee for that common purpose, in consideration that the others would transfer theirs. A mutual contract was thereby entered into, the consideration of which was valid and sufficient. *Clark* v. *Sigourney*, 17 Conn. 511; *Greene* v. *Nash*, 85 Maine, 148; *Bigelow* v. *Bigelow*, 95 Maine, 17. The written instrument was something more than a mere power of attorney. A valid trust was created giving certain powers and duties to the trustee. There was in effect a joint trusteeship, the Trust Company holding the legal title but the powers were to be exercised as Hall, Ames and Wilson or a majority of them should direct, so that these three were really the active trustees and the plaintiff in his bill, recognizing this, speaks of Ames and Wing as his co-trustees.

The agreement was not only to put the shares in trust but to keep them there until December 31, 1908, unless previously sold as therein specified. To permit any party to that agreement to withdraw from it at his pleasure would be to sanction the breaking of a contract, and to that a court of equity should not readily lend its aid.

Finally, the good faith of the defendants is attacked, but on this it is only necessary to say that the whole course of dealing on their part was open and honest from beginning to end, and in ordering the sale of the stock to be made before the expiration of the trust agreement they adopted the only course open to them to protect their own interests in a legal way and in a way which the plaintiff himself had previously approved of and solemnly agreed to.

Our conclusion therefore is that the instruments of trust referred to in the bill, were valid, unrevoked and binding upon all the parties thereto, that the bill must be dismissed with a single bill of costs for defendants, but under the stipulation the decree below must be so framed as to direct the trustee to sell all the stock now in its hands, at public auction, after due notice to all the equitable owners, with the same effect as if made before December 31, 1908.

Decree in accordance with this opinion.

GEORGE L. DENNETT *vs.* ACME MANUFACTURING COMPANY et als.

Penobscot. Opinion March 26, 1910.

Mandamus. When Same Lies. Corporations. Stock Certificates. Duty of Officers to Issue. Revised Statutes, chapter 47, sections 34, 35.

Mandamus lies, in the discretion of the court, to compel performance of a ministerial duty clearly imposed by law in behalf of one whose right to its performance is legally established and unquestioned, where there is no other adequate remedy.

The duty imposed by Revised Statutes, chapter 47, section 34, upon corporate officers to issue stock certificates to persons entitled to them, unless such officers are without knowledge of the apparent title of the person to whom they are issued, is a ministerial duty, enforceable by mandamus.

That a petitioner was a bona fide purchaser for value of stock in the defendant corporation, represented by a certificate previously issued to his vendor, and by her duly assigned and delivered to him, and that he offered to surrender the certificate on receipt of a new one, which he requested, and which the defendant officers refused to issue, shows the petitioner's right to a certificate, under Revised Statutes, chapter 47, section 34, requiring corporate officers to issue certificates to persons entitled to them, unless without knowledge of the apparent title of the person to whom they are issued.

A remedy sufficient to bar mandamus should be commensurate with the petitioner's necessities and rights under all the particular circumstances.

The remedy of a stockholder of a domestic corporation, whose right, under Revised Statutes, chapter 47, section 34, to the issuance of a stock certificate, and to a record of the transfer, has been denied, by an action against the corporation for the value of his shares, or by suit in equity for specific performance, is not sufficiently adequate to bar his right to relief by mandamus.

On exceptions by defendants. Overruled.

Petition for a writ of mandamus to compel the Acme Manufacturing Company, a private corporation, and its president and treasurer in their official capacities, to issue to the petitioner a certificate for ten shares of the capital stock of the corporation, and to record the transfer of the same upon the books of the company.

The bill of exceptions further states the case as follows: "The respondents filed a demurrer to the original petition asking that it

be dismissed for the reason that the facts stated did not entitle the petitioner to the relief demanded. Thereupon the presiding Justice overruled the demurrer and ordered the alternative writ to issue. Upon the return day of the alternative writ the Acme Manufacturing Company and Frank H. Drummond, its Treasurer, two of the defendants named therein, made return or answer that neither the facts set forth in the original petition, nor the facts set forth in the alternative writ justified the court in interfering with the control and management of the company, and insisted that no such case was made in and upon the petition, or in and by the alternative writ, that required the defendants to make further return or answer to the same. Thereupon the presiding Justice ordered the peremptory writ to issue as prayed for. To all of which orders and rulings of the presiding Justice the two defendants, the Acme Manufacturing Co. and Frank H. Drummond seasonably excepted."

The case appears in the opinion.

Charles Hamlin, and Hugo Clark, for plaintiff.

E. C. Ryder, and B. L. Fletcher, for defendants.

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

KING, J. Petition for a writ of mandamus to compel the Acme Manufacturing Company, a private corporation, and its president and treasurer in their official capacities, to issue to the petitioner a certificate for ten shares of the capital stock of the corporation, and to record the transfer of the same upon the books of the company.

The petition sets forth, that on the 13th day of August, 1909, the Acme Manufacturing Company was a corporation legally established and existing under the general corporation laws of the State of Maine; that the respondents, Drummond and Fogler, were then respectively the duly elected, qualified, and acting treasurer and president of the said corporation; that on said 13th day of August, the petitioner purchased for a valuable consideration ten shares of the capital stock of the corporation, represented by a certificate thereof previously issued to his vendor, and by her duly

and regularly delivered, transferred and assigned to him; that by virtue of his ownership of said stock he was entitled to have a new certificate of said shares issued to him under the provisions of sec. 34, c. 47, R. S., and a record of transfer thereof made upon the books of the corporation; that he made application to the respondents to issue to him such certificate which they refused to do; and that he has not a plain, specific, speedy, or adequate remedy at law in the premises.

A demurrer to the petition, on the ground that the petitioner was not entitled to a writ of mandamus upon the facts stated, was overruled and the alternative writ issued. To that writ, in which the same facts were set forth as in the petition, the respondent, Fogler, as the president of said corporation, made answer that he had been and still was willing and ready to do his part to issue the new certificate as requested. The other two respondents, the corporation and its treasurer, Drummond, made answer to the alternative writ that neither the facts set forth in the original petition nor in the alternative writ are sufficient to justify the issuing of a writ of mandamus. The peremptory writ, however, was ordered to issue, and the case is before this court on exceptions to the orders and rulings of the Justice in the premises.

It is elementary law that mandamus is an extraordinary remedy, not generally grantable of right, but in the discretion of the court, and is only to be used in those cases where, except for its assistance, a ministerial duty plainly enjoined by law must necessarily fail to be enforced, thereby producing irremediable injury from a failure of justice.

From the authorities the general rule is deducible, we think, that mandamus will not be used except to compel the performance of some duty clearly imposed by law and in respect to the performance of which no discretion may be exercised, and in behalf of one whose right to its performance is legally established and unquestioned, and where there is no other sufficient and adequate remedy. *Baker* v. *Johnson*, 41 Maine, 15; *Townes* v. *Nichols*, 73 Maine, 515; *Bassett* v. *Atwater*, 65 Conn. 353; *Murray* v. *Stevens*, 110 Mass. 95; *Stackpole* v. *Seymour*, 127 Mass. 104; *Galbraith* v. *Building*

Association, 43 N. J. L. 389; *Birmingham Fire Ins. Co.* v. *Commonwealth*, 92 Pa. St. 72. Am. & Eng. Ency. of Law, Vol. 19, 2d. Ed. "Mandamus;" Spelling on Extraordinary Relief, secs. 1369-1376.

1. Was there a duty imposed by law upon the respondents to issue to the petitioner the new certificate of stock applied for? We think there was. Among the provisions of chap. 47, R. S., are the following:

"Sec. 34. When the capital of a corporation is divided into shares, and certificates thereof are issued, they may be transferred by indorsement and delivery. The delivery of a certificate of stock of a corporation to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties. Certificates of shares with the seal of the corporation affixed, shall be issued to those entitled to them by transfer or otherwise, signed by the president or vice-president, and by the cashier, clerk or treasurer. Neither shall sign blanks and leave them for use by the other, nor sign them without knowledge of the apparent title of the person to whom they are issued. In case of the absence or disability of either of said officers, the signature of a majority of the directors in his stead is sufficient.

"Sec. 35. No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

By these express provisions of the statute the duty to issue new certificates of shares to those entitled to them by transfer or otherwise is plainly enjoined upon the respondents.

The importance and necessity of the prompt issuance of new certificates of shares to the vendees of old ones is made manifest by the provisions of sec. 35 above quoted. Without such new certificate, or recorded transfer, the owner of shares has no legal right to demand from the corporation any dividends declared upon his

shares, or to be recognized by the corporation as a holder of its stock with the rights and privileges incident thereto. In view of these statutory provisions and requirements it cannot be doubted that it was the plain, legal duty of the respondents to issue a new certificate of shares to the petitioner, if he was entitled to the same. That he was so entitled is unquestioned. The facts stated show that he was a bona fide purchaser of the shares for value, and that the old certificate thereof had been assigned and delivered to him by his vendor, thereby giving him "the title against all parties."

2. But it is contended that the provisions of the statute, forbidding the designated officers to sign certificates "without knowledge of the apparent title of the person to whom they are issued," shows that the performance of this statutory duty depends upon an exercise of judgment and discretion on the part of the officers, and is therefore not such a ministerial duty as mandamus will enforce. True it is, that the respondents were not required or permitted to issue the new certificate to the petitioner "without knowledge" of his apparent title thereto.

But if they did not have knowledge of his title they could and should have so returned to the alternative writ, thereby giving the petitioner the right to contest the truth of such return. If, on the other hand, they did in fact have knowledge that he was entitled to the new certificate, then it is clear that they ought to have issued it to him. We think it sufficiently appears that the respondents did have knowledge of the petitioner's title to the new certificate, for it is stated that he was a bona fide purchaser for value of the shares, and that the old certificate had been assigned and delivered to him, and, moreover, that when he applied to the respondents for the new certificate he offered to surrender up the old one. In view of those statements contained in the petition, and in the alternative writ, and the fact that no return thereto was made other than that the facts stated were insufficient in law to justify mandamus, we think the respondents should not now be permitted to claim, as an excuse for not issuing the new certificate, that they were "without knowledge" of the petitioner's right and title thereto.

3. It is finally contended in behalf of the respondents that the weight of authority is against the granting of mandamus to compel a private corporation or its officers to issue certificates of shares in its capital stock, or to record the transfer of the same on its books.

It will be found, we think, that in a majority of the cases where this question has arisen mandamus has been denied. But in many of those cases it was not made clearly to appear that there was a duty plainly imposed by law upon the respondents to issue new certificates, or that the petitioner's right to the new certificate claimed was clearly established and unquestioned. We concede, however, that many of the cases in other jurisdictions, in which apparently the real question decided has been whether mandamus should issue to compel a private corporation to issue certificates of stock to persons entitled thereto, hold that it should not. The reason given in those cases is that an action at law to recover damages for the refusal of a new certificate, or proceedings in equity to compel its issue and record transfer, would afford the petitioner other adequate remedy.

Our court, however, is not committed to that doctrine. See *Townes* v. *Nichols*, 73 Maine, page 517. It is now called upon for the first time to decide whether one, who is admittedly entitled to a certificate of shares in the capital stock of a private corporation, organized and existing under the statutes of this State, has an adequate remedy at law or in equity for its refusal. Speaking of an adequate remedy sufficient to constitute a bar to relief by mandamus, Mr. Spelling in his work on Extraordinary Relief, sec. 1375, says:

"It must be such a remedy as is calculated to afford relief upon the very subject of the controversy. For if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy." Continuing the same author says: "The controlling question is not, 'Has the party a remedy at law?' but 'Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case.'"

The idea of the cases, denying mandamus on the ground that an action at law is open to the petitioner, is that in such action he could recover as damages the market value of the stock, and would thereby be fully indemnified. But it must be conceded, we think, that in very many cases that idea could not be realized in practice. Business of all classes and kinds is now carried on under corporate organization. The capital stock of some of these corporations has some known market value, but that of the greater number of them, perhaps, has none. Nevertheless, the shares in the latter have a substantial value to the owners thereof. That value may result from business immediately profitable, from special opportunities and circumstances insuring future profits, or from the good-will of a well established business. It does not, therefore, seem reasonable that the owner of such shares is afforded adequate relief, for a denial of his rights as a stockholder, by an action at law, to be prosecuted at his own expense and trouble, and for the uncertain recovery of some trifling sum as damages in lieu of the rights and benefits he would have enjoyed if the transfer to which he was entitled had been made to him. We quote with approval the language of Prof. Thompson's Commentaries on the Law of Corporations, (sec. 2445) where, speaking of the cases holding that an action at law is an adequate remedy, it is said: "It may be observed that the remedy by an action for the conversion is, in many cases, clearly inadequate, and the rule of these cases is hence unsound on principle. A large shareholder in a corporation may, by the purchase of a few additional shares, acquire a controlling vote therein. This vote may be to him of many times more value than the value of the shares which, if properly transferred to him, would enable him to exercise it. But the officers of the corporation may remain in power and possession of its assets, repudiate his rights and tortiously perpetuate their official existence, and his only legal remedy for this great wrong is to have the assets of the corporation mulcted, and other innocent shareholders perhaps damaged, to the extent of the market value of his shares thus converted."

The same reasons and objections, we think, may be urged against the suggestion that the petitioner has an adequate remedy in equity.

Before that remedy could be prosecuted to a final decree important opportunities to enhance the value of the business of the corporation may have passed, and maladministration have wasted and dissipated its assets. Such a remedy is not commensurate with the petitioner's rights. He is entitled to the privileges of a stockholder at once, that he may immediately share in the assets of the corporation and have a part in its affairs. A remedy that can at most afford him his rights as a stockholder only at some future time, is not an adequate remedy.

Notwithstanding the fact that the weight of authority in other jurisdictions appears to be otherwise, we are unable to assent to the doctrine that a bona fide share owner in a private corporation, existing under our statutes, who is wrongfully denied his statutory right to have a certificate of his shares issued to him by the corporation, and a record transfer thereof made on its books, is afforded an adequate remedy — a remedy commensurate with his special and peculiar rights and necessities under all the circumstances, by an action at law against the corporation for the value of his shares, or by equitable proceedings for a specific performance. And we are of opinion that such remedies should not constitute a bar to relief by mandamus to compel such issue and transfer where the petitioner's right is unquestioned, and where neither the corporation nor its officers have, or pretend to have, any reason or excuse for their refusal.

We readily perceive that great injury would often result to a petitioner from a refusal of mandamus in such case as the one at bar, while, on the other hand, we fail to perceive how injustice could be done to any one from granting it in such case, since no reason is given or suggested why the shares should not be transferred as requested.

The conclusion here reached is by no means unsupported by judicial authority. In Cook on Corporations (5th Ed.), sec. 390, the author says: "There is a strong line of decisions, however, which holds that a mandamus does lie to compel a corporation to allow a registry of a transfer of stock, particularly where the corporation has no good and sufficient reason for refusing the registry."

Included in a long list of cases, cited by the author in support of the text quoted, are the following:

People v. *Goss, etc., Co.* 99 Ill. 355; *State* v. *Bank*, 89 Ind. 302; *Turnpike Co.* v. *Bulla*, 45 Ind. 1; *Norris* v. *Irish Land Co.*, 8 El. & Bl. 512; *Regina* v. *Carnatic Ry.*, L. R. 8 Q. B. 299; *Slemmons* v. *Thompson*, 23 Oreg. 215; *Hair* v. *Burnell*, 106 Fed. R. 280. See also *In re Klaus*, 76 Wis. 401, 29 N. W. 582; *State ex rel* v. *Consumers Brewing Co.*, 115 La. 728, 40 So. 45; *Scherk* v. *Montgomery*, 81 Miss. 426, 33 So. 507.

In the case at bar the petitioner's right to the new certificate of shares was clearly established and unquestioned. Under the express statutes of this State it was the plain duty of the respondents to issue such certificate to him. They offer no reason or suggestion as an excuse for their refusal. In the opinion of the court mandamus is a permissible and necessary remedy for the petitioner under the circumstances of this case.

The entry will therefore be,

Exceptions overruled.

JAMES R. COREY AND JARVIS W. FERRIS, In Equity,

vs.

INDEPENDENT ICE COMPANY AND ROBERT B. STONE, "Trustee" so called.

SAME

vs.

CHARLES RUSSELL et als., Quo Warranto.

Cumberland. Opinion April 5, 1910.

Judgment. Res Judicata. Foreign Judgments. U. S. Statute, July 2, 1890. U. S. Constitution, Article 4, section 1.

Where a Massachusetts court by its decree found that certain shares of the stock of a corporation were owned by certain individuals and not by the corporation, and no appeal from the decree was taken, *held* that the decree barred a subsequent suit in Maine on the same issue.

Under the Constitution of the United States, Article 4, section 1, requiring each State to give full faith and credit to judicial proceedings in other States, a judgment in Massachusetts can be pleaded in bar in Maine, whenever it could be so pleaded in Massachusetts courts.

As a general rule a judgment between the same parties or their privies is a final bar to any other suit for the same cause of action, and is conclusive, not only as to all matters which were tried in the first action, but as to all matters which might have been tried where the court has jurisdiction, the proceedings are regular, and there is no fraud.

A prior judgment concludes all issues tried and decided, as to all subsequent litigation between the same parties and their privies, including suits not for the same cause of action.

On appeal by defendants. Sustained. Bill dismissed. Quo warranto dismissed.

Two cases, a bill in equity and an information in the nature of a quo warranto.

The bill in equity prayed for an injunction to restrain the defendant, Robert B. Stone, from voting on 509 shares of the preferred stock of the Independent Ice Company or exercising any rights as

stockholder or owner thereof, and that he be ordered to deliver up the certificate of such shares to the plaintiffs, as officers of the Independent Ice Company and the proper custodians of its property. The defendants filed a demurrer, a plea in bar, and an answer to the merits.

The quo warranto proceedings were instituted to oust the defendants named therein, from certain offices of the Independent Ice Company, which, it was alleged, they had usurped and were illegally holding. The defendants filed a demurrer, a plea in bar, and an answer to the merits.

The two cases were heard together before the Justice of the first instance, who made a final decree for the plaintiffs in the equity case, and rendered judgment for the plaintiffs in the quo warranto proceedings. The defendants in both cases then appealed.

The cases are stated in the opinion.

MEMO. Mr. Justice BIRD having been of counsel, did not sit in these cases.

Symonds, Snow, Cook & Hutchinson, Sherman L. Whipple, and Alexander Wilson, for plaintiffs.

Bird & Bradley, and Anthoine & Talbot, for defendants.

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

SPEAR, J. These cases involve a bill in equity and an information in the nature of quo warranto and depend substantially upon the same state of facts. The finding of the sitting Justice was in favor of the plaintiffs in each proceeding, and the cases are here on appeal by the defendants. The Independent Ice Company is a corporation organized under the laws of Maine. At the date of filing the bill the plaintiff Ferris, was president and Corey was treasurer and both were directors of the corporation. There had been issued 1000 shares of preferred stock and 500 shares of common stock, the common stock having no voting power. The control of the corporation was therefore vested entirely in the ownership of the 1000 preferred shares. Of these preferred shares the plaintiffs held a total of 491, of which Corey owned 245, Ferris 246, and

each had a certificate representing his stock ownership. The remaining 509 shares of preferred stock were represented by a certificate standing in the name of the defendant Stone, described as "trustee."

The plaintiffs allege that until shortly before the filing of the bill they supposed that the defendant Stone held the 509 shares of stock as trustee for the defendant company. At about this time upon information that Stone claimed to hold these shares in trust for other parties than the defendant company, the plaintiffs made a formal demand on Stone that these shares as the company's property should be delivered to them, the officers of the corporation entitled to hold them. This demand the defendant Stone refused to comply with, and in return threatened to so vote the 509 shares at the impending annual meeting as to deprive the plaintiffs of their official positions and of the control of the affairs of the corporation. Thereupon the bill was filed.

The plaintiffs' contention as set forth in the language of their brief, is this: "The basis of the plaintiffs claim as set forth therein is that the 509 shares are actually held in trust by the defendant Stone for the corporation, and are actually its property, because the purchase price was paid out of the funds of the corporation under circumstances which show an intention and agreement to create a trust or, at least, that a resulting trust arose by operation of law.

The plaintiffs' claim accordingly is that the outstanding certificate was illegally held by said Stone except as trustee for the corporation; and since the stock belonged in equity to the corporation, he had no right to vote thereon or to make use of the same to deprive the plaintiffs of their official positions and the control of the corporation, to which, as owners of a majority of the stock legally outstanding, they were entitled.

The bill prays for an injunction to restrain the defendant Stone from voting on said shares or exercising any rights as stockholder or owner thereof; as further an incidental relief there is a prayer that the defendant Stone be ordered to deliver up such certificate to the plaintiffs, as officers of the corporation and proper custodians of its property.

The annual meeting was held after the filing of the bill at which the defendant Stone voted said 509 shares against the protest of the plaintiffs as a result of which vote the defendants named in the quo warranto proceeding were declared elected to the respective offices, as set out in the petition. The defendants thereupon took possession of the offices and excluded the plaintiffs from the performance of their duties as president, treasurer and directors of the corporation. The quo warranto proceedings were instituted to oust the defendants named in that case from the respective offices which they had occupied.

The averments of the information are practically the same as those of the bill in equity except so far as they recite occurrences subsequent to the filing of the bill. The two suits are complimentary to each other. The quo warranto proceeding involves the same question as the bill in equity except that they are instituted to correct a wrong accomplished, while the bill is filed for the prevention of a wrong.

The plaintiffs also state the issue as follows:

"The issue, therefore, which the cases present is whether the plaintiffs as holders of a majority of the stock outstanding entitled to vote are entitled to elect the officers of the corporation, control its affairs and enjoy the incidental benefits of such control, or whether the defendant Stone has such a title to the certificate standing in his name as "trustee" as to entitle him to vote thereon, to elect officers and enjoy the incidental benefits of control. The controversy is one between stockholders or alleged stockholders for control of the corporation."

It is also asserted that the equity suit is not a minority stockholders' bill, but rather a bill to declare that the plaintiffs are majority stockholders; that the bill has for its object to enforce directly individual rights of the plaintiffs rather than rights of the corporation; that the corporation itself is not a necessary party to the bill.

To the bill, setting forth the foregoing contentions, the defendant filed (1) a demurrer, (2) a plea in bar, and (3) an answer to

the merits. The plea in bar raises the defense of res adjudicata and in the opinion of the court must prevail.

It appears that in May, 1907, Frank H. Foster of Somerville and Eugene S. Currier of Chelsea, both of the Commonwealth of Massachusetts, brought a bill in behalf of themselves and all other stockholders of the Independent Ice Company against Reuben H. Hopkins and others, among whom were Robert B. Stone and the Independent Ice Company, Robert B. Stone and the Independent Ice Company being the same parties referred to by these names in the plaintiff's bill. It is evident from the plaintiff's bill that the gravamen of their complaint is (1) that a seventy-five thousand dollar loan ($75,000) from the American Loan & Trust Company was made and intended to be made to the Independent Ice Company, and (2) that the 476 shares of the capital stock held by Stone as trustee were purchased with the proceeds of this loan and that the other 33 shares, purchased by funds advanced by Flanders, by final agreement were to be paid for by the Independent Ice Company out of the proceeds of the sale of its bonds, and thus become the property of the corporation. Therefore stripped of all verbiage, the substantial allegations of the plaintiffs' bill are (1) that the Independent Ice Company was the actual debtor for the seventy-five thousand dollar loan and (2) that the defendant Stone held the 509 shares of preferred stock as trustee for the Independent Ice Company, and not as trustee for any other parties.

It seems to us that these were the precise questions presented in the bill before the Massachusetts court. After alleging a conspiracy on the part of the defendants to get a controlling interest of the Independent Ice Company the bill says: "In furtherance of this conspiracy they caused the said Independent Ice Company to secure a loan from the American Loan and Trust Company of Boston, of seventy-five thousand dollars and with the sum so borrowed, the said company purchased from said Homans and Burnham the 476 shares of the capital stock owned by them and paid its debts, for which sum Homans and Burnham were in some way responsible, to the amount of Sixty-five Thousand, Two Hundred and Forty-seven Dollars and Eighty-nine cents ($65,247.89). The

said Ferris, Hopkins and Flanders then, as your orators are informed and believe, loaned to the said Independent Ice Company sufficient money to purchase 33 other shares of stock, which were thereupon so purchased by said company."

In their answer the defendants traverse the plaintiffs' allegations, specifically denying the truth of the averment with respect to the loan and ownership of the 509 shares of stock. In item 4 they say: "The respondents deny that in furtherance of such conspiracy, the respondents, Bartlett, Hopkins and Flanders caused said Independent Ice Company to secure a loan from the American Loan & Trust Company of Boston, of Seventy-five Thousand Dollars ($75,000). The respondents deny that with such sum, so borrowed, said company purchased from said Homans and Burnham the four hundred and seventy-six (476) shares of the capital stock owned by them, and paid its debts for which said Homans and Burnham were in some way responsible, to the amount of Sixty-five Thousand Two Hundred and Forty-Seven and Eighty-nine one-hundredths ($65,247.89) dollars. The respondents deny that Bartlett, Hopkins and Flanders loaned to said Independent Ice Company sufficient money to purchase thirty-three (33) other shares of stock, which were thereupon so purchased by said company; and said respondents deny that any of the shares of stock, referred to in the complainants' bill, were at any time purchased by said company."

The prayers in the plaintiffs' bill were: First. That an injunction issue from this Honorable Court temporarily restraining said defendant Robert B. Stone, from selling, assigning, transferring or in any way parting from the possession or title of a certain certificate purporting to represent 509 shares of the preferred stock of the Independent Ice Company except by delivery of the same to the plaintiffs as officers of said Independent Ice Company for cancellation, until order of this Honorable Court. Second. That an injunction issue restraining said Robert B. Stone until further order of this Honorable Court from voting of said certificate of 509 shares of preferred stock of the Independent Ice Company, or exercising

any rights as holder or owner thereof. Third. That upon hearing, it may be declared that said Robert B. Stone shall deliver up to the plaintiffs as officers of the defendant the Independent Ice Company said certificate purporting to represent 509 shares of the preferred stock of said Independent Ice Company, and that the same be duly cancelled and retired."

The prayers in the Massachusetts bills were: "(1) That Robert B. Stone be enjoined during the pendency of this suit from parting with any of the stock of the Independent Ice Company now standing in his name as trustee or otherwise. (2) That said Robert B. Stone be ordered by decree of this court to return to the treasurer of said company the 509 shares of stock of said company standing in his name as trustee, and that he be further enjoined from acting as an officer of, or further intermeddling with the affairs of, this corporation." The other prayers are not material to the issue here raised. While differing in form, the prayers in the plaintiffs' bill are identical in substance with those in the Massachusetts bill. It therefore becomes apparent that both the allegations of fact and the prayers for relief in the two bills are practically the same.

In the Massachusetts case the sitting Justice made a long finding of fact, upon which he based his decree, in which he specifically found, "As a matter of fact those funds, that seventy-five thousand dollars ($75,000) were not the funds of the Independent Ice Company; they were either the funds of the Boston Ice Company or these three defendants, and it is not material as far as this case is concerned whether they were the funds of one or the other." In a supplementary finding of facts the sitting Justice further said: "I find that the capital stock of the Independent Ice Company purchased by the defendant, Hopkins, Bartlett and Flanders, for the purpose of obtaining control, was composed of 238 shares purchased from F. W. Homans; 238 shares from H. A. Burnham; 20 shares purchased from H. A. Spaulding; 8 shares purchased from P. Couglin; 5 shares purchased from W. H. Brewster, making a total of 509 shares; and that all said stock was purchased, and paid for, with money *not* of said Independent Ice Company but of said

Hopkins, Bartlett and Flanders; and that said 509 shares are now represented by the 509 shares of preferred stock standing in the name of Robert B. Stone, trustee."

Upon these findings of fact with reference to these particular matters appears the following final decree: "This case came on to be heard at this sitting, and was argued by counsel, and it appearing, and having been found that five hundred and nine (509) shares of the capital stock of the respondent, Independent Ice Company, was purchased by the respondents, Hopkins, Bartlett and Flanders with their own money, and not with the money of said Independent Ice Company, and that said five hundred and nine (509) shares are now represented by five hundred and nine (509) shares of preferred stock standing in the name of the respondent, Robert B. Stone as trustee, and that the said Independent Ice Company has no right to have any of said stock surrendered, or cancelled, and that the complainants have in no wise been defrauded by the respondents, or any of them, all as more fully appears in the finding of fact heretofore entered, and forming a part of the record in this case, thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED that the complainants' bill be, and hereby is, dismissed, and that the respondents recover their costs against the complainants in the sum of sixty-seven dollars and fifty-one cents and that execution, in the ordinary form, issue therefor."

There can be no question whatever that the subject matter litigated in the Massachusetts case was precisely the same as that litigated in the Maine case. It requires no extraneous evidence to establish the identity of the one with the other.

Now then appears the vital question in the determination of this case, can the Maine case be differentiated from the Massachusetts case so as to relieve the former from the defense of res adjudicata? The plaintiffs undertook to distinguish the cases by asserting that the Maine suit it not a minority stockholders' bill, but rather a bill to declare that the plaintiffs are majority stockholders. But it is apparent that the assertion that the plaintiffs are majority stockholders does not make them so. Whether they are or not depends upon the establishment of certain facts, the most important of which

is that they own a majority of the voting stock. Whether they own such a majority depends entirely upon the number of shares owned by other stockholders. In this case the other stockholders claim to be represented by 509 shares, a clear majority, held by Robert B. Stone as trustee. Whether these 509 shares were held by Robert B. Stone as trustee for various stockholders, or whether they belonged to the corporation and were not votable, was the precise question determined in Massachusetts, adversely to the claim of these plaintiffs. Therefore whatever they may call themselves in their bill and in their argument, if the Massachusetts judgment is valid and binding, these plaintiffs are not majority stockholders, and their bill is not a majority stockholders' bill. The assertion that they are majority stockholders does not differentiate their case from that of the Massachusetts case. A judgment in Massachusetts can be pleaded in bar in Maine, whenever it could be so pleaded in Massachusetts courts. *Cleaves* v. *Lord*, 43 Maine, 290; *North Bank* v. *Brown*, 50 Maine, 214; *Sweet* v. *Brackley*, 53 Maine, 346; *Whiting* v. *Burger*, 78 Maine, 287; Const. U. S. Art. 4, sec. 1, an act of Congress of May 26, 1790.

It is not in controversy that the plaintiffs in the Maine case holding 491 shares of the voting stock were, during the proceedings of the Massachusetts case, also stockholders in the defendant corporation holding the same 491 shares. The Massachusetts bill was brought in behalf of the plaintiffs "and all other stockholders of the Independent Ice Company." These plaintiffs, however, were not made parties to the bill, but were present and represented by counsel during the trial of the Massachusetts case. They had an undoubted right as stockholders to become parties to the litigation for the protection of their interests, if they saw fit to do so, at any stage of the proceedings. Under the well established rules of law we think these plaintiffs being stockholders and vitally interested in the ownership of the 509 shares in the hands of Stone as trustee, and also being present and represented by counsel at the trial, must be regarded as privies to this litigation and to have had their day in court. With respect to the Massachusetts litigation it may be said that (1) It nowhere appears that the Massachusetts court did

not have jurisdiction; on the contrary all parties to that suit voluntarily appeared. (2) It nowhere is alleged that there was any fraud or collusion in the Massachusetts case. (3) It nowhere appears that the Massachusetts decision was erroneous or unlawfully rendered; on the contrary the proceedings in the Massachusetts case were regular and lawful.

Conceding jurisdiction, absence of fraud, and regularity in proceedings, we think it will not be challenged as a general rule, that a judgment between the same parties, or their privies, is a final bar to any other suit for the same cause of action and is conclusive not only as to all matters which were tried in the first action, but as to all matters which might have been tried.

In *Emery* v. *Goodwin*, 13 Maine, 14, a bill in equity was brought by Ward against the guardian for an alleged illegal sale of real estate. The defendant pleaded in bar a former suit in the name of the Judge of Probate, involving the same question. Although the plaintiffs in the two bills were not the same, yet the court say: "It is an elementary principle of high importance in the administration of justice that the judgment or decree of a court of competent jurisdiction is final as to the subject matter determined and that it cannot be opened before any court of concurrent jurisdiction. The authorities go further and maintain the position that the parties are concluded as to whatever might have been litigated or decided in the former suit." See also *Stout* v. *Lye*, 103 U. S. 66; *Werlein* v. *New Orleans*, 177 U. S. 390; *Harlow* v. *Bartlett*, 170 Mass. 584.

Corbett v. *Craven*, 193 Mass. 30, was a case in which the plaintiffs were not the same yet the court held; "The decree of 'Bill dismissed' was a final decree, upon the merits, that settled forever all matters involved in that suit, and includes 'everything that was litigated or that might have been litigated.'" Upon this point may be cited the following cases: *Emery* v. *Goodwin*, 13 Maine, 14; *Rankin* v. *Goddard*, 55 Maine, 389; *Blodgett* v. *Dow*, 81 Maine, 197; *Paul* v. *Thorndike*, 97 Maine, 87; *Insurance Company* v. *Tremblay*, 101 Maine, 585; *Barnes* v. *Huntley*, 188 Mass. 374.

It may also be laid down as a general principle that a prior decision is conclusive upon all matters and issues which were in fact there tried and decided, in all subsequent litigation between the same parties, or their privies, even in a suit which is not for the same cause of action. *Chase* v. *Walker*, 26 Maine, 555; *Sturtevant* v. *Randall*, 53 Maine, 149; *Lynch* v. *Swanton*, 53 Maine, 100; *Walker* v. *Chase*, 53 Maine, 258; *Cromwell* v. *County of Sac.*, 94 U. S. 351.

In *New Orleans* v. *Citizens Bank*, 167 U. S. 371, it is said: "The estoppel extends to every material allegation or statement which having been made on one side, and denied on the other, was at issue in the cause, and was determined therein."

While the plaintiffs in this suit were not made parties to the bill in the Massachusetts case, we think it is nevertheless a sound rule of law that a stockholder is privy to and bound by a decree or judgment against the corporation in regard to corporate matters, although the stockholder was not made a party to the suit. *Willoughby* v. *Chicago Junc. Ry. Co.*, 50 N. J. Eq. 656, is an elaborate and well reasoned opinion in which the above principle of law is fully sustained. In Vanfleet on former adjudication, sec. 502, page 998, the reason for this rule is stated as follows: "The complainant stockholder is merely an agent of the corporation proceeding for its benefit because the regular agent refuses to do so, and the corporation is the real party in interest, and is bound by the decree, and of course, if so bound, neither it nor any stockholder providing for its benefit can re-litigate the matters decided. See also *Herst* v. *Putnam Mining Company*, 28 Utah, 184 (77 Pac. Rep. 753); *Memphis R. R. Company* v. *Grayson*, 88 Ala. 572.

In *Merrill* v. *Suffolk Bank*, 31 Maine, 57, it was held that a stockholder in a corporation is so far a privy to a judgment against the corporation that he may prosecute a writ of error to reverse the judgment.

It may be said at this juncture that the assertion on the part of the plaintiffs that this is not a minority stockholders' bill, has not been fully answered and that consequently the above rules of law do

not apply. If, however, this bill is not a minority stockholders' bill, in whose interest can it be said to have been brought? We presume it will be conceded that the character of a bill must be determined upon the allegations of fact and prayers for relief. This bill is brought in behalf of the plaintiffs and all other common shareholders of the defendant company who may desire to join in the proceedings. It then alleges that the seventy-two thousand dollar loan spoken of was made to the Independent Ice Company, and that the 509 shares of stock put in the name of Robert B. Stone, trustee, were paid for from the funds of the Independent Ice Company and thereby became the property of the defendant company, and that the same in equity should, upon demand, be turned over for cancellation to the plaintiff, Corey, as TREASURER of the corporation. The prayer in the bill, following the allegations, demands that it may be decreed that said Robert B. Stone shall deliver to the plaintiffs, as officers of the defendant company, the certificate purporting to represent 509 shares of preferred stock, and that the same may be cancelled and retired. We deem it important to here note that the plaintiffs nowhere pretend to own these 509 shares. On the contrary they aver that they are the property of the corporation, having been purchased with corporate funds, and demand that they shall be turned over, not to the plaintiffs, but to the treasurer. Their bill, therefore, must be regarded to have been brought for the benefit of the corporation, as the return of these shares would add to the corporate assets whatever their value might be.

While the cancellation or return of the 509 shares would result in giving the plaintiffs a majority of the voting stock, it is, nevertheless, a result that follows cancellation and not a fact which precedes it. Hence, the plaintiffs' assertion that this is a majority stockholders' bill can only be made upon the assumption that the 509 shares held by Stone as trustee are corporate property, a statement which results in merely begging the question. In other words, they predicate the assertion that they are majority stockholders upon the ownership of the 509 shares by the corporation, the title to which is the very question they seek in their bill to determine.

Whatever the name given to the bill or the character ascribed to the plaintiffs, there still remain the two paramount issues, presented by the bill, the prayers, the answer and the proof, (1) To whom was made the seventy-five thousand dollar loan? (2) In whom was the title to the 509 shares of stock? Both of which, if decided in favor of the plaintiffs, inure directly to the benefit of the corporation. In view of the undisputed elements in the case, we are of the opinion that the plaintiffs' bill must be declared to have been brought for the benefit of the corporation, in which the corporation was the real, and the plaintiffs the nominal, party.

Therefore, whatever our conclusion might be upon the finding of facts made by the Maine court, we feel compelled to say that the same issues involved in the Maine cases were litigated and determined in the Massachusetts case, and that the plea, res adjudicata, is an effectual bar to the prosecution of the plaintiffs' bill.

The plaintiffs further contend that the purchase of the 509 shares of voting stock was acquired in violation of the Federal Anti-Trust act which provides; Sec. 1. "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraining trade or commerce among the several states, or with foreign nations is hereby declared to be illegal . . . ." It is claimed that the Independent Ice Company was a competitor of the Boston Ice Company and that the manner in which the 509 shares of the Independent Ice Company's stock was acquired shows that there was a combination on the part of the officers of the Boston Ice Company to remove the Independent Ice Company from further competition in the ice business.

But upon this point it is only necessary to observe that the evidence, regarded in its most favorable light to the plaintiffs' contention, falls far short of sustaining it. As the quo warranto proceedings involve precisely the same issues as those considered in the equity proceeding, it is evident that the former procedure must stand or fall with the latter.

Appeal sustained.
Bill dismissed.
Information for quo warranto dismissed.

E. S. MARTIN & SON COMPANY *vs.* THE JESSE L. HEDDEN COMPANY.

Washington. Opinion April 23, 1910.

Attachment. Mechanic's Liens. Pleading. Surplusage.

No lien claim need be set out in the declaration in a writ to entitle a plaintiff to attach property in a suit for labor and materials furnished in repairing a house where the personal defendant is also the owner of the property, and if one is set out it is immaterial or surplusage and is not subject to special demurrer.

On exceptions by defendant. Overruled.

Assumpsit on an account annexed for "labor performed and materials furnished by the said plaintiff upon the house of said defendant." The declaration also contained the following allegation: "This suit is brought to enforce a lien claim for the above named sum for labor performed and materials furnished by the said plaintiff upon the house of said defendant, standing on a certain lot or parcel of land situated in the western part of said Eastport and commonly known as 'Shackford's Head,'" etc. The defendant filed a special demurrer to the declaration assigning seven causes therefor. The demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

L. D. Lamond, for plaintiff.

J. H. McFaul, and A. D. McFaul, for defendant.

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

SPEAR, J. This case comes up on exceptions to the overruling of a special demurrer to the plaintiff's declaration, containing an account annexed and setting out a lien claim in the following language. "This suit is brought to enforce a lien claim for the above named sum for labor performed and materials furnished by said plaintiff upon the house of said defendant standing on a certain lot or parcel of land,"

It appears from this declaration that the personal defendant was the owner of the house upon which the lien claim is sought to be attached. The defendant assigned seven causes for special demurrer all of which relate to the insufficiency of the declaration in setting forth the lien claimed upon the defendant's house. In a case where the personal defendant is also the owner, that part of the declaration relating to the lien cannot be reached by demurrer.

It was held in *Martin* v. *Darling*, 78 Maine, 78: "If the defendants alone are interested, as the contract for labor was made with them, and the property is attachable, a judgment for a lien would add nothing to the security which the plaintiff now has by virtue of his attachment. In such case and in the absence of general notice given, the law does not authorize judgment in rem to be given . . . . but leaves the question to be settled by subsequent proceedings, if necessary."

Laughlin v. *Reed*, 89 Maine, 226, presents a similar case in which the court say: "Under these circumstances a valid judgment was rendered against the defendant Lincoln and no further judgment was authorized, or acquired, in order to make the property attached available for the satisfaction of the execution issued on the judgment in that suit."

Under these decisions it becomes entirely immaterial to the defendant in the case at bar whether the declaration setting forth the lien claim is good or bad. No lien claim is required to be set out to enable the plaintiff to attach the property of the defendant, and, if set out, becomes immaterial or surplusage. The personal defendant being the owner, the declaration on the account against him and the attachment upon the writ, were sufficient to bind him in both respects without further notice. There can be no occasion to pass upon the validity of the plaintiff's attachment until some third person, not personally liable, raises the question upon proper issue. In the meantime the questions raised by the demurrer are res inter alios.

Exceptions overruled.

CHARLES H. LEVY et al.

vs.

JOHN H. WEBSTER AND ELIZA J. WEBSTER.

Cumberland. Opinion April 25, 1910.

Guaranty. Remedies. Parties. Joinder.

A guarantor is not suable jointly with the maker of the principal contract. Their contracts are distinct and not joint, and the guarantor must be sued separately upon his contract of guaranty, and not jointly upon the principal contract.

Held: That an indorsement on a note, "I hereby guarantee payment of the within note," constituted a contract of guaranty, on which the guarantor must be sued separately from the maker of the note.

On motion and exceptions by defendant, Eliza J. Webster. Motion sustained. Exceptions not considered.

Action of assumpsit against the defendants jointly on a promissory note, brought in the Portland Municipal Court, Cumberland County, where judgment was rendered for the plaintiffs and the defendants appealed to the Superior Court in said County. Defendant John H. Webster pleaded the general issue and Eliza J. Webster, the other defendant pleaded the general issue with a brief statement alleging that the note was procured by duress. At the conclusion of the evidence in the Superior Court, the presiding Justice directed a verdict against the defendant Eliza J. Webster and by agreement also directed a verdict in favor of the defendant John H. Webster.

The defendant Eliza J. Webster excepted to the order directing a verdict against her and also filed a general motion for a new trial.

The case is stated in the opinion.

E. L. Wilson, for plaintiff.

S. L. Bates, for John H. Webster.

Dennis A. Meaher, for Eliza J. Webster.

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

KING, J. John H. Webster, one of the defendants, gave the note in suit to save himself from being committed to jail on a writ against him in an action of trover. At the time the note was given, at his request, the other defendant, Eliza J. Webster, signed an indorsement on the back of the note "I hereby guarantee the payment of the within note." This is an action of assumpsit against the defendants jointly on the note, and the defense was duress. The presiding Justice instructed the jury that no duress had been proved that would avoid the contract of Eliza J. Webster and directed a verdict against her. By agreement of counsel a verdict was also directed in favor of John H. Webster. The case comes before this court on exceptions by Eliza J. Webster and upon her motion to have the verdict against her set aside on the usual grounds.

It is elementary law that a guarantor is not suable jointly with the maker of the principal contract. Their contracts are distinct and not joint. The guarantor must be sued separately upon his contract of guaranty, and not jointly upon the principal contract, *Reed* v. *Cutts*, 7 Maine, page 189; *Smith* v. *Loomis*, 72 Maine, page 55. The contract of Eliza J. Webster was, by its express terms, that of a guarantor. The evidence established separate and distinct contracts and not a joint contract. Accordingly the entry in this case must be that the verdict ordered against Eliza J. Webster be set aside and a new trial granted.

So ordered.

PEOPLES NATIONAL BANK *vs.* HANOVER S. NICKERSON.

Somerset. Opinion May 4, 1910.

Pleading. Duplicity. Declaration.

Duplicity in a declaration consists in joining in one and the same count different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery.

A declaration is not bad for duplicity because more than one cause of action is set forth in one count, if no more than one independent and sufficient ground or matter is therein alleged in support of a single demand or right of recovery.

A declaration in a writ of entry, which combines in one count several tracts of land, is not bad for duplicity, where only one independent matter, disseisin by defendant, is alleged in support of a single demand or right of recovery.

On exceptions by defendant. Overruled.

Real action to recover several tracts of land in Pittsfield, Somerset County. At the return term of the writ, the defendant filed a special demurrer to the declaration. The presiding Justice pro forma overruled the demurrer and the defendant excepted.

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

"In a plea of land wherein the plaintiff demands of the defendant a lot of land situated in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Also another lot situated in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Also another lot situated in said Pittsfield and bounded as follows, to wit: (Description omitted in this report.)

"Also another lot of land situate in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Whereof the demandant was seized in fee simple within twenty years last past and whereof the defendant within said time unjustly and without judgment of law disseized the demandant and still

unjustly withholds said premises from it and the demandant further avers that the defendant has been in possession of said premises since the 11th day of May, 1908, receiving the rents and profits thereof during all that time which the demandant avers are reasonably worth fifteen dollars ($15.00) per month which it claims to recover in this action."

The case is stated in the opinion.

Charles F. Johnson, for plaintiff.

David D. Stewart, for defendant.

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

KING, J. The sole question presented in this case is whether a declaration in a writ of entry containing in one count several distinct tracts of land is bad for duplicity.

"Duplicity in a declaration consists in joining in one and the same count, different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery." Gould on Pleading (5 Ed.), page 205, sec. 99.

In Chitty on Pleading (16 Ed.), Vol. 1, star page 249, it is said: "The plaintiff cannot, by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect to such demand."

Mr. Stephen in his work on Pleading says, page 242: "that the declaration must not, in support of a single demand, allege several matters, by any one of which that demand is sufficiently supported."

The distinction between the combining in one count of several distinct causes of action and duplicity must be kept clearly in mind. That distinction was aptly stated in *Higson* v. *Thompson*, 8 U. C. B. 561, 562, where the court said: "Duplicity in a count consists in supporting the same claim on several distinct grounds, not in laying several injuries in one count."

A declaration, therefore, is not bad for duplicity because more than one cause of action is set forth in one count, provided not

more than one independent and sufficient ground or matter is therein alleged in support of a single demand or right of recovery.

In *Platt* v. *Jones*, 59 Maine, page 242, it is said: "It is not quite accurate to say that two causes of action in one count render it double. Several items of account may be very properly embraced in one count, and yet each one of those items might be a good cause of action. So in the case of several trespasses upon the same lot of land."

It will be seen upon examination of the declaration before us that it does not violate the rule against duplicity. The pleader has set forth as his demand, or right of recovery, the right to the possession of four distinct tracts of land; the ground or matter alleged in support of his demand, or right of recovery, is that the defendant has disseized him of those tracts. If the declaration is to be construed as setting forth in one count a separate demand for each of those tracts, rather than a demand for them all combined, there is no duplicity, because there is no allegation of more than one ground relied upon in support of each single demand. In other words, if there is but one demand, or right of recovery, set forth,—that is, the demand of the combined tracts,— then there is but one ground relied upon in support of that demand,—the defendant's disseizin; on the other hand if there is set forth a distinct demand, or right of recovery, for each tract, still there is but one ground relied upon in support of any of those distinct demands,— the defendant's disseizin. In neither case would the declaration be bad for duplicity.

In addition to the uniform authorities in support of the meaning and application of the doctrine of duplicity as defined by the learned authors above quoted, the following cases are directly in point as to the particular question now before us. *Hotchkiss* v. *Butler*, 18 Conn. 287; *Den* v. *Snowhill*, 13 N. J. L. 23. In the latter case the declaration, like the one at bar, contained but one count for several tracts of land. In answer to the position there taken that the declaration was bad for double pleading the court said: "No decision or authority was cited to show the legal soundness of this position, nor can I yield to the reasoning, however ingenious, of the defendant's counsel. On the contrary, all argument, all con-

venience, all analogy, and some decisions, appear to me to hold the converse of this doctrine, and to show that in one action, the plaintiff may recover several distinct tracts, and claimed under different titles, if from all he has been unlawfully ejected by the same defendant. . . . Three several slanderous charges, entirely unlike, circulated in as many different weeks may be redressed in one suit. So may three several batteries perpetrated as many months asunder. Under a single count for money had and received, the plaintiff may prove the receipt of money to his use by the defendant from divers persons, at divers times, and on occasions wholly disconnected. A bond, a note, a book account, a demand for rent or work done, may be included in one declaration. Is there any less incongruity in these combinations than for a plaintiff to seek by one action to be restored to three several tracts of land lying in the same township, from which he complains that the defendant has on the same day dispossessed him?"

It is the opinion of the court that the declaration in the case at bar is not open to the charge of duplicity.

Exceptions overruled.

STATE OF MAINE *vs.* NATHAN BERLIAWSKY.

Kennebec. Opinion May 28, 1910.

Perjury. Material and Immaterial Matters. Revised Statutes, chapter 123, section 1.

1. False testimony by a party defendant in a civil suit in support of claim filed in set off for money loaned, that no negotiable promissory note was given or accepted therefor is testimony "to a material matter" and is perjury.
2. Where the party actually sets up such claim for money loaned in defense by way of set off and testifies in support of it, the fact that he need not have done so because of another available defense does not make the claim immaterial matter.

On report. Judgment for the State.

Indictment against the defendant for perjury and reported to the Law Court under the provisions of Revised Statutes, chapter 135, section 26. The report signed by the presiding Justice is as follows:

"This was an indictment for perjury found at the January term of the Superior Court for the County of Kennebec. The respondent pleaded "not guilty." Questions of law arising in the case the presiding Justice deems it proper that the same should be reserved on report for the decision of the Law Court, under the statute.

"The report is to be made up of the writ, account in set-off, pleadings, report of the evidence and all exhibits in the case of *Isaac Weiner* v. *Nathan Berliawsky*, tried at the November term, 1907, of said Superior Court, together with the full record in said case.

"Respondent admits that the testimony as alleged in the indictment was false, but contends that it was not material to the issue involved in the case then on trial.

"The respondent admits all the allegations in the indictment except the allegation of materiality.

"If the Law Court is of the opinion that the testimony was material to the issue, then judgment for the State is to be ordered

or the case to stand for trial, as the Law Court may deem necessary in the premises, and the respondent in open court agrees that if the order of the court be that the case must stand for trial he will withdraw his plea of not guilty and enter a plea of nolo contendere. If the Law Court is of the opinion that the testimony was not material to the issue the respondent is to be discharged."

The pith of the case is stated in the opinion.

Fred Emery Bean, County Attorney, for the State.

Harvey D. Eaton, Herbert M. Heath, and Anson M. Goddard, for defendant.

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

EMERY, C. J. The defendant was charged in the indictment with perjury in his testimony given in the trial of a civil action, Isaac Weiner against him. In that action Weiner sued for the price of merchandise sold and delivered. The defendant filed an account in set off containing among other items this: "July 12, 1907, to cash $125." The defendant testified that $100 of this item was cash paid by him to one Withee at Weiner's request. The plaintiff claimed that he had given and the defendant had accepted therefor his negotiable promissory note on six months' time. As to this claim, the defendant testified that he had not received and never had any such note, and that no note was given him for that item. The indictment is based on this testimony in denial. In this proceeding he formally admits that the testimony was false, that he did receive, accept and discount Weiner's negotiable promissory note given for the $100 paid to Withee, and he submits to judgment against him if the Law Court is of the opinion that his false testimony was "to a material matter." R. S., c. 123, sec. 1.

We think it was. Whether the item of $100 paid Withee could be allowed as such to the defendant in set off against Weiner's claim was an issue and a material issue at the trial of the civil suit. If no negotiable note had been given and accepted therefor, it might have been so allowed. If, however, a negotiable promissory

note had been given and accepted therefor, the item was, presumably at least, merged in the note and extinguished; no action could be maintained upon it nor could it be allowed in set off as cash paid. The defendant's right of action or set off was on the note itself. *Snow* v. *Foster*, 79 Maine, 558. So far, the matter of the note was clearly material.

All the evidence in the civil suit, however, is made a part of the report in this case, and defendant claims that all the evidence at the trial of the civil suit shows that the plaintiff had delivered the merchandise sued for in payment of an indebtedness of his to the defendant, and hence he could not maintain the action for the price. He claims that this rendered the matter of the set-off and the note immaterial. That ground, however, was not taken at the trial of the civil suit. The quantity and price of the merchandise delivered, the truth and validity of the items in set off were the issues raised and tried. The verdict and judgment were upon those issues and it is upon those issues that the materiality of the defendant's false testimony depends. That the matter of the note was material, to at least one of those issues, has already been shown.

Judgment for the State.

In Equity.

LINWOOD S. DURGIN *vs.* JOHN J. CURRAN.

Androscoggin. Opinion May 26, 1910.

Elections. Ballots. Marking Ballots. Distinguishing Marks. Voter's Intention. Statutes. Construction. Revised Statutes, chapter 1, section 6, paragraph 1; chapter 6, sections 29, 43, 70 to 75.

In a city election, the aldermen can act only on the ward returns, having no power to recount the ballots, and hence their determination based on a recount is without effect.

A ballot is not vitiated by a ward clerk placing a distinguishing mark on it at the time of the count.

Nothing appearing to the contrary, a distinguishing mark on a ballot will be presumed to have been made by the voter.

Any other mark than a single X which the statute prescribes for marking a ballot is a distinguishing mark, which invalidates the ballot.

A ballot is vitiated by the voter placing two X's in the square over a party name.

Where the name of one of the candidates for mayor was written on a ballot under the name of the other candidate which was not erased, *held* that it did not affect the ballot as to the other officers voted for.

A ballot is vitiated by placing an X in the square over a party name and an X after the name of one or more individual candidates.

Writing the name of a candidate above a name erased, instead of under it as required by statute, invalidates the ballot as to that particular office.

Where the names of three candidates for councilman were printed in one column, even if it was improper, on erasing the middle name, to write another name in a blank space below the third name, yet the ballot was not invalidated as to the vote for alderman.

Where a sticker for one candidate for mayor was placed above the name of the other in the party group voted for without erasing the name of the latter, *held* that it did not vitiate the ballot as to the other officers voted for.

Where the names of three candidates for councilman were printed in a column and the last name was erased, the fact that another name was written after it, instead of under it, as required by law, did not affect the ballot as to the vote for alderman.

Inserting a name on a ballot where another name is erased, instead of inserting it below, as required by statute, invalidates that vote.

A distinct pencil mark on a ballot in addition to an X is a distinguishing mark, which invalidates the ballot, though it was made carelessly and was unnoticed by the voter.

Where a voter made something resembling a figure 4 in the square above the party name and then made an X over or upon it, *held* that it was a distinguishing mark which invalidated the ballot.

In passing on the validity of a ballot not marked according to law, a court cannot consider the voter's intention as manifested by the marking.

Under Revised Statutes, chapter 1, section 6, paragraph 1, when a court finds a statute clear in its terms and unambiguous in its meaning, it must give it the construction conveyed by the common meaning of the language.

Revised Statutes, chapter 6, section 43, prohibiting the rejection of a ballot on account of a distinguishing mark, after it has been received into the ballot box, was repealed by necessary implication, since, if given effect, it would abrogate the entire policy and purpose of the Australian ballot system.

In equity. On appeal by defendant. Decree below sustained.

Proceedings by the plaintiff, "as in equity," under the provisions of Revised Statutes, chapter 6, sections 70 to 75, to determine his right to the office of alderman from Ward 2, in the City of Lewiston. The matter was heard by the Justice of the first instance who found and decreed that the plaintiff was entitled by law to the said office of alderman and thereupon and in accordance with the provisions of section 72 of the aforesaid chapter, the defendant appealed and the matter was brought before the Justices of the Supreme Judicial Court as provided in said section 72.

The case is stated in the opinion.

George S. McCarty, for plaintiff.

William H. Hines, and John J. Curran, for defendant.

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

SPEAR, J. This case is properly before the Justices on appeal under the provisions of R. S., ch. 6, sec. 72. The sitting Justice made the following decision from which the appeal before us was taken.

"This case, after due notice had been ordered and served, came on for hearing April 1, 1910. The defendant appeared personally and by his attorney, William H. Hines, Esq.

The petitioner brings this proceeding under the provisions of sections 70 to 75 of chapter 6 of the Revised Statutes to determine his right to the office of Alderman from Ward Two, in the City of Lewiston, for the current year. He contends that at the municipal election held at Lewiston, on the first Monday in March, 1910, he was a lawful candidate for the office of Alderman, in Ward Two, and receiving a plurality of all the votes cast for that office at that election in said Ward; and that he was thereby elected to said office, and should have been so declared, but that the defendant, who was also a candidate for said office, was, contrary to the fact, declared elected to said office, that a certificate of election was issued to him, and that the defendant, having been duly qualified according to law, is now in the exercise and enjoyment of said office. On the other hand the defendant contends that he himself received a plurality of all the votes cast at that election for alderman, that he was accordingly elected, and that he is now in the lawful possession of said office. This is the only issue.

At the close of the Ward meeting the warden made the official declaration that the petitioner had received 227 votes, and that the defendant had received 229 votes, and was accordingly elected. The ward returns filed with the City Clerk showed the same figures and the same result. The petitioner denies the correctness of this declaration and return. He introduced testimony to the effect that when the votes were counted at the close of the meeting, it was found that 208 "straight" ballots had been cast for the party group containing the defendant's name, and 219 "straight" ballots for the group containing the petitioner's name, and that the defendant had received in "split" ballots 14 votes additional, and the petitioner in like manner had received eight additional votes, making in all 222 votes for the defendant and 227 for the petitioner, a total of 449 votes; That notwithstanding the result of the count, the warden declared the vote as above stated, 227 for the petitioner, and 229 for the defendant; that the error was occasioned by adding the defendant's 14 votes on "split" ballots to 215 instead of 208; that that 215 was the total vote received by the candidate for Mayor whose name was in the defendant's column, that the 215 made up

of 208 "straight" ballots and seven additional votes which that mayoralty candidate received on "split" ballots, so that adding fourteen "split" votes to 215, which itself was made up of 208 "straight" and 7 "split" votes, gave the defendant the benefit of 21 "split" votes, whereas in fact he had only 14; in other words, that 7 "split" votes were reckoned for the defendant, twice.

This evidence was not in any way contradicted at the hearing, except inferentially by the ballots now in the ballot box, of which I shall speak later. The petitioner's claim that there was an error in stating and returning the vote for alderman, finds some corroboration in the returns made of the votes for other officers on the same ballots, and of the defective ballots, the latter being returned as 14 in number.

The returns show that the vote for mayor was	215	
	234	
(add defective)	14	total, 463
for councilmen (3)	1349	
average for each	449	
(add defective)	14	total, 463
for school committee	218	
	231	
(add defective)	14	total, 463
for warden	220	
	231	
(add defective)	14	total, 465
for ward clerk	220	
	231	
(add defective)	14	total, 465
for alderman	229	
	227	
	14	total, 470
The aldermanic count as testified to for the petitioner was	222	
	227	
(add defective	14	total, 463

Upon the face of these returns it would seem that there was an error either in the return of the aldermanic vote, or in all the others. But while these returns are suggestive on the point in controversy, I do not regard them as conclusive, because it may have happened that more voters voted for aldermanic candidates than for others, or that fewer voters erased the names of aldermanic candidates, than they did the names of others.

In defense, the defendant, against objection, introduced the evidence of the recount of ballots by the aldermen of the city who were in office at the time of the election in question, and of the action of the aldermen thereon. But aldermen have no authority to recount ballots. They can act only on the ward returns. And inasmuch as these aldermen had no lawful authority to recount the ballots, their determination, based upon their count, had no validity or effect whatever. Their count is admissible in any event only to show the state of the ballots in the box at the time they counted them, so far as that is of any importance.

At the hearing the defendant introduced the ward 2 ballot box, and the ballots in it were counted in my presence. The total number was 469, approximating the number stated in the ward return for alderman, inclusive of defective votes. At the conclusion of the count the parties agreed that upon undisputed ballots the petitioner received

223 votes and the defendant

222 votes. The parties also agreed that two ballots were to be disregarded, the names of the candidates for alderman, one on each side, having been erased.

The remaining 22 ballots were reserved for my consideration, and were marked Plff's Exhibits 3 to 24 inclusive. Subsequently the parties agreed that numbers 5, 6, 8, 9, 10, 11, 12 and 13 were defective, and not to be counted. Upon the remaining 14, I rule as follows:

No. 3. The undisputed evidence showed that the ward clerk at the time of the count on election day made a X in one of the squares over a party name. Of course nothing that the ward clerk did under such circumstances could invalidate the ballot. But the

ballot showed two X's in the square over the other party name. Nothing appearing to the contrary, it must be presumed that the voter put them there. The statute provides that the voter shall indicate his vote by making a X in one of the squares. He can make one X and no more. He can make a X but no other mark. If he does more than the statute permits, as by making two X's, his ballot is defective and cannot be counted. Any mark other than the single X which the statute prescribes becomes a distinguishing mark, and distinguishing marks necessarily invalidate ballots. See *Curran* v. *Clayton*, 86 Maine, 42. This ballot is claimed for the petitioner. It is defective. I do not count it.

No. 4. This ballot is claimed to be defective because the name of one of the candidates for mayor was written under the name of the other, the latter name not being erased. I think this condition does not effect the ballot as to the other officers voted for. I count No. 4 for the petitioner.

No. 7. This ballot contains an X in the square over the party name, also an X after the name of each candidate in that party group. These are distinguishing marks. The ballot is defective. I do not count it.

No. 14. On this ballot the name of the petitioner is erased by a line drawn through it, and the name of the defendant (as "John J. Curran") is written above it. This is contrary to the statute provision, which is that the new name shall be written under the names erased. This invalidates the ballot, so far as these parties are concerned. I do not count it.

No. 15. On this ballot there is a X in the square above the party name; also a X opposite the name of the aldermanic candidate voted for. This is a distinguishing mark and renders the entire ballot defective, and I do not count it.

No. 16. On this ballot the name of the three councilmen in one group were printed in this order: Samuel Stewart, Chas. G. Kernan, Paul Kramer. The name of Kernan was erased by a line drawn through it, and another name was written in the blank spaces below the name of Kramer.

I think that was the proper place to write it, and that in any event it does not affect the vote for alderman. I count this vote for the petitioner.

No. 17. This ballot is similar to No. 16, and I count it for the petitioner for the same reasons as are given under No. 16.

No. 18. On this ballot there is a X in the square above a party name. The voter also placed a X after the name of the candidate for warden, in the other group of names. This is a distinguishing mark. The ballot is defective and I do not count it.

No. 19. This ballot is similar to No. 4, differing only in the fact that a sticker for one candidate for mayor is placed above the name of the other in the party group voted for. For reasons given under number 4, I count No. 19 for the defendant.

No. 20. This ballot is very much like No. 16, except that the voter erased the last name of the councilman candidates, and wrote another name after it, instead of under it. I count this vote for the defendant.

No. 21. On this ballot the name of one of the candidates for alderman was completely erased by scratching, and the name of the other was written, not below, but upon the space where the erased name had been. This is contrary to the statutory provision, and invalidates the ballot for alderman. I have not considered the position taken at the hearing, that it was invalid for another reason. I do not count this ballot.

No. 22. This ballot is precisely like No. 21, and for reasons already given, I do not count it.

No. 23. On this ballot the X in the square presents a peculiar appearance. It seems to have been made by a nervous, and perhaps an aged hand. Besides a X it contains another distinct pencil mark, and from its appearance, I think that this latter mark was made carelessly, and that perhaps the voter did not notice it. Nevertheless under the rules of law, I am not able to find any sufficient ground for distinguishing between this one and other distinguishing marks. I do not count this vote.

No. 24. On this ballot, the voter appears first to have made a figure 4, or something that looks like 4, in the blank space, and

then to have made a X over or upon it. I think it is clear that this must be held to be a distinguishing mark, and that the ballot is defective. I do not count it.

Counting all the ballots in the box which I think can be counted for either of the parties, I find that the petitioner received 226 votes, and that the defendant received 224 votes. And upon all the evidence I find and adjudge that the petitioner received a plurality of all the votes cast for alderman in Ward Two, for the municipal year 1910-1911, and that he is entitled by law to the said office. I award judgment to the petitioner for his costs.

We think the decree of the sitting Justice must be sustained.

It is contended, however, that the intention of the voter, as manifested by the marking of his ballot, should be considered. But, whatever the intention, or lack of intention, of the voter, in marking his ballot at variance with the requirements of the statute, is a matter which may, if thought proper, be addressed to the attention of the legislature, but cannot be considered in the deliberations of the court. When the court finds a statute, clear in its terms and unambiguous in its meaning, it must rest content in giving such statute the construction conveyed by the "common meaning of the language." R. S., chapter 1, section 6, par. 1. The rule of intention, therefore, which characterized the interpretation of the old statute cannot prevail under the present system.

The very purpose and spirit of the Australian system, are secrecy with respect to the ballot cast, and immunity to the voter from danger of detection as to how he marked his ballot. Section 29 of chapter 6 makes it a penal offense for a voter to expose his intention as to "how he is about to vote," or for any person to "endeavor" to induce the voter to show how he marks or has marked his ballot. *Curran* v. *Clayton*, 86 Maine, 42, fully covers the various contentions in the case at bar. The court is of the opinion that the conclusion of the sitting Justice as to the method of counting the disputed ballots was correct, and his determination that the petitioner received a plurality of the legal votes cast and was entitled to the office of alderman, so claimed in his bill, must be sustained.

R. S., chapter 6, section 43, has not been overlooked. But it is so evident, if given effect, that it not only abrogates the entire policy and purpose of the Australian ballot, but opens the door to placing distinguishing marks upon ballots not possible under the old statute, that its retention in the statute was not the legislative intent and must be regarded as repealed by necessary implication.

Decree sustained with costs.

Certified to the clerk of courts for a judgment in accordance with this opinion.

LOUIS J. FORD *vs.* FRANK HOWGATE.

York. Opinion May 31, 1910.

Statute of Frauds. Instructions. Part Performance of Contract. Corporations. Sales of Stock. Revised Statutes, chapter 113, section 4.

In a suit for the price of corporate stock, instructions that the sale gave the defendant an equitable right to have the stock delivered to him, and that if he took possession under the trade the contract was executed and not within the statute of frauds, were not improper, as not sufficiently distinguishing between plaintiff's intangible rights as stockholder and the corporation's ownership of the physical property, nor as making assumption of possession of the corporation's property ipso facto an actual acceptance and receipt of the stock.

Proof of acts respecting the subject matter of a contract of sale, concurrent with or subsequent to its making, showing delivery by the seller and acceptance by the buyer, with intent to give the buyer right of possession as owner, or conduct of the buyer consistent only with his ownership, shows sufficient execution to take the contract outside the statute of frauds, requiring certain contracts of sale to be evidenced by writing unless the buyer receives part of the goods or makes part payment.

Delivery and acceptance of goods sold, taking the contract outside of the statute of frauds may be inferred from attendant circumstances.

A contract to sell corporate stock was taken outside the statute of frauds by the buyer entering upon the management of the corporate business as an owner.

An entire contract to sell corporate stock and an interest in an automobile was taken outside the statute of frauds by acceptance of the automobile by the buyer.

A seller of corporate stock need not procure issuance of a certificate of the shares to the buyer, nor procure a certificate to himself and transfer or tender it to the buyer.

On exceptions by defendant. Overruled.

Assumpsit to recover the sum of $1000 for a "7-15 interest in the Crystal Spring Water Company and one half interest in Ford runabout automobile of 1907" alleged to have been sold by the plaintiff to the defendant. Plea, the general issue with brief statement as follows:

"That if defendant did make any promise, the alleged contract was for the sale of goods, wares and merchandise and void under the statute of frauds.

"That if defendant did promise said promise was induced by the fraud and misrepresentation of plaintiff."

The verdict was for the plaintiff. The defendant excepted to certain rulings made by the presiding Justice during the trial.

The case is stated in the opinion.

Natt T. Abbott, for plaintiff.

George W. Hanson, for defendant.

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

KING, J. This case is before the Law Court on defendant's exceptions to certain instructions to the jury.

The plaintiff was one of the incorporators of the Crystal Spring Water Company, a corporation, and as such was the owner of seven shares of its capital stock. Seven other shares were owned by Mr. Wentworth, and the remaining share by Mr. Abbott. These three persons were the officers and directors of the corporation. No certificates of stock had been issued. The plaintiff and Mr. Wentworth owned an automobile used by them for pleasure, and also used in

and about the business of the corporation. The plaintiff claimed that he and defendant made an agreement whereby the defendant purchased of him his interest in the corporation, and his interest in the automobile, for the gross sum of $1000. No writing was made, no money paid, and no certificate of the seven shares of stock was tendered or demanded. But the plaintiff introduced evidence that after the contract was made the defendant went into the company's shop and there assisted in the business of the corporation for about ten days, and while there used the automobile. This evidence was introduced for the purpose of showing, as claimed by plaintiff, that the defendant had taken possession of the interest in the business of the corporation, and of the automobile, as an owner under his alleged purchase. The defendant claimed that he only agreed to purchase plaintiff's interest in the business provided he found it as represented, and he denied that he took possession of the business under the alleged sale, and claimed that he went into the shop only to assist Mr. Wentworth, at his request, and also for the purpose of examining into the business affairs of the corporation to ascertain if they were as represented by the plaintiff. He further denied that the plaintiff's interest in the automobile was included in the proposed sale.

It was urged, among other defenses, (1) that the alleged agreement was void under the statute of frauds, and (2) that the plaintiff could not recover without delivery or tender to the defendant of a certificate of the shares of stock.

Section 4 of c. 113, R. S., commonly known as the statute of frauds, provides: "No contract for the sale of goods, wares or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent."

The plaintiff did not contend at the trial that the subject matter of the contract of sale, comprising, as he claimed, his ownership of the shares of stock in the corporation and his interest in the automobile, was not "goods, wares or merchandise" within the meaning

of the statute of frauds. Such claim, if made, would have been without support in reason or authority. *Pray* v. *Mitchell*, 60 Maine, 430.

But it was the plaintiff's theory that although the oral contract of sale was within the terms of the statute, nevertheless it had been taken out of the operation and effect of the statute by reason of a compliance with the provisions of the exception that if "the purchaser accepts and receives a part of the goods" the contract is valid and enforceable. Upon this branch of the case the presiding Justice instructed the jury: "that although all the right which Mr. Ford had in the business was his shares, it being a corporation, nevertheless, it was a corporation in which he was acting as men do with their own property, and he and Mr. Wentworth had been operating it. It was a business, and the sale of the interest in the business gave Mr. Howgate an equitable right to have the stock delivered to him. And if he went into possession of the business under the trade which he claims, and took part in it as owner, it was an executed contract. It was all done, nothing to be done except to pay. And when a contract has been executed and completed-finished, and the parties have gone into the business, carrying it out, then the statute of frauds does not apply." In respect to the effect of an acceptance and receipt of the automobile by defendant, as claimed by the plaintiff, the presiding Justice said: "And the plaintiff claims in this case that the automobile was physically accepted, that is, the defendant Howgate took it into his possession, not into his sole possession, because it was only an undivided interest in an automobile that he bought anyway,— but that he took it and used it as one of the owners. If he did, then that would be an acceptance of it, and an acceptance of a part of the whole thing that was furnished,— interest in the business and automobile, and that would take it out of the statute of frauds also. So that upon the plaintiff's theory that the defendant made the trade and went into the execution of it by taking the business, or taking his part of the business, the statute of frauds does not apply."

Summarizing his instructions as to the statute of frauds as a defense the Justice said: "and it comes back, so far as those legal defenses

are concerned, to the proposition which I stated earlier, that if the trade was made as the plaintiff claims, that the interest in the business and the half interest in the automobile were sold at an agreed price of a thousand dollars, and the defendant, Howgate, entered into the possession of the business with the other man, running it as an owner, carrying it on as contemplated by the contract, and took the automobile in the same way, then he must pay what he agreed, so far as any evidence in this case is concerned."

The defendant contends in support of his exceptions, that the instructions given did not sufficiently distinguish the plaintiff's interest in the business, being only an intangible right of ownership in the shares of stock in the corporation, from an ownership in the physical property of the corporation, and for this reason the jury were permitted to conclude, and naturally did conclude, that if the defendant went into possession of the business of the corporation with Mr. Wentworth he thereby physically accepted and received the plaintiff's "interest in the business," which was the subject of the sale, and thereby the exception in the statute was necessarily complied with.

We do not think the instructions are open to that objection. The theory on which they were given is, that because the plaintiff's interest in the business was only the intangible right of ownership of the shares of stock, for which no certificate had ever been issued, the contract of sale gave the defendant all and the same right to the ownership of those shares which the plaintiff before had, no act on the part of the plaintiff remaining to be done, and if the defendant, on his part, accepted that contract, and used and enjoyed the privileges and benefits it was intended to afford him, then the contract became executed, and for that reason the statute of frauds was not applicable to it.

The language of the instructions does not express the meaning that the defendant's act in taking possession of the tangible property of the corporation was ipso facto an actual acceptance and receipt of the thing sold; but on the other hand the meaning is clearly expressed, that if the defendant "entered into the possession of the business with the other man, running it as *an owner*, carrying it on

as contemplated by the contract," such act on the part of the defendant was evidence, and sufficient evidence, that he had accepted the contract as completed, and entered upon the enjoyment of the fruits of it. Or, in other words, the jury were instructed in effect that if they found the facts to be as the plaintiff claimed, they would be authorized to draw from those facts the conclusion that the defendant had been placed in possession and enjoyment of the thing sold,—the ownership of the shares of stock in the corporation,—and he, on his part, had accepted and received it as owner of it. We think the instructions given were not erroneous, but appropriate and applicable to this phase of the case.

In the valuable note to *Shindler* v. *Houston*, (1 N. Y. 261) 49 Am. Dec. 316, Note 325-340, will be found an able discussion, and painstaking collection of authorities, relating to the provision of the statute of frauds as to the acceptance and receipt of a part of the goods by the vendee. See also the extended note, on the same subject, following the report of *Devine* v. *Warner*, 75 Conn. 375, in 96 Am. St. R. 211, Note 215-229.

Although there is much conflict and controversy to be noted in the vast number of judicial decisions touching the meaning and application of this exception in the statute of frauds, yet we think the decisions will be found substantially harmonious in support of the rule, that when it appears from evidence, in addition to that which establishes the contract itself, that something was done with respect to the subject matter of the contract, either concurrent with or subsequent to it, which unequivocally indicates that there was a delivery by the vendor, with an intention of vesting the right of possession of the subject matter of the sale in the vendee as owner, and an acceptance and receipt of the same by the latter, with an intent thereby to become the owner thereof, then the contract is so far executed that the statute of frauds does not apply to it.

"If the vendee does any act to the goods of wrong, if he is not the owner of the goods, and of right, if he is the owner of the goods, the doing of that act is evidence that he has accepted them." Erie J., in *Parker* v. *Wallis*, 5 El. & Bl. 21. Both delivery and acceptance may be inferred as conclusions from the attendant cir-

cumstances. *Leonard* v. *Medford*, 85 Md. 666, 37 Atl. 365. If the vendee does some act that is only reconcilable with the fact that he is owner of the subject matter of the sale, such act is evidence that he has accepted the sale and it is no longer executory.

In the case at bar the subject matter of the sale, so far as it included the plaintiff's ownership of the unissued shares of stock in the corporation, was incapable of any manual tradition, and for that reason no act remained for the plaintiff to perform to execute the contract. And what more significant act could the defendant have done to evidence his ownership of the shares, and to show that the contract was executed, than to enter into the management of the business of the corporation as an owner? Assume, as an illustration, that the defendant, after the sale, had accepted and received a dividend apportioned to the shares, would not that act be evidence sufficient to show that the contract of sale of the shares to him was no longer executory? If the defendant did "enter into possession of the business with the other man, running it as owner, carrying it on as contemplated by the contract," such acts are irreconcilable with any other conclusion than that he had become the owner of the shares, and that the contract of sale was executed, nothing remaining to be done under it except for him to pay the purchase price.

All that has been said applies with added force to that part of the instructions relating to the acceptance and receipt of the interest in the automobile. That interest was capable of a manual delivery and receipt. It was a part of the property included in the one entire contract of sale. Acceptance and receipt of it took the whole contract out of the statute. In *Weeks* v. *Crie*, 94 Maine, page 463, it is said: "It is unquestionably the law, in such case, that an acceptance and receipt of a part of the articles purchased, or all of one class of the articles purchased, necessarily takes the whole contract out of the statute."

As to the other claim of defendant, that the plaintiff should have procured and delivered or tendered to him a certificate of the shares, the learned Justice instructed the jury that that was not a necessary act on the part of the plaintiff to entitle him to recover. This

instruction was correct. The plaintiff sold his ownership of the stock, which carried with it the right to have a certificate issued to the purchaser, no certificate having been issued up to that time. By virtue of the contract of sale the defendant acquired the right, which the plaintiff before had, to have a certificate of the stock issued to him by the corporation. It was not the duty of the plaintiff, and not included in the terms of the contract, that he should procure from the corporation a certificate of the shares to himself and transfer that to defendant, or that he should procure a certificate to be issued to the defendant.

Finding no error in the instructions, the entry must be,

Exceptions overruled.

MASSACHUSETTS BREWERIES COMPANY *vs.* MORRIS HERMAN.

Cumberland. Opinion June 7, 1910.

Replevin. Bonds. Sufficient Sureties. Non-resident Sureties. Evidence. Presumption of Regularity. Revised Statutes, chapter 98, section 10.

The word "sufficient" as used in Revised Statutes, chapter 98, section 10, requiring "sufficient sureties" on a replevin bond means adequate to suffice or equal to the end proposed.

Under Revised Statutes, chapter 98, section 10, requiring "sufficient sureties" on a replevin bond, the fact that one of the two sureties upon such a bond is a non-resident of Maine does not, in and of itself, constitute non-compliance with the requirements of the statute.

When one of the two sureties on a replevin bond is a non-resident of Maine, the sufficiency of such surety can be attacked only by plea in abatement, and not by a motion to dismiss.

In the absence of proof to the contrary, a replevying officer is presumed to have taken the bond required by Revised Statutes, chapter 98, section 10.

On exceptions by plaintiff. Sustained.

Action of replevin for 500 dozen pint bottles, brought in the Superior Court, Cumberland County. The defendant appeared specially on the return day of the writ and filed a motion to dismiss

the action on the ground that the officer had failed to take the bond required by statute, because it appeared from the bond itself that one of the sureties thereon was a non-resident. The motion was sustained and the plaintiff excepted.

The case is stated in the opinion.

William C. Eaton, and Connellan & Connellan, for plaintiff.

Foster & Foster, and Frank H. Haskell, for defendant.

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

BIRD, J. This is an action of replevin of goods. The return of the officer upon the writ, which was returnable to the Superior Court of Cumberland County, states that he took a bond with sufficient sureties but the bond returned with the writ as required by statute declares that one of the two sureties is of Boston, in the Commonwealth of Massachusetts. The defendant appeared specially and seasonably filed a motion to dismiss the action on the ground that the officer had failed to take the bond required by statute because it appeared from the bond itself that one of the sureties was a non-resident of this State. The motion was sustained and the plaintiff had exceptions.

The defendant is entitled to a bond in conformity to the provisions of the statute —"a bond to the defendant, with sufficient sureties:" R. S., c. 98, §10,— that is with two or more sureties adequate to suffice or equal to the end proposed. The motion does not and cannot deny that either of the sureties did not possess or hold property within the State adequate to enable him to respond to the obligation which he assumed. Can the fact that one of such sureties is not a resident of the State render him insufficient? We think not. Sufficiency does not import residence and the statute makes no other requirement save in the matter of number and sufficiency: See *Clarke* v. *Chapin*, 7 Allen, 425, 426. While not in pari materia, it is a significant fact that of all the bonds for which provision is made by the statutes of the State, the sureties of those of executors, administrators and guardians only are required to be residents.

The case of *Wilkins* v. *Dingley*, 29 Maine, 73, is relied upon by defendant as supporting his contention. It is a suit of a sheriff upon the bond of his deputy for damages arising from the failure of the latter to take the replevin bond provided for by the statute which then required a sufficient surety or sureties. The bond was executed by one surety, an inhabitant of Boston, who did not appear to have ever resided or to have had any property in this State. The question for decision was whether the officer had taken a bond with sufficient surety and the court held that a surety residing without the State and having no property within it was not sufficient, and this upon the ground that the language of the statutes requiring sufficient surety or sureties is "limited by the jurisdiction of the legislative power, which did not contemplate its operation beyond its limits;"—in other words that the defendant in replevin should have a remedy upon the bond enforceable in the courts of the State. This is the scope of the decision.

In *Rutherford's Heirs* v. *Clark's Heirs*, 4 Bush. (Ky.) 27, the bond of the executor appointed by the court in Kentucky was signed by non-residents as sureties and the court, upon objection that the bond was therefore void, says that "however improvident the acceptance of the bond of non-residents may have been, there being no law forbidding it, this court cannot adjudge it illegal."

Whether the non-resident surety in the case before us has sufficient property within the State is not open on motion to dismiss.

If the officer served the writ, the implication is that the bond required by statute was given. In the absence of proof, he is presumed to have acted as the law requires. *Shorey* v. *Hussey*, 32 Maine, 579, 580. There is a presumption, therefore, that the non-resident surety was sufficient. His sufficiency can be attacked only by plea in abatement, as the attack can be supported only by evidence dehors the record.

We conclude, therefore, that the fact that one of two sureties upon a replevin bond is not a resident of the State does not in and of itself render the bond insufficient.

Exceptions sustained; motion to dismiss overruled.

CITY OF BANGOR *vs.* ANNA C. PEIRCE, Admx.

Penobscot. Opinion June 7, 1910.

Municipal Corporations. Public Improvements. Personal Liability. Assessments. Executors and Administrators. Revised Statutes, chapter 23, sections 33, 37.

1. Neither the state nor federal constitution prohibits the enactment of section 37 of chapter 23, R. S., imposing a personal liability upon the party assessed for benefits to his abutting real estate resulting from street improvements.
2. A party vested with the legal title to such abutting property, though in trust only, is within the statute and can be assessed and made personally liable for such benefits, since he has the right of reimbursement from the trust estate, even though no right of reimbursement is expressed in the statute.
3. If such trustee does not pay the assessment in his lifetime an action can be maintained therefor under Revised Statutes, chapter 23, section 37, against his goods and estate in the hands of his executor or administrator.

On report. Judgment for plaintiff.

Action under the provisions of Revised Statutes, chapter 23, section 37, to recover the assessments on certain lots of land on Franklin Street, Bangor, made on account of widening said street. Plea, the general issue, with brief statement as follows: "That neither the said Laura Hayford in her lifetime, nor the defendant as administratrix with the will annexed of the estate of said Laura Hayford, as aforesaid, ever was indebted to the plaintiff as alleged." When the action came on for trial, the following admissions were made:

"It is admitted that there was an authorization of this suit by the City Council of Bangor.

"It is admitted that the street has been opened and that the damages have been paid.

"It is admitted that the assessment was legal and in due form upon land held by Laura Hayford as trustee.

"It is admitted that the claim was duly filed in the probate office against the estate of Laura Hayford."

At the conclusion of the evidence, the case was reported to the

Law Court to render such judgment as the law and the evidence require.

The declaration in the plaintiff's writ is as follows: "In a plea of the case for that whereas on the twelfth day of December A. D. 1905 upon the petition of thirty-four tax-payers and residents of said City, the City Council of said City ordered the Street Engineers of said City to lay out a widening of Franklin Street in said City; and whereas the said Street Engineers gave due notice of their intention to lay out said widening on the 30th day of December A. D. 1905, and on said 30th day of December A. D. 1905, said Street Engineers met and proceeded to lay out said widening, and after hearing all persons on the questions of damages, awarded Laura Hayford Trustee, the sum of $30,000 as full compensation for the land taken for said widening, and assessed a portion of said sum so awarded, to wit, the sum $22,500 upon the lots adjacent to and bounded on said street, other than those for which damages are allowed, and did assess upon Laura Hayford under the name of Laura Hayford trustee, the sum of $8,250.07 she owning land bounded upon said street and being benefited thereby;

And whereas on the 9th day of January A. D. 1906, the City Council of said City accepted the report of said Street Engineers and established said laying out as made by them in their report, and ordered notice to be given to all persons that said City Council would meet on the 29th day of January A. D. 1906, to give a hearing to all persons interested in the question of betterments; and whereas due notice having been given, said City Council met on the said 29th day of January 1906, heard all parties on the question of betterments and finally established and confirmed said assessments as reported by said Street Engineers; and whereas the City Clerk of said City having recorded the assessment apportioned and established as aforesaid, gave due notice on the 31st day of January A. D. 1906, to each owner and proprietor of said lot or parcel of land so assessed, of the amount assessed against it, and whereas said City has paid to the owner of the land taken for said widening the sum of $30,000 being the amount awarded, and has entered upon and taken possession of said land for the purpose of widening said street;

wherefore by reason of all of which acts and proceedings by said City in the premises, the said Laura Hayford became indebted to said City in the sum of $8250.07 with interest thereon at twelve per cent per annum from the said twenty-ninth day of January A. D. 1906, as for money paid, laid out and expended by said City for the benefit of said Laura Hayford which sum the said Laura Hayford in consideration of the premises aforesaid promised to pay plaintiff on demand as by statute in such case made and provided.

And plaintiff avers that on the twenty-first day of November A. D. 1908, being within eighteen months after the said Anna C. Peirce had filed notice of her appointment in the Probate Court as administratrix with the will annexed as aforesaid, and at least thirty days before the commencement of this suit, the claim herein declared on, a copy of which is hereto annexed, was filed in the Probate Court according to law; yet neither the deceased in her lifetime, nor since her decease, has the said Anna C. Peirce, ever paid the same.

And plaintiff further avers that twenty months has not elapsed since the defendant filed her notice of appointment as aforesaid in the Probate Court.

Bangor, Me., Nov. 21, 1908.

ESTATE OF LAURA HAYFORD,
To CITY OF BANGOR, Dr.
Highway Department.

1908. For assessment made January 29, 1906 on account of widening of Franklin Street.

Lot westerly side of Franklin Street with the store house and buildings, bounded southerly by Kenduskeag Stream and measuring on Franklin Street about 110 feet.

Amount assessed	498.92
Lot easterly side of Franklin Street bounded northerly by Kenduskeag Stream with buildings, measuring on Franklin Street about 275 feet.	
Amount assessed	8250.07
	8748.99
Interest for two years, 9 months, 24 days at 12%	2957.15
	11706.14

Also for that the said Laura Hayford at Bangor on the 29th day of January A. D. 1906 being indebted to the plaintiff in another sum of fifteen thousand dollars for so much money before that time laid out and expended by the plaintiff for the use of the said Laura Hayford at her request, in consideration thereof, then and there promised the plaintiff to pay the same on demand; yet neither the said Laura Hayford in her lifetime, nor since her decease has the said Anna C. Peirce, Administratrix with the will annexed, ever paid the same, although plaintiff on the 21st day of November A. D. 1908 being within eighteen months after said Anna C. Peirce filed notice of her appointment in the Probate Court as administratrix of said Laura Hayford with the will annexed as aforesaid, and at least thirty days before the commencement of this suit filed the claim herein declared on, being the account hereto annexed in the Probate Court according to law. And plaintiff further avers that twenty months has not elapsed since the defendant filed notice in the Probate Court of her appointment as aforesaid.

Bangor, Me. Nov. 21, 1908.

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Interest for 2 years, 9 months, 24 days at 12%	2957.15
	$11706.14

Yet though often requested, said Defendant has not paid said sum, nor any part thereof, but neglects and refuses so to do, to the damage of said plaintiff (as it says) the sum of Fifteen Thousand Dollars."

The case is stated in the opinion.

Donald F. Snow, Charles A. Bailey, and Taber D. Bailey, for plaintiff.

E. C. Ryder, for defendant.

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

EMERY, C. J. By statute, R. S., chap. 23, sec. 33-37 inclusive, provision for widening streets, etc., in cities is made substantially as follows, viz: When the city council widen any street and decide that damages should be allowed therefor, they may apportion a part or the whole of such damages, as to them seems fit, upon the lots adjacent to and bounded on such street. Before such apportionment or assessment is made, public notice is to be given to all persons interested. Any person not satisfied with the amount for which he is assessed can have the assessment upon his land determined by arbitrators. If the assessment finally fixed on any lot is not paid, the lots may be sold, etc., and, by sec. 37, "If said assessments are not paid, and said city does not proceed to collect said assessments by a sale of the lots or parcels of land upon which said assessment is made, or does not collect, or is in any manner delayed or defeated in collecting said assessments by a sale of the real estate so assessed, then the said city, in the name of said city may maintain an action against the party so assessed for the amount of said assessment, as for money paid, laid out and expended, in any court competent to try the same, and in such action may recover the amount of such assessment, with twelve per cent interest on the same from the date of said assessment, and costs."

Acting under the above statute, the City Council of Bangor duly widened Franklin street, allowed $30,000 for damages caused thereby, and apportioned a part of said damages upon certain lots

adjacent to and bounded on Franklin street. The lots so assessed had been conveyed to Laura Hayford by a deed reciting that the consideration was "paid by Laura Hayford of said Bangor as she is trustee under the last will of Wm. B. Hayford, late of said Bangor, deceased;" and that the conveyance was made to "the said Laura Hayford, Trustee, her successors in said Trust, heirs and assigns forever" with habendum to "the said Laura Hayford, Trustee, her successors in said trust, heirs and assigns forever." There was in the deed no other suggestion that she was not to have the land in absolute fee simple. The assessment upon this land by the City Council was made against "Laura Hayford, Trustee," Jan. 29, 1906. She did not appeal from the assessment, nor did she pay the assessment during her lifetime up to her death, March 20, 1907. The assessment not having been paid nor any other measures to collect it having been taken, the city on Dec. 22, 1908 brought this suit therefor against her estate in the hands of Anna C. Peirce, Admx. thereof. Authority for the suit is claimed under sec. 37 of the statute above quoted.

No question is made of the regularity of the proceedings, nor of the validity of the assessment upon the lots. The only contention in the defense is that Laura Hayford was not in her lifetime personally liable for the assessment, and hence of course her individual estate is not liable after her death. Two propositions are urged in support of the contention,—first, that the legislature has no power to impose upon the owner a personal liability for such assessment,—second, that in fact this assessment was not upon her personally but only upon her as trustee, and hence only the trust estate was made liable.

1. The constitutional question raised has received different answers in different States. The majority of the answers affirm the power. Many of the cases denying the power seem to be based on a theory that it is unjust to make the owner personally liable for what is only a benefit to a particular parcel of land. But the justice or injustice of the requirement is a question for the legislature, not for the court. The power is manifestly legislative in character, and hence must be upheld unless clearly prohibited to the legislature

by some section or clause of the State or Federal Constitution. No exercise of the legislative power is to be held thus prohibited unless the prohibition is manifest, beyond a reasonable doubt, as has often been iterated in prior opinions of this court. We do not find in either constitution any section or clause clearly forbidding the imposition of a personal liability upon the owner to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense. The imposition of a personal liability for special assessments is not under the power of eminent domain, but is under the taxing power of the legislature, almost if not quite its most extensive, least limited, power. *Dalrymple* v. *Milwaukee*, 53 Wis. 185; *People* v. *White*, 94 Ill. 604; *Allen* v. *Drew*, 44 Vt. 175; *Warren* v. *Henley*, 31 Iowa, 31; *New Haven* v. *R. R. Co.*, 38 Conn. 442; *Hager* v. *Reclamation Dist.*, 111 U. S. 701; *State* v. *Newark*, 35 N. J. L. 168; *Hill* v. *Higdon*, 5 Ohio St. 243; *Litchfield* v. *New York*, 41 N. Y. 123. In this State *Auburn* v. *Paul*, 84 Maine, 212, was a case to enforce a personal liability upon an abutting owner for the sum assessed upon his abutting property under a statute identical with the sec. 37 in this case. The action was sustained, the court remarking (page 216) "The constitution no where provides that the legislature shall not require private interests receiving a peculiar advantage from a public work to contribute in a commensurate degree." In *City of Lowell* v. *Hadley*, 8 Met. 181, as early as 1844, there was sustained without question an action of assumpsit against the owner to recover the amount of an assessment for the expense of a sidewalk in front of his land. Statutes imposing personal liability to pay special assessments have long existed and been enforced in Maine and Massachusetts without question and this acquiescence is strong argument for their constitutionality, if argument were needed.

II. The statute (sec. 37), above held constitutional, expressly, in terms, authorizes "an action against the party so assessed for the amount of said assessment as for money paid, laid out and expended." If the deed to Laura Hayford and the assessment had made no mention of her title being that of trustee, it would now

need no argument to justify holding her personally liable under the statute. *Auburn* v. *Paul*, 84 Maine, 212. *Lowell* v. *Hadley*, 8 Met. 181. The deed and the assessment, however, did describe her as "Trustee" and it should be conceded that a trust in the land could have been enforced against her. Was she, nevertheless, personally liable for the assessment made upon the land which she held under the deed above recited?

She held the legal title, and, though holding it in trust, she was yet the legal owner with all the legal rights, duties and liabilities of owner as to all the world except the cestui que trust. *Smith* v. *Portland*, 30 Fed. 734; *Carey* v. *Brown*, 92 U. S. 171, at page 172 and cases there cited; *Obert* v. *Bordine*, 20 N. J. L. 394; 1 Perry on Trusts (3 Ed.), sec. 32. She could have maintained real actions against disseisors and actions of forcible entry and detainer against tenants, and also actions for rents, injuries to the freehold, etc. in her own name without describing herself as trustee. She would have been personally liable to others for injuries resulting from the condition of the property. *Shepard* v. *Creamer*, 160 Mass. 496. In actions against her concerning the property, it would not have been necessary to declare against her as trustee. *Odd Fellows* v. *McAllister*, 153 Mass. 292. As said in that case (page 297) "the description of the defendants as 'trustees' in the writ was surplusage. There is no provision by which judgment and execution against trustees run against the trust estate in their hands, as in the case of executors and administrators. Even when they are entitled to indemnity from the trust fund, the judgment in an action at law is against them as individuals, whatever may be the doctrine in equity."

That general taxes upon land held in trust may be assessed to the holder of the legal title and that such holder is within the statutes imposing a personal liability therefor upon the person assessed, is well settled and, indeed, does not appear to have been questioned. *Baldwin* v. *Trustee*, 37 Maine, 369; *Tracy* v. *Reed*, 38 Fed. 69; *Miner* v. *Pingree*, 110 Mass. 47; *Richardson* v. *Boston*, 148 Mass. 508; *Knight* v. *Boston*, 159 Mass. 551; *Dunham* v. *Lowell*, 200 Mass. 468; *Latrobe* v. *Baltimore*, 19 Md. 13; Perry

on Trusts, sec. 331; Beach on Trusts and Trustees, sec. 415; Lewin on Trusts (1 Ed.), page 557. On principle, the trustee would seem to be as much within the statute as executors, administrators, guardians, etc., whose personal liabilities for taxes on property in their hands assessed to them is at least assumed in *Fairfield* v. *Woodman*, 76 Maine, 549 (page 551); *Dresden* v. *Bridge Co.*, 90 Maine, 489 (page 493) and is expressly held in *Payson* v. *Tufts*, 13 Mass. 493.

It is urged, however, that even if Mrs. Hayford was personally liable for general taxes assessed upon the land in question, it does not follow that she was personally liable for special assessments like that in this case. That much may be conceded. The question of her personal liability in either case depends upon the statute in that case. In the case of special assessments the statute is comprehensive and explicit that an action for the amount of the assessment may be maintained "against the party so assessed." Mrs. Hayford was the party and the only party assessed. She was the proper person to be assessed as she was the legal owner, held the legal title. The taxing authorities were not required to go behind her title. The addition of the word "Trustee" to her name did not make her any the less the party assessed, any more than does the addition of the word "guardian," or "executor" or "administrator" in assessments against such persons. It did not exempt her from her obligation, as the holder of the legal title and the party properly assessed, to pay the assessment as required by the statute.

One argument strongly urged against the applicability of the statute to one who holds the legal title, not for himself but in trust only for others, is that the statute does not provide that such person may be reimbursed from the trust estate. It is contended that for want of such a provision the statute must be held inoperative upon persons holding only the legal title without any beneficial interest, since otherwise it would be open to the constitutional objection that it would thus operate to take the property of one person for the benefit of another without due process of law. The answer is that the trustee would have the right of reimbursement from the trust estate for what he is compelled by the statute to pay for its benefit, and it is not necessary the right should be expressed in the statute.

Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate and that in equity, at least, reimbursement will be enforced. Perry on Trusts, secs. 910, 913, 915; *Perrine* v. *Newell*, 49 N. J. Eq. 57; *Woodruff* v. *N. Y. R. R. Co.*, 129 N. Y. 27; *Gibson* v. *Charter Oak Ins. Co.*, 142 U. S. 326. The principle is illustrated by analogous cases where life tenants have been obliged to pay the whole assessment for street improvements benefiting the property. The duty to pay the whole may be imposed on life tenants though the benefit is to the fee as well as the life estate, and when imposed and performed the life tenant can compel the remainder man to contribute his equitable share. *Plympton* v. *Boston Dispensary*, 106 Mass. 544; *Reyburn* v. *Wallace*, (Md.) 3 S. W. 482. So in the case of a tenant from year to year. *Hitner* v. *Ege*, 23 Pa. St. 305. No statute was invoked in those cases.

It is still further urged that if there was a right of action against Mrs. Hayford personally it should have been brought in her lifetime since by its terms the trust ended with her death and now there is no trust estate from which her estate can be reimbursed if now compelled to pay. In the argument at bar there was some discussion whether a special assessment is a debt. Whether technically a debt or not, there was a personal duty to pay the assessment, not contractual to be sure and only imposed by statute but nevertheless a personal duty. Duties imposed by law are as much duties as those assumed by contract, 3 Bl. Com. 160. This duty she did not perform in her lifetime as she might and should. Her estate must now answer for her default. *Bulkley* v. *Clark*, 2 Root 60 (Conn.); *Wooten* v. *House*, (Tenn.) 36 S. W. 936. The right of action was against her personally and hence under modern law survives her death.

Judgment for the plaintiff for eighty-seven hundred and forty-eight dollars and ninety-nine cents with interest at twelve per cent per annum from Jany. 29, 1906, the date of the assessment.

CHARLES D. MERRITT AND LYMAN B. MERRITT

vs.

THE HOULTON WATER COMPANY.

Aroostook. Opinion June 29, 1910.

Waters and Watercourses. Diversion of Water by Permission. Damages.

When a riparian owner gives permission, even gratuitously, to divert water from the stream, he cannot recover damages for such diversion made before revocation of the permission.

On report. Judgment for defendant.

Action on the case to recover damages for the alleged unlawful diversion of water by the defendant from the plaintiffs' mills on the Meduxnekeag Stream in Houlton. Plea, the general issue with brief statement alleging, among other things, that any taking or diverting of water by the defendant, if any, was by the "license, consent and permission of the said plaintiffs" and that such license, consent and permission had never been revoked. At the conclusion of the evidence, the case was withdrawn from the jury and reported to the Law Court to determine "all questions of law and fact," and to assess the damages if the plaintiff were entitled to recover.

The gist of the case is stated in the opinion.

P. H. Gillin, and Ransford W. Shaw, for plaintiffs.

Madigan & Madigan, Ira G. Hersey, and Powers & Archibald, for defendant.

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

EMERY, C. J. In their declaration the plaintiffs set forth their cause of action substantially as follows:—They are the owners and operators of mills propelled by water power on the Meduxnekeag Stream, and as such are and have been entitled to have come to their mills for power the water that would naturally flow down said

stream past the mills, subject to its reasonable use by riparian proprietors above. After the erection and the beginning of the operation of the mills by the plaintiffs, the defendant company for some years diverted large quantities of water from one of the tributaries of the Meduxnekeag so that much less water than otherwise would, flows down the Meduxnekeag to the plaintiffs' mills. No complaint is sufficiently made of any trespass upon any property of the plaintiffs. The action is simply to recover damages for the diversion of the water from their mills.

But it clearly appears from the evidence, even that introduced by the plaintiffs, that the diversion of the water was well known to the plaintiffs and they made no objection to it. Indeed it further fully appears from their language and conduct that they consented to it,—distinctly gave the company to understand it might divert water as it did, without making any compensation. The first notice given the company of any change of mind was the service of the writ. It is evident that the plaintiffs cannot recover damages for a diversion to which they consented, and that, at the date of their writ at least, they had no cause of action therefor. *Miller* v. *Auburn, etc., R. R. Co.*, 6 Hill (N. Y.) 61.

Judgment for the defendant.

MARIA L. ATWOOD et al.

vs.

NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.

Penobscot. Opinion June 29, 1910.

Exceptions. Authority to Allow. Proceedings to Establish. Application to Law Court. Rule of Court XLIII. Revised Statutes, chapter 79, section 55.

1. It is for the ruling Justice to determine in the first instance what statements of facts or evidence should be incorporated in the bill of exceptions, to his ruling to be presented to the Law Court.
2. If the excepting party is not satisfied with the bill of exceptions as finally allowed by the ruling Justice, his remedy is by petition to the Law Court to establish a proper bill of exceptions under R. S., chapter 79, section 55, and Rule of Court XLIII.
3. If, instead of petition to the Law Court to establish a bill of exceptions, the excepting party brings to the Law Court the bill as settled by the ruling Justice, he must present the whole bill or his exceptions must be dismissed.
4. That it has become impossible without his fault for the excepting party to present the evidence required by the bill of exceptions does not relieve him from the duty. The court and the opposite party are nevertheless entitled to the evidence before considering the exceptions.

On exceptions by plaintiffs. Dismissed.

Action of trespass quare clausum under Revised Statutes, chapter 97, section 11, for entering upon ornamental grounds of the plaintiffs and cutting down and removing therefrom, without permission of the owners, certain ornamental trees, and lopping, trimming, and otherwise defacing certain other ornamental trees thereon standing. Plea, the general issue with brief statement as follows: "That the close described in the plaintiffs' writ was within the limits of a public highway in said town of Hampden and that any entries made by the defendant were made with the authority, permission and supervision of the selectmen of said Hampden and any acts committed by it were committed under legal authority so to do."

Verdict for plaintiffs for $135 with the following special finding: "Do the jury find that the plaintiffs' land upon which the alleged trespass was committed, was either grass land or ornamental ground." Answer: "Ornamental."

The verdict, in accordance with the instructions of the presiding Justice, was for the actual damages, and the plaintiffs filed a motion for judgment for three times the actual damages found by the jury. This motion was overruled and the plaintiffs excepted.

The case is stated in the opinion.

Mayo & Snare, for plaintiffs.

Norman L. Bassett, for defendant.

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

EMERY, C. J. The action was trespass q. c. for entering plaintiffs' close and cutting down trees thereon. After verdict for the plaintiffs for actual damages as instructed by the court, the plaintiffs moved for judgment for three times the amount of the actual damages. The court denied the motion and the plaintiffs excepted. The bill of exceptions allowed by the presiding Justice and presented to the Law Court made "the evidence introduced at the trial, including the plans and photographs exhibited," a part of the bill. The evidence, plans and photographs thus made a part of the bill were not filed, and were not produced at the Law Court, whereupon the defendant moved the Law Court to dismiss the exceptions.

The plaintiffs claim that the remainder of the bill without the evidence, plans or photographs, contains enough to enable the Law Court to determine whether the ruling was correct or not. Whether the Law Court can so determine without the evidence, etc., is a question for the Justice who made the ruling and settled the bill of exceptions. He, not the Law Court, is the judge in the first instance of what the bill should contain or omit. If the excepting party is not satisfied with the Justice's determination of that question, he should petition the Law Court to establish a proper bill of exceptions. If, instead, he brings to the Law Court the bill settled by the Justice, he must bring the whole of it as so settled,—must comply with all its requirements to be entitled to a hearing.

At the argument upon the motion to dismiss the exceptions it was stated and admitted that the notes of the evidence at the trial taken by the official stenographer were lost, and that hence it was practically impossible for the plaintiffs to bring that evidence before the Law Court. The plaintiffs urge that this impossibility, being without any fault of theirs, should excuse them from furnishing a report of the evidence. The Law Court must assume, however, that the ruling excepted to was correct unless it appears from the entire bill of exceptions that the ruling was wrong and the plaintiffs prejudiced thereby. Whatever that part of the bill actually before the court may show, it cannot be known but that the part omitted would have shown the ruling to be correct or unprejudicial. At least, it must be assumed that the part omitted was necessary to the proper determination of that question. It may be a hardship upon the plaintiffs but the duty was upon them to present to the Law Court the entire bill of exceptions as settled and allowed by the presiding Justice if they desired its consideration. Their inability to do so, though not their fault, is their misfortune for which the defendant is not responsible. The misfortune must remain where it fell. The *Stenographer Cases*, 100 Maine, 271.

Exceptions dismissed.

J. A. COFFIN *vs.* FRANK L. ROBINSON.

Washington. Opinion June 29, 1910.

Logs and Lumber. Log Driving. Liabilities.

Merely making use for log driving purposes of structures one finds in a floatable stream does not imply a promise to pay the owner of the structures for such use.

On report. Judgment for defendant.

Assumpsit on account annexed for use of a wharf and lumber yard on Pleasant River, and for use of dams, brows, flowage, etc., in driving logs in the river above. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for determination and in case the defendant was found liable, "to assess damages in such an amount as the evidence warrants."

The case is stated in the opinion.

E. N. Benson, Oscar F. Fellows, and Raymond Fellows, for plaintiff.

P. H. Gillin, and John F. Lynch, for defendant.

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

EMERY, C. J. The items of the plaintiff's account annexed are all for use and occupation, and fall into two groups, those for the use of a wharf and lumber yard on Pleasant River, and those for the use of dams, brows, flowage, etc., in driving logs in the river above.

As to the first group, the preponderance of the evidence is that full payment was made therefor. As to the second group, we do not find sufficient evidence that the defendant promised to pay the plaintiff anything for what use he made of the dams, etc., for log driving purposes. The mere use of them did not imply any promise

to pay for such use. The defendant in driving his logs down the river was entitled to use the river as he found it. The plaintiff showed no franchise to charge for the use of the dams, etc., and without evidence of such franchise or of an agreement to pay, the plaintiff cannot recover. *Ocqueoc Improvement Co.* v. *Mosher*, 101 Mich. 473. *Lamprey* v. *Nelson*, 24 Minn. 304.

Judgment for defendant.

In Equity.

LUCY C. FARNSWORTH, Admx.,

vs.

GEORGE F. WHITING, et als.

Knox. Opinion June, 1910.

Equity. Appeal. Decree. Revised Statutes, chapter 79, section 22.

Equity rule No. XXVIII of the Supreme Judicial Court, authorizing an appeal from a single Justice's decree entered on a decision of the law court on appeal, and Revised Statutes, chapter 79, section 22, requiring him to enter a decree according to such decision, does not prevent a decree on affirmance from containing elements not in the original decree, though the decree must follow the mandate, which the Justice cannot enlarge, limit, or modify, it being proper to enter such decree as will effectuate the court's decision; and hence a decree, on affirmance of a decree finding that defendants owned securities sued for by plaintiff as administratrix, properly required plaintiff to transfer and indorse the securities and to pay over money collected during the litigation as interest or dividends.

In equity. On exceptions by plaintiff. Overruled.

The bill of exceptions states the case as follows:

"In the above entitled cause, after an appeal by the plaintiff from the final decree on file, the law court certified its decision upon such appeal that decree be affirmed with costs upon appeal. Now,

a decree having been entered therein on the twenty-fifth day of May, A. D. 1910 by a single justice in accordance with said certificate and the opinion of the law court, the plaintiff alleges that she has agreed to the form of such last named decree and within ten days after the entering of said decree as aforesaid now takes exceptions thereto as follows:

"FIRST. Because the words 'and extended to conform with the issues raised, the evidence and judgment of the Court on such appeal' are not warranted by the terms of the decision so certified.

"SECOND. That Item third in the final decree now excepted to is not included within the terms of the final decree ordered to be affirmed by the law court and that said final decree so affirmed contains no provisions relative to the endorsement or transfer of title of the personal property and securities designated in said item third, nor anything whatever so in relation thereto.

"THIRD. That Item fourth in the final decree, to which exceptions are now taken, relates to a subject matter not referred to or included in the final decree ordered to be affirmed by the law court.

The decree to which the exceptions relate, omitting formal parts, is as follows:

"This case came on to be heard, after an appeal by the plaintiff from a final decree on file, and was argued by counsel.

"Thereupon, upon consideration, it is adjudged and decreed as follows:

"1st. That said final decree be and is hereby affirmed and expanded to conform with the issues raised, the evidence, and judgment of the court on said appeal.

"2nd. That James R. Farnsworth, the donor, after the death of his wife, Helen A. Farnsworth, to wit, on the sixth day of May, A. D., 1905, at his dwelling house in Rockland, did give to George F. Whiting, one of said defendants, all of the personal property and securities enumerated and described in paragraph 3 in the plaintiff's bill, to be equally divided between said George F. Whiting and his sister Isabella A. Martin, as stated in defendants' answer.

"3rd. It is further ordered and decreed that the plaintiff Lucy C. Farnsworth, Administratrix with the will annexed of the estate of

the said James R. Farnsworth, shall on presentation, endorse and legally transfer all her apparent title or semblance to title or interest as administratrix in said personal property and securities hereinafter designed, to wit: (List omitted in this report.)

"4th. It is further ordered and decreed that the said Lucy C. Farnsworth, administratrix, pay to the defendants, their attorneys of record or either of them, all sums of money collected, as interest, or dividends on any and all of the above named securities, together with lawful interest on all such sums, from the time of the reception of the same to the time of payment as herein provided.

"5th. A single bill of costs to be taxed for defendants."

See *Farnsworth, Admx.*, v. *Whiting*, 104 Maine, 488, also same case, 106 Maine, 430.

Heath & Andrews, for plaintiff.

David N. Mortland, Rodney I. Thompson, and Arthur S. Littlefield, for defendants.

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

CORNISH, J. This case is before the Law Court upon plaintiff's exceptions to the final decree entered in the above entitled cause under date of April 26, 1910, and involves the construction of Equity Rule No. 28.

The original suit in equity was brought to recover certain personal property in the possession of the defendants but alleged to belong to the plaintiff in her representative capacity, the property consisting of promissory notes, with bills of sale and insurance policies given as security therefor, certificates of stock, bonds and a dividend check. An issue of fact was framed for the jury as to whether the plaintiff's intestate, before his death, had given to the defendants the personal property in question and the jury found that he had. Thereupon the sitting Justice signed a decree affirming the finding of the jury and decreeing that "all said property is now the property of said Whiting and Martin." The plaintiff carried the case to the Law Court on appeal where the finding as to this particular property was sustained and the decree of the sitting Justice was

affirmed with costs. Thereupon a decree was filed and signed in accordance with the decision of the Law Court and it is to this decree that the plaintiff excepts.

The ground of exception is that the decree, excepted to, contains "various provisions requiring the plaintiff to transfer and endorse certain securities and to pay over any sums of money she may have collected during litigation by way of interest, or dividends," the plaintiff contending that the decree should contain simply the words of the former decree and should embrace no elements not contained therein. Such a construction of Revised Statutes, chapter 79, section 22, and of equity rule No. 28, is altogether too narrow. It is true, as decided in *Whitney* v. *Johnston*, 99 Maine, 220, that the decree must follow the mandate and that a single Justice cannot enlarge or limit or modify the scope of the mandate or hinder or delay its execution. But it is also true, as stated in the same opinion, that while he should enter a decree in accordance with the mandate, he may no doubt issue subsidiary process, if necessary, to enforce such decree. In other words, a single Justice should sign such a decree as will effectuate the decision of the court and give to the prevailing party such remedy as the court decides he is entitled to. In the case at bar the court has decided that the property in question belongs to the defendants. To simply enter a decree to that effect while the nominal title still rests in the plaintiff, would be but one step in securing to the defendants their rights. It would decide that the defendants were entitled to the property but could not have it unless another bill in equity were brought to compel the transfer. This would be a useless formality and a court of equity cannot be so impotent. The last decree simply carries into effect the first. It is a mere corollary. It does not attempt to go outside the scope of the mandate but to effectuate it.

It is the opinion of the court that these exceptions should be overruled with treble costs.

Exceptions overruled.

WILLIAM W. RIPLEY *vs.* GEORGE E. TRASK.

Lincoln. Opinion July 7, 1910.

Trespass Quare Clausum. Title. Burden of Proof. Evidence. Deeds.

Plaintiff in trespass quare clausum must affirmatively show his title.

A stipulation that defendant in trespass quare clausum cut timber on the land under claim of title to the land is insufficient to show prescriptive title in him.

On an issue of title, a quitclaim deed from one conceded to be the owner of the land shows absolute title, and is equivalent to title through warranty deed.

That for over 70 years plaintiff in trespass quare clausum and his predecessors had been in uninterrupted possession of a farm under recorded deeds which included the disputed tract, wild and unfenced land, and that plaintiff was in possession when suit was brought, established his title prima facie.

On report. Action to stand for trial.

Action of trespass quare clausum, but involving by stipulation the question of title only, and reported to the Law Court on exhibits and an agreed statement of facts, with the stipulation "that if the court shall find that the title of said land in dispute is in the plaintiff, the action shall be returned to have damages assessed by a jury or by the court as the parties may then determine it. If the court find that the title of the premises in dispute is in the defendant, final judgment in the action is to be given for the defendant; but the plaintiff may have and recover the sum of $35 for which the defendant offered to be defaulted, with costs of suit to the date of said offer."

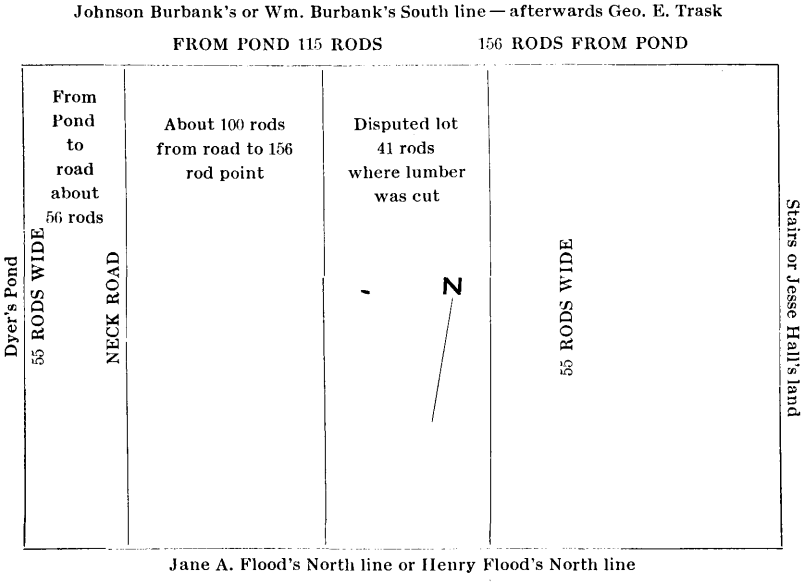
The case is stated in the opinion.

R. S. Partridge, for plaintiff.

Heath & Andrews, for defendant.

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

SPEAR, J. This is an action of trespass quare clausum, on report, but involving by stipulation the question of title only. The accompanying chalk is a fair representation of the locus.



It will be observed that both parties base their contention upon conveyances from the same source, George Jones, the former owner of the disputed premises. The plaintiff relies upon a deed, dated in 1831, conveying the whole tract of land shown by the above chalk "excepting however the land sold by me to Daniel H. Weeks."

The defendant does not rely upon proof of title in himself, admitting several breaks, but upon the plaintiff's alleged want of title in this, that the exception in the above named deed included the lot in controversy and excluded it from the plaintiff's chain of title. That it is incumbent upon the plaintiff to affirmatively show his title is now settled. *Brown* v. *Webber*, 103 Maine, 60. The defendant contends that the plaintiff has failed to do this.

The deed from George Jones to Daniel H. Weeks, purporting to convey the excepted premises, was not recorded nor produced, therefore the extent of the exception can be determined, if at all, by inference only from other deeds. But such inference cannot be admitted. It is expressly agreed that the plaintiff's chain of title included the excepted tract.

Stipulation 5 admits: "That the plaintiff, and all his predecessors in title under the deeds introduced by him, have been in uninterrupted possession of the farm on which they live and that the aforesaid deeds conveying said farm included all the disputed premises between the 115 and 156 rod line, which disputed premises consist of wild land, not fenced as between the two respective lines of title, nor occupied for ordinary farm purposes."

Inasmuch as all the plaintiff's deeds except the first explicitly include the disputed tract, and in this it is not necessarily excluded, it is obvious that the express stipulation should control the construction of the plaintiff's deeds with respect to the extent of the premises described. Has the plaintiff succeeded in proving title in himself? We think he has.

The case is composed of a series of deeds offered by the plaintiff, which for a period of seventy-six years covered the tract upon which the plaintiff and his predecessors had lived, and also the disputed lot contiguous to the part of the tract occupied; and of several deeds offered by the defendant through one of which by inference he claimed that the disputed tract was excepted from the plaintiff's chain of title; but a careful examination of the case shows that stipulation 5 precludes the defendant from claiming the exception and admits that the plaintiff's deeds covered the disputed tract; and no claim was made by the defendant of prescriptive title. The only evidence tending to show any acts of prescription on the part of the defendant is found in stipulation 6, which admits: "That the defendant cut wood and timber growing on land lying between the above mentioned points under a claim of title to said land." It is evident that this stipulation might as well have been left out as put into the case, so far as it affects the result. The cutting might have been done within a year. It may have been the very

trespass complained of in the plaintiff's writ. So that upon a final analysis the defendant shows no title whatever in himself.

The deeds offered in evidence by the plaintiff were quitclaim, except the last three which were warranty deeds. The first quitclaim deed was from George Jones, the original owner, as appears from the admission in stipulation 3: "That one George Jones of Alna, Maine, was at one time the owner of the real estate in dispute." It would therefore seem to follow under the decision in *Rand* v. *Skillin*, 63 Maine, 103, that the quitclaim deeds through which the plaintiff claims title conveyed to him and his predecessors in title are at least prima facie evidence of ownership. In this case it is said: "In a real action tried upon a plea of nul disseisin a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quit-claim deed, is sufficient prima facie evidence of ownership, and will authorize a verdict for the plaintiff unless the defendant prove a better title." It is admitted that Jones, the original grantor of the plaintiff's title, was the owner of the land which he sought to convey. The Jones title, therefore, under the admission, must be considered as absolute and equivalent to one conveyed to him by a warranty deed. Hence under the above decision, the quitclaim deed to the plaintiff's original predecessor from Jones, may be regarded as based upon a warranty deed to one from whom the plaintiff, through his predecessors, has a quitclaim deed.

Blethen v. *Dwinel*, 34 Maine, 133, seems to be more liberal in proof of title by quitclaim deed than the case just cited. The *Blethen case* was a writ of entry on the demandants own seisin to which was pleaded the general issue and a brief statement of title by possession. The demandant offered in evidence a quitclaim deed to himself of the demanded premises which were duly executed and recorded. With respect to the title conveyed, the court say: "In the absence of other evidence, the deed, itself, raises a presumption that the grantor had sufficient seisin to enable him to convey, and also operates to vest a legal seisin in the grantee. The deeds introduced by the demandant, prima facie, establish his title."

It is also admitted by stipulation 1: "That the plaintiff was in possession of the premises in dispute at the time of the action being brought." This stipulation, interpreted in its narrowest sense, nevertheless excludes any possible claim of possession on the part of the defendant, and leaves the plaintiff in possession under a recorded warranty deed, as it is admitted that the last three deeds, culminating in the plaintiff's title, were warranty deeds. *Tibbetts* v. *Estes*, 52 Maine, 566, is a case in which the plaintiff alleged that the defendant was in possession, and the court say: "Such possession being prima facie evidence of title, the plaintiffs must prove a better one, or they cannot recover."

Chandler v. *Wilson*, 77 Maine, 76, differentiates the phrases "strength of his own title" and "weakness of the tenants" as found in the well established rule that "the demandant must recover upon the strength of his own title and not on the weakness of the tenants." Chief Justice PETERS in the opinion says: "Still, the demandant may recover if he has merely a better title than the tenant. In such case, he does recover upon the strength of his own title because this title is the strongest. He may not have what is called a true title — a title good against the world — but if he has a good title as against the tenant, he may recover. The bare possession is the first degree of title, and any degree is better than no degree of title." *Clements* v. *Estes*, supra, is quoted and approved.

We think the plaintiff has established, as against the defendant, prima facie title to the disputed tract, and that the entry must be, in accordance with the stipulation of the parties.

Action to be returned to have damages assessed by a jury or by the court as the parties may then determine.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

WILLIAM BARNET et al. *vs.* WILLIAM T. HAINES.

Kennebec County. Decided January 29, 1910. Assumpsit against the defendant as guarantor of a debt due from the Oakland Woolen Company to the plaintiffs. The question was whether the guaranty covered only those accounts due, and certain other goods ordered but not delivered prior to the date when the written guaranty was given July 8, 1908, or whether it was a continuing guaranty and covered also goods sold and delivered subsequent to that date. Reported to the Law Court. Held to be a continuing guaranty. Judgment for plaintiffs for $2,857.11 with interest from date of writ. *Manson & Coolidge*, for plaintiffs. *John E. Nelson*, for defendant.

MICHAEL MCGRATH *vs.* BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot County. Decided February 4, 1910. Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Reported to the Law Court. Judgment for defendant. *C. J. Dunn*, for plaintiff. *E. C. Ryder*, for defendant.

DENNIS DALEY *vs.* PATTEN PRODUCE COMPANY.

Penobscot County. Decided February 5, 1910. Action for breach of warranty of the quality of a car-load of potatoes sold by the defendant to the plaintiff. Verdict for plaintiff for $211.49. Motion for new trial filed by defendant. Overruled. *B. L. Fletcher, and William B. Peirce,* for plaintiff. *B. L. Smith,* for defendant.

ELVIRA H. WOOD AND HARLOW P. WOOD, Appellants.

Knox County. Decided February 5, 1910. Appeal from the decrees of the Judge of Probate allowing the accounts of Walter J. Wood, guardian of the plaintiffs. Appeals dismissed. Decrees below affirmed. *Arthur S. Littlefield,* for plaintiffs. *Reuel Robinson,* for defendant.

HARLOW H. ROGERS *vs.* WILLIAM HAUGH.

Waldo County. Decided March 1, 1910. Real action to recover Lot 36, Division 1, Belfast. Writ dated November 25, 1908. Plea, the general issue with brief statement as follows: "And for brief statement the defendant says, that he is seized in fee simple, of the premises demanded by the demandant in his said writ, and that he has been in possession thereof for the last three years without denial or interruption and that said demandant has not been in possession nor has he the right to possession of said demanded

premises." Both plaintiff and defendant claimed title by virtue of certain tax deeds. The last deed in the defendant's chain of title was a quit-claim deed given to him by Elbridge S. Pitcher, treasurer of the city of Belfast, dated December 8, 1908, and recorded December 10, 1908, conveying to the defendant all the right, title and interest which had accrued to the City of Belfast for the non-payment of taxes, duly authorized by the order of the city council of the city of Belfast. Concerning this last mentioned deed, the rescript says: "The deed of the treasurer last mentioned, which is essential to the defendants title, bears date subsequent to the date of the plaintiff's writ; and being a matter arising after the commencement of the suit and before issue joined, it is not provable except under a special plea in bar to the further maintenance of the plaintiff's action. Although the defendant's brief statement under the general issue lacks the technical formality of such a plea, yet in as much as the plaintiff had not raised the question of its sufficiency by demurrer, we hold that the deed is admissible under the special plea, and shows that at its date the defendant had title to the demanded premises superior to that of the plaintiff." Judgment for defendant. *Thompson & Blanchard*, for plaintiff. *James S. Harriman*, for defendant.

LAURA A. LEAVITT *vs.* ALONZO A. SEAVEY, Admr.

York County. Decided May 25, 1910. Assumpsit to recover for services as housekeeper for defendant's intestate, Stephen A. Seavey, also for services in taking care of barn, cattle, etc., of defendant's intestate also for use and occupation of plaintiff's tenement by defendant's intestate, amounting in all to $3,984. Verdict for plaintiff for $1,475.88. Defendant filed a general motion for a new trial. Overruled. *James O. Bradbury, and N. B. Walker*, for plaintiff. *John P. Deering*, for defendant.

SUSAN JORDAN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock County. Decided June 4, 1910. Action on the case under Revised Statutes, chapter 52, section 73, to recover damages caused by a fire alleged to have been set by a locomotive of the defendant. The defendant offered no evidence. Verdict for plaintiff for $198.33. Defendant filed a general motion for a new trial. Overruled. *Harry L. Crabtree*, for plaintiff. *Oscar F. Fellows, and Raymond Fellows, and Hale & Hamlin*, for defendant.

CHARLES E. HILL *vs.* MAINE CENTRAL RAILROAD COMPANY.

Oxford County. Decided June 8, 1910. Action on the case to recover damages for the destruction of the plaintiff's saw mill and contents, in Brownfield, by fire alleged to have been set by a passing locomotive of the defendant. Verdict for plaintiff for $7,269.30. Defendant filed a general motion for a new trial. Verdict set aside unless remittitur of all above $5,000 be made. *Fred V. Matthews and Henry A. Peabody*, for plaintiff. *Bisbee & Parker, and White & Carter*, for defendant.

RIVES MITCHELL *vs.* PURCHASE C. LEE.

Penobscot County. Decided June 10, 1910. Assumpsit on an unwitnessed promissory note to which the defendant pleaded the statute of limitations. The note matured more than six years prior to the date of the writ but the plaintiff claimed that certain rocks and oats were delivered to him by the defendant within the six

years, the value of which was by agreement to be allowed on the note. The defendant admitted the delivery and agreement but contended that the same took place seven years before the suit. Verdict for plaintiff for $253.10. Defendant filed a general motion for a new trial. Overruled. *George H. Worster*, for plaintiff. *Bertram L. Smith*, for defendant.

BATH SAVINGS INSTITUTION *vs.* JOHN L. CLIFFORD.

Lincoln County. Decided June 13, 1910. Real action reported to the Law Court. The plaintiff claimed title to the property under a mortgage and the foreclosure thereof from Bessie B. Gamage, dated Dec. 14, 1905 and recorded Dec. 19, 1905. The defendant claimed title under a sale on execution issued on a judgment rendered in proceedings to enforce a mechanic's lien against the same property for materials furnished "from Nov. 24, 1905 to and including May 8, 1906." The mortgagee, the plaintiff in the action, was not a party to the suit to enforce the lien claim, and had no notice of it. Judgment for plaintiff. *Foster & Foster, and George E. Hughes*, for plaintiff. *Arthur S. Littlefield, H. E. Hall, and Rodney I. Thompson*, for defendant.

HIRAM S. HIGGINS *vs.* CHANDLER S. MERRILL.

Penobscot County. Decided June 29, 1910. Action of trespass quare clausum fregit. Practically the only question at issue was the location of the boundary line between the parties. Verdict for plaintiff for $46. Defendant moved for a new trial. Overruled. *Mayo & Snare*, for plaintiff. *Martin & Cook, J. B. Merrill, and A. J. Merrill*, for defendant.

CHARLES L. SIBLEY *vs.* BESSE-FOX COMPANY.

Penobscot County. Decided June 29, 1910. The plaintiff, an employee of the defendant corporation, having been injured while attempting to enter an elevator in the charge of a fellow servant, brought an action of tort on the ground of the defendant's negligence in employing and retaining an incompetent servant. Verdict for plaintiff for $925. Defendant filed a general motion for a new trial. Sustained. *Thompson & Blanchard*, for plaintiff. *P. H. Gillin, and Edgar M. Simpson*, for defendant.

ALBERT FRANCIS *vs.* A. E. MCDONOUGH, Admr.

Androscoggin County. Decided July 12, 1910. Assumpsit for personal services on the farm of defendant's intestate. Verdict for defendant and plaintiff moved for a new trial. Motion overruled. *Tascus Atwood*, for plaintiff. *McGillicuddy & Morey*, for defendant.

EDWIN PIERCE,

Appellant from Decree of Judge of Probate in re Twentieth Account of Trustee in re Will of John W. Lane.

Cumberland County. Decided July 21, 1910. Appeal from decree of Judge of Probate, Cumberland County, allowing the 20th account of Edward M. Rand as trustee under the will of John W. Lane, and reported to the Law Court. For services and commissions the Probate Court allowed the trustee $1,536.77. Appeal sustained and case remanded for modification of account so that the amount allowed to trustee for services and commissions should be $1059.30. *Payson & Virgin*, for appellant. *Eben Winthrop Freeman*, for appellee.

WILLIAM VIGUE *vs.* LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec County. Decided July 21, 1910. Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. Verdict for plaintiff for $4,950. On motion and exceptions by defendant. Exceptions not argued. Motion sustained unless remittitur be made of so much of the verdict as exceeded $3,500. *B. F. Maher*, for plaintiff. *Heath & Andrews*, for defendant.

CHRISTIAN IVERSON *vs.* HERBERT ST. CLAIR and Trustee.

Cumberland County. Decided July 21, 1910. Action brought in the Superior Court. Verdict for plaintiff and defendant moved for a new trial. Motion overruled. *John B. Kehoe*, for plaintiff. *Strout & Strout*, for defendant.

ALANSON J. MERRILL,
Appellant from Decree of Judge of Insolvency Court.

Penobscot County. Decided August 15, 1910. Appeal from a decree of the Court of Insolvency, Penobscot County, made September 30th, 1908, ordering said Merrill to charge himself in his capacity as assignee of Edward O. Nason, an insolvent debtor, with the sum of $300 found by the Judge to have been received by said Merrill from a sale to Sanford C. Smith, in 1896, of all said Merrill's right, title and interest as such assignee in and to certain real estate; and also ordering said assignee to charge himself with interest on said sum at savings bank rates from the time said sum

was received by him to the date of said decree. Reported to the Law Court. Appeal dismissed on the ground that it was not specially provided for in the insolvent law. See Revised Statutes, chapter 72, section 10. *Alanson J. Merrill*, for appellant. *George H. Worster*, for appellee.

HENRY FARR

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Androscoggin County. Decided September 16, 1910. The plaintiff's wife was a passenger upon one of the defendant's cars. Owing to a defective brake, the car going down hill got beyond the control of the motorman and ran away. The plaintiff's wife either jumped, or was thrown from the car. She was seriously injured. This suit was brought by the plaintiff to recover compensation for the loss of the service, society and companionship of his wife, and for expenses, medicine, medical attendance and nursing, incurred in trying to cure her of her injuries. Verdict for plaintiff for $3,500.48. Defendant filed a general motion for a new trial. Overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Skelton*, for defendant.

JOHN WALKER *vs.* CHARLES LITTLEFIELD.

Somerset County. Decided September 28, 1910. Action on the case to recover damages for injuries inflicted on the plaintiff's mare in a collision with the defendant's automobile, so that she died. Verdict for plaintiff for $82.50. Defendant moved for a new trial. Motion overruled. *George H. Morse*, for plaintiff. *Butler & Butler*, for defendant.

SOPHRONIA B. HIGGINS

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Sagadahoc County. Decided September 29, 1910. Action on the case to recover damages for personal injuries sustained by the plaintiff, who was a passenger on one of the defendant's cars, when she alighted from the car and in doing so her feet slipped from the lower step of the car and caused the injuries complained of. The plaintiff claimed that the cause of her fall was the slippery condition of the step from snow and ice which the defendant had negligently allowed to accumulate and remain on the step. Verdict for plaintiff for $2300. Defendant moved for a new trial. Motion overruled. *A. H. Stetson, and Foster & Foster*, for plaintiff. *Newell & Skelton*, for defendant.

AMANDA F. HEATH *vs.* DIRIGO MUTUAL FIRE INSURANCE CO.

Somerset County. Decided October 18, 1910. Assumpsit brought by the plaintiff to recover of the defendant the sum of $1300 and interest upon a policy of insurance issued to Robert S. Brown and payable in case of loss to the plaintiff, as her mortgage interest may appear. The special matter of defense set up was that Brown represented and warranted in his application that there was no other insurance upon the premises that the warranty was in fact untrue. Verdict for plaintiff for $1384.50. Defendant moved for a new trial. Only two questions were raised, namely, the validity of the policy and the amount of the damages. Motion overruled. *Merrill & Merrill*, for plaintiff. *H. & W. J. Knowlton, L. R. Folsom, and Newell & Skelton*, for defendant.

JULIA B. MATTHEWS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland County. Decided November 12, 1910. Action on the case brought in the Superior Court in said county, to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. The plaintiff was about to enter a coach of the defendant company at Bath for the purpose of going to Lewiston, and described the accident as follows: "As I went to board the train they backed the engine. I was standing on my right foot just as they coupled the engine, with the left foot, I suppose, up, and that throwed me one side striking my shoulder. After striking my shoulder I fell to my knees." The evidence showed that the plaintiff's right shoulder or arm came in contact with the hand rail of the car. Verdict for plaintiff for $1750. The defendant moved for a new trial. The only question involved was the amount of the damages, the liability of the defendant being admitted for whatever damage the evidence showed the jury were warranted in finding. "Motion sustained unless plaintiff within 30 days from the certification of the case files a remittitur of so much of the verdict as is in excess of $500." *E. C. Plummer, and Foster & Foster*, for plaintiff. *White & Carter, and Nathan & Henry B. Cleaves & Stephen C. Perry*, for defendant.

FRED W. BROWN, Admr., *vs.* HENRY O. NICKERSON.

Waldo County. Decided November 23, 1910. Assumpsit on a note for $303.75 with interest, given by the defendant to the plaintiff's intestate. Defense, payment. Verdict for defendant. Plaintiff moved for a new trial. Motion overruled. *F. W. Brown*, for plaintiff. *H. C. Buzzell*, for defendant.

MAUD A. JORDAN, Admx., d. b. n., *vs.* CHARLES A. BONNEY.

Androscoggin County. Decided December — 1910. The rescript says: "Action for money had and received brought by the administratrix de bonis non of the estate of Deborah Jordan against the residuary legatee of Hannah L. Rowe, who was the first administratrix of said Deborah Jordan's estate, to recover the amount of said estate alleged to have been in the hands of Hannah L. Rowe at the time of her decease and therefore to be now held by the defendant as her residuary legatee. The case was heard by the presiding Justice without the intervention of a jury with right of exception in matters of law. The finding of the presiding Justice after reviewing the evidence was in these words. 'No other material facts appear in the case. Upon these facts I rule that the action is not maintainable and direct that judgment be entered for the defendant.'" The plaintiff excepted to this ruling. *Held.* "That the decision of the presiding Justice was solely as to the question of fact whether the plaintiff had sustained the burden of tracing the property of the intestate into the hands of the defendant and that his finding upon that question is conclusive and not subject to exception. No question of law was raised by the exceptions." Exceptions overruled. *George C. Wing*, for plaintiff. *Tascus Atwood*, for defendant.

GEORGE B. PIKE *vs.* ROSCOE H. MORRELL.

York County. Decided December 12, 1910. Action of trespass in cutting and removing the standing growth from a tract of land comprising about six acres. In 1905, the plaintiff conveyed to the defendant the standing growth on a certain tract of land,

but previous to the conveyance the plaintiff and the defendant went upon the premises and spotted trees to indicate the boundary lines of the tract to be included in the conveyance. The lines as marked by the spots were not straight, but quite irregular and zigzag, being so made to include spots of growth suitable to be cut. The chief question in dispute was where on the face of the earth the spotted line was actually made. If made where the plaintiff claimed, the six acre piece, on which the alleged trespass was committed, was entirely outside of the territory on which the defendant bought the standing growth, and if made where the defendant claimed the six acre piece was within the territory covered by the conveyance to him. The question of fact whether the parties spotted the line as claimed by the plaintiff, or that claimed by the defendant, was determinable almost wholly from the conflicting testimony of the plaintiff and the defendant. Verdict for plaintiff for $256.50. The defendant moved for a new trial. Motion overruled. *Geo. F. & Leroy Haley, and Addison E. Haley*, for plaintiff. *Charles T. Read, and Cleaves, Waterhouse & Emery*, for defendant.

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"Luckily I saved my index when I was wrecked on Juan Fernandez."
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An attorney, within the scope of his employment, represents his client. His acts or omission as well as commission are to be regarded as the acts of the party he represents. The neglect of the attorney is equivalent to the neglect of the party himself. *Beale* v. *Swasey*, 35.

An attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. He may do all things incidental to the prosecution of the suit and which affect the remedy only and not the cause of action. He cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right.

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Under a chattel mortgage of a stock of goods permitting the mortgagors to make retail sales and buy for cash other goods to replace those sold, the mortgagors could remain in possession, and make sales in the ordinary course of business, on condition that the proceeds should be used to replace the goods, so as to prevent impairment of the mortgagee's security, but an unpaid-for folding couch, carpet, movable office, and clothes-press bought on credit, and placed in the store after the mortgage and not bought to replace mortgaged stock, are not covered by the mortgage.

Conley v. *Murdock*, 266.

Under a chattel mortgage of a stock of goods permitting the mortgagors to make retail sales and buy for cash other goods to replace those sold, neither the mortgagors nor their assignee in insolvency could recover against the mortgagee on the theory that they have not used the proceeds to purchase new goods, but bought new goods on credit so that they would not be subject to the mortgage. *Conley* v. *Murdock*, 266.

The mortgagee of chattels under a duly recorded mortgage can maintain an action therefor, at least up to the amount of his claim thereon, against one who takes them upon a writ of replevin against the mortgagor alone even if the mortgage has not been foreclosed. *Muskin* v. *Lazarovitch*, 353.

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State v. *Intoxicating Liquors*, 135.

When merchandise has been brought to its place of destination by a common carrier, and the consignee or his agent presents the bill of lading to the carrier and receipts for all the merchandise, there is a delivery to the consignee of all the merchandise though a part of it is left on the premises of the carrier. *State* v. *Intoxicating Liquors*, 138.

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State v. *Intoxicating Liquors*, 138.

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COMPROMISE AND SETTLEMENT.

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In an action on an account annexed where it was alleged in defense that the plaintiff's attorney had waived and released certain items in the plaintiff's writ, *held* that the statute, R. S., chapter 84, section 59, providing that "no action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small," was not available in defense, first, because there was no settlement of the demand "in full discharge thereof," and, secondly, because it did not appear that there was any valuable consideration whatever for "waiving and releasing" the items.

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that "the company agrees to pay J. A. Clarke, fifteen per cent commission." In another it was stated that "the fifteen per cent commission shall be credited and paid," only under certain conditions therein named. The eighth and twelfth clauses were as follows "Eighth. A statement of account is to be rendered by the company to J. A. Clarke every three months, or within fifteen days thereafter, together with a check for any monies due him after deducting monies drawn." "Twelfth. The company agrees to allow J. A. Clarke a weekly drawing account of fifty dollars to be charged against commissions earned by him and due to him by the company. Said J. A. Clarke is to pay his own travelling expenses." The defendant discharged the plaintiff before the expiration of the contract period. In an action to recover damages for this alleged breach of the contract,

Held: 1. That the contract was not ambiguous, with respect to the compensation agreed to be paid, and that parol evidence was not admissible to explain it, or to show that the words "weekly drawing account," in the twelfth clause, were intended to mean a guaranteed salary.

2. That the plaintiff was not entitled, under the contract, to a salary of fifty dollars a week, but only to a fifteen per cent commission upon the amount actually paid to the company by the advertisers whose contracts for advertising the plaintiff personally secured. *Clarke* v. *Eastern Adv. Co.*, 59.

One employed to excavate to a specified grade at a stated price per cubic yard cannot recover for excavation below that line, incidental to performance of the contract. *Norton* v. *University of Maine*, 436.

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A bill in equity to wind up a corporation under Revised Statutes, chapter 47, sections 80 and 81, *held* not to dissolve a prior attachment of real estate, but to suspend its enforcement in the usual way.

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by her duly assigned and delivered to him, and that he offered to surrender the certificate on receipt of a new one, which he requested, and which the defendant officers refused to issue, shows the petitioner's right to a certificate under Revised Statutes, chapter 47, section 34, requiring corporate officers to issue certificates to persons entitled to them, unless without knowledge of the apparent title of the person to whom they are issued.

Dennett v. *Mfg. Co.*, 476.

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Revised Statutes, chapter 84, section 18, authorizing transfers of causes from Superior Courts on pleas of equitable defenses, contemplates transfers on facts developed on the trials, new facts, appearing after the close of the evidence not being a proper basis for a transfer.

Toothaker v. *Pennell*, 188.

By chancing verdict in her favor in the Superior Court, defendant lost her right to have the cause transferred under Revised Statutes, chapter 84, section 18, which authorized transfers to the Supreme Judicial Court on pleas of equitable defenses. *Toothaker* v. *Pennell*, 188.

Revised Statutes, chapter 84, section 16, authorizing the Supreme Judicial Court to transfer to the equity term, a cause commenced in the Superior Court, where it appears that the rights can be better determined, does not authorize a transfer after verdict has been recorded and after refusal to set it aside. *Toothaker* v. *Pennell*, 188.

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A verdict for $1050 for the death of the plaintiff's intestate *held* not to be excessive. *Waiczenko* v. *Paper Co.*, 108.

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Revised Statutes, chapter 89, sections 9, 10, giving a right of action for wrongful death for the benefit of specified relatives, to be sued on within two years, create a single cause of action which vests immediately and finally at the time of the death in the statutory beneficiary, and not when suit is brought or recovery is had, and hence, on the death of decedent without children, the cause of action vested in his widow, and could not be transferred to any other beneficiary by her death or failure to sue. *Hammond* v. *Street Ry.*, 209.

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Dedication is the intended appropriation of land by the owner for some proper public use, reserving to himself no rights inconsistent with the full exercise and enjoyment of such use. *Brown* v. *Dickey*, 97.

Held: That certain vacant lots as marked on the plan of a park system did not imply dedication. *Brown* v. *Dickey*, 97.

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A widow, in 1891, unless she had barred her right, was dowable in land, not taken by right of eminent domain, but purchased by a railroad company, during the coverture, from her husband, in a case where the land lay outside of the location of the railroad right of way, and was bought for and used as a gravel pit. *McAllister* v. *Railroad Co.*, 371.

A woman divorced from her husband in 1891 for his fault, other than impotence, was dowable in his lands, and in lands owned by him during coverture, but conveyed previous to the divorce, and in which she had not barred her dower right, the same as if she had then become his widow.
McAllister v. *Railroad Co.*, 371.

Upon the granting of a divorce, in 1891, to a woman for the fault of her husband, other than impotence, her dower right became consummate. And even if it was not assigned, it became a vested property right of which she could not constitutionally be divested by a repeal of the statute which gave her that right. *McAllister* v. *Railroad Co.*, 371.

A consummate right of dower existing either in a widow, or a divorced wife, when the statute of 1895, chapter 157, enlarging the dower right to an estate in fee, was enacted, was not destroyed nor in any way effected by that statute. *McAllister* v. *Railroad Co.*, 371.

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McAllister v. *Railroad Co.*, 371.

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McAllister v. *Railroad Co.*, 371.

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Where one grants a base or determinable fee since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him, i. e., he has no future vested estate in fee ; only what is called a naked possibility or reverter, which is incapable of alienation or devise although it descends to his heirs. *Pond* v. *Douglass*, 85.

The possibility of reverter to the grantor of a base or determinable fee denotes no estate but only the possibility to have the estate at a future time. One kind of such possibility is that a common law fee other than a fee simple may revert to the grantor by the natural termination of the fee. The possibility of reversion expectant on such an estate is left in the person who limits it and in the meantime the whole estate is in the grantee or owner subject only to this possibility of reverter in the grantor. *Pond* v. *Douglass*, 85.

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A written contract of hiring construed and *held* not to be ambiguous so as to authorize the admission of parol evidence to explain it.
Clark v. *Eastern Adv. Co.*, 59.

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Cobb v. *Savings Bank*, 178.

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Palmer v. *Estate of Palmer*, 25.

In relation to claims against the estates of decedents, Revised Statutes, chapter 89, section 21, provides as follows: "Sec. 21. If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

Held: That relief under this statute is grantable only in those cases that are unmistakably shown to be within the express provisions of the statute strictly construed. *Beale* v. *Swasey*, 35.

Where the plaintiff brought a bill in equity under the provisions of Revised Statutes, chapter 89, section 21, and the defendant demurred, *held* that the allegations in the bill did not sufficiently show that the plaintiff's neglect to enforce her claim against the estate of the decedent within the time limited by statute was not the result of culpable neglect within the meaning of said chapter 89, section 21, and chargeable to her. *Beale* v. *Swasey*, 35.

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Farnsworth v. *Whiting*, 430.

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Jurisdiction is the right to adjudicate concerning the subject matter in a given case, which depends upon the court's cognizance of the class of cases to which the one to be adjudicated belongs, presence of the proper parties and the point decided being in substance and effect within the issue.

Rockland v. *Hurricane Isle*, 169.

JURY.

The provision of the Constitution, Article I, section 20, that in all civil suits and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced, is a declaration of the common law right to trial by jury and in no way inconsistent with the establishment of a court of chancery having general jurisdiction, as it was at the time of the adoption of the Constitution and proceeding in accordance with its fundamental rules of practice as then existing.

Farnsworth v. *Whiting*, 430.

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Where a boarder fell down a flight of unrailed and unlighted stairs in the darkness of the early morning and was injured, *held* that he was guilty of negligence and could not recover damages for the injury.

Cook v. *McGillicuddy*, 119.

LAW COURT.

See EXCEPTIONS.

Where a petition was filed praying the Law Court to recall its certificate of decision and mandate in a case which had been heard and determined by the Law Court and restore the case to the docket of the Law Court and the case had already gone to judgment when the petition was filed, *held* that there was no statute or rule of law which authorized the Law Court to recall such judgment and reinstate the case on the docket of the Law Court.

Mather v. *Cunningham*, 115.

LEGACIES.

See EXECUTORS AND ADMINISTRATORS. WILLS.

LIENS.

See ATTACHMENT. LOGS AND LUMBER.

LIMITATION OF ACTIONS.

See ACCOUNTING. EQUITY.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LOCAL USAGE.

See CUSTOMS AND USAGES.

LOGS AND LUMBER.

See ASSIGNMENTS. EVIDENCE.

The safe rule for the interpretation of Revised Statutes, chapter 93, section 46, inasmuch as it gives protection to one of the parties but compels the other to pay a debt which he had no voice in contracting, is to neither extend nor restrict its operation beyond the fair meaning of the words used, and to give such a construction as the language naturally imports.

Hutchins v. *Blaisdell*, 92.

Under Revised Statutes, chapter 93, section 46, which gives a lien for cutting, hauling, rafting and driving logs or lumber, no lien is created for "sticking" which is not a necessary incident of hauling but a distinct and independent branch of work requiring experience and skill in order to accomplish the best results. *Hutchins* v. *Blaisdell*, 92.

Where in an action of assumpsit to enforce a lien for "hauling 158,221 feet of lumber at 60c. per M., $94.93," the plaintiff testified that his contract covered both "hauling" and "sticking," and the presiding Justice ruled that there was no lien and denied a motion to amend the writ so as to cover a claim for "hauling" only, *held* that the amendment should have been allowed.

Hutchins v. *Blaisdell*, 92.

NOTE. ***Hutchins v. Blaisdell,* supra, so far as the same implies or holds that there is a lien under Revised Statutes, chapter 93, section 46, for hauling *manufactured* lumber, has been expressly overruled in *Mitchell v. Page,* announced December 15, 1910, and which will appear in a subsequent volume of these reports.**

Where parties agree upon a surveyor to scale logs, they are bound by his scale, in the absence of fraud or mathematical mistake. *Burton* v. *Mayo*, 195.

In an action for the price of logs sold under an agreement that the scale of a surveyor should be final, defendants could not show a contract with third persons requiring defendants to furnish boards of lengths the same as those specified for the logs, and providing that if a board fell even slightly short it must be scaled as of the next lesser specified length, nor that that fact was communicated to the plaintiffs, with the fact that the logs were to be used under the contract; nor could defendants show, by surveys of the logs by other surveyors that the particular survey was not such as was contemplated by the agreement under which the surveyor was appointed, though the contract of sale required a strict scaling, such provision meaning that the logs should be scaled as strictly according to the contract as was practicable by using the method of scaling logs when run out of a boom.

Burton v. *Mayo*, 195.

MANDAMUS.

MASTER AND SERVANT.

MERGER.

See MORTGAGES.

MINORS.

See INFANTS. PARENT AND CHILD. PAUPERS.

MISTAKE.

See REFORMATION OF INSTRUMENTS.

MORTGAGES.

See CHATTEL MORTGAGES. INSOLVENCY. REAL ACTIONS.

MOTIONS.

See COURTS. EXCEPTIONS.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW. STREET RAILWAYS. WATERS AND WATERCOURSES.

The right to use the public streets for the purposes of travel as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the State, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the State, called its police power, be used. *State* v. *Mayo*, 62.

Reasonable regulations for the safety of the people while using the public streets are clearly within the police power of the State, and in the exercise of that power the State may regulate the speed, and enact other reasonable rules and restrictions as to the use of automobiles upon the public streets.
State v. *Mayo*, 62.

Neither the state nor federal constitution prohibits the enactment of section 37 of chapter 23, R. S., imposing a personal liability upon the party assessed for benefits to his abutting real estate resulting from street improvements.
Bangor v. *Peirce*, 527.

A person vested with the legal title to abutting real estate, though in trust only, is within the statute, R. S., chapter 23, section 37, and can be assessed and made personally liable for benefits to such abutting real estate for street improvements, since he has the right of reimbursement from the trust estate, even though no right of reimbursement is expressed in the statute.
Bangor v. *Peirce*, 527.

NATURALIZATION.

Under Revised Statutes of the United States, section 2165 requiring a declaration of intention two years before admission to citizenship, an oath when application for admission is made, and a showing to the court of certain residence in the United States and the particular State, and of good moral

character, etc., such prerequisites are matters of proof, and not of jurisdiction, and hence a record of naturalization need not show residence in the State for the required time. *Rockland* v. *Hurricane Isle*, 169.

In a naturalization proceeding under Revised Statutes of the United States, section 2165, the court has power to admit to citizenship or not, depending upon whether the essential facts are proved, and, in either event, the judgment should be recorded. *Rockland* v. *Hurricane Isle*, 169.

A record of naturalization must be given the same reasonable intendment of construction that is given records in ordinary cases, and hence such record presupposes proof of the residence required by Revised Statutes of the United States, section 2165. *Rockland* v. *Hurricane Isle*, 169.

NAVIGABLE WATERS.

See LOGS AND LUMBER.

"And the waters prevailed, and were increased greatly upon the earth, and the ark went upon the face of the waters." *Genesis*, *VII*, 18.

NEGLIGENCE.

See ATTORNEY AND CLIENT. BAILMENT. COMMON CARRIERS. DEATH. EXECUTORS AND ADMINISTRATORS. LANDLORD AND TENANT. MASTER AND SERVANT. RAILROADS. STREET RAILWAYS.

A person 16 years old is bound to use that degree of care which ordinarily prudent persons of his age and intelligence are accustomed to use.
Wyman v. *Berry*, 43.

When the owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incident to the business carried on there by himself or by his tenants. If the building is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. To those invited, he owes the duty of exercising care in the management of the premises, so that they may not be injured; but to those merely licensed, he owes no such duty. To a mere licensee, he owes no duty, except that he will not wantonly injure him.
Stanwood v. *Clancey*, 72.

NEW TRIAL.

See APPEAL. EVIDENCE. EXCEPTIONS. LAW COURT.

NONSUIT.

See TRIAL.

NOTICE.

See INSURANCE. MASTER AND SERVANT. TAXATION. WAYS.

NUISANCE.

See CRIMINAL LAW. INDICTMENT. INTOXICATING LIQUORS.

Under Revised Statutes, chapter 22, section 1, declaring places used as houses of ill fame or for the illegal sale or keeping of intoxicants, etc., to be common nuisances, all the prohibited acts need not be alleged or proved to constitute a nuisance; it being sufficient to allege one. *State* v. *Arsenault*, 192.

OBLIGATION OF CONTRACTS.

See CONSTITUTIONAL LAW.

OFFICERS.

See CORPORATIONS. EXEMPTIONS.

Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith.
Jensen v. *Cannell*, 445.

Where in an action against a deputy sheriff for making an excessive attachment on a writ and it appeared that the ad damnum in the writ was $50.00 and the officer attached goods claimed to be worth $73.25, but before, making the attachment the officer was informed by a well known and reliable merchant that the value of the goods was much less than $73.25, *held* that the attachment was not excessive. *Jensen* v. *Cannell*, 445.

Where it was contended that an officer was oppressive in refusing to attach goods other than those attached or to take a bond, *held* that there was no adequate evidence to support the contention. *Jensen* v. *Cannell*, 445.

ORDINANCES.

See CONSTITUTIONAL LAW.

PARENT AND CHILD.

See INFANTS. PAUPERS. SALES.

PARTIES.

See EXCEPTIONS.

PAUPERS.

PERJURY.

See INDICTMENT.

PLEADING.

See ASSUMPSIT. ATTACHMENT. DOWER. LOGS AND LUMBER.

PLEA IN BAR.

See JUDGMENT.

POLICE POWER OF THE STATE.

See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS.

POOR PERSONS.

See PAUPERS.

POWERS.

See CORPORATIONS.

PRESCRIPTION.

See TRESPASS.

PRESUMPTIONS.

See CONTRACTS. CRIMINAL LAW. WILLS.

PRINCIPAL AND AGENT.

See ASSOCIATIONS. ATTORNEY AND CLIENT. INSURANCE (ACCIDENT).

PRINCIPAL AND SURETY.

See BANKRUPTCY.

Where the principal and surety duly signed a promissory note and delivered the same to the payee and the payee and the principal without the knowledge or consent of the surety, orally agreed to extend the time of the payment of the note for one year after it became due, and no consideration for the agreement was shown, *held* that the surety was not thereby discharged.

Bartlett v. *Pitman*, 117.

PROBATE COURTS.

See CORPORATIONS. EXECUTORS AND ADMINISTRATORS.

PROCESS.

A writ must show for whose benefit suit is brought.

Hammond v. *Street Ry.*, 209.

PROPERTY DEDICATED TO PIOUS USES.

See RELIGIOUS SOCIETIES. REVISED STATUTES, 1903, CHAPTER 16, SECTION 33.

PROVERBS.

"Battles are never won with blank cartridges." *American.*

"Jest not with a rude man lest thine ancestors be disgraced." *Eastern.*

"Strive not with a man that is full of tongue, and heap not wood on his fire." *Eastern.*

PROXIMATE CAUSE.

See STREET RAILWAYS.

PUBLIC SERVICE CORPORATIONS.

See RAILROADS. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES.

RAILROADS.

See COMMON CARRIERS. DOWER. MASTER AND SERVANT. SPECIFIC PERFORMANCE. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES.

A railway right of way deed binding the company to always maintain an overhead street crossing so far as concerned the property conveyed did not bind the company to build a bridge over an adjoining right of way of another company, though failure to do so defeats the reservation, and though the grantee company afterwards obtained control of the other company.
Brown & Sons v. *B. & M. R. R. Co.*, 248.

The word "highway" in R. S., chapter 52, section 86, which provides that "no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour" is not limited to ways established by county commissioners or by municipal authority, but is used in its more generic and popular legal sense. It embraces all public traveled ways including ways by prescription. *Moore* v. *M. C. R. R. Co.*, 297.

A certain way *held* to be a "highway" within the meaning of R. S., chapter 52, section 86. *Moore* v. *M. C. R. R. Co.*, 297.

The phrase "near the compact part of a town" in R. S., chapter 52, section 86, is not limited to the largest or principal compact part of a town, but applies to any compact portion and was *held* to include a village, with church, school house, engine house, store and dwelling houses in all at least twenty-five buildings, and all situated within three hundred and fifty feet of a central point. *Moore* v. *M. C. R. R. Co.*, 297.

Where a railroad company became obligated by contract to build and did build and plank and keep open a crossing for a prescriptive right of way, the public had a right to use the crossing. It is a crossing within the purview of R. S., chapter 52, section 86. *Moore* v. *M. C. R. R. Co.*, 297.

REAL ACTIONS.

RECALLING JUDGMENT.

RECEIVERS.

RECORDS.

See NATURALIZATION.

REFERENCE.

See ARBITRATION AND AWARD. INSURANCE.

REFORMATION OF INSTRUMENTS.

To constitute a "mutual mistake" so as to authorize reformation of an instrument, the minds of the parties must meet in a common intent.
Potter v. *Frank*, 165.

The burden is on one suing to reform an instrument to show that, when altered it will correctly show the actual intention of both parties.
Potter v. *Frank*, 165.

Evidence in a suit to reform a constable's bond for omission of seals from the signatures *held* insufficient to show that the seals were omitted through mutual mistake. *Potter* v. *Frank*, 165.

RELEASE.

See ATTORNEY AND CLIENT. PRINCIPAL AND SURETY.

RELIGIOUS SOCIETIES.

A dedication of land in pais to a pious use does not transfer the fee, but only the use. The legal title, the fee, remains in the dedicator and his heirs or assigns. *Attorney General* v. *Property in Webster*, 132.

REPLEVIN.

RESIDENCE.

RES JUDICATA.

REVENUE.

See TAXATION.

REVERSIONS.

See ESTATES.

REVIEW.

See AMENDMENTS. EXCEPTIONS. INSTRUCTIONS. LAW COURT.

REVOCATION.

See WILLS.

"RIDERS."

See INSURANCE.

ROADS.

See RAILROADS. WAYS.

RULES OF COURT.

See EXCEPTIONS.

SALES.

See CORPORATIONS. INTOXICATING LIQUORS. LOGS AND LUMBER. STATUTE OF FRAUDS. TAXATION.

Evidence in an action to recover for fishing tackle, guns, revolvers, ammunition and materials for bicycle repairs furnished to the defendant's minor sons, *held* sufficient to sustain a recovery by plaintiff, on the theory that defendant authorized delivery to her sons. *Furber* v. *Wade*, 199.

Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption, and permitting foreclosure of the same as chattel mortgages, applies to an agreement of sale whereby title was retained until payment of notes for the purchase price. *W. E. & M. Co.* v. *Railroad Co.*, 349.

Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption, and permitting foreclosure of the same as chattel mortgages, gives the buyer a right to redeem after condition broken, which right continues until the seller forecloses in the manner provided for foreclosing chattel mortgages. *W. E. & M. Co.* v. *Railroad Co.*, 349.

Under Revised Statutes, chapter 113, section 5, making property sold under retention of title until payment of the price subject to redemption and permitting foreclosure of the same as chattel mortgages, the seller can sue for the debt and also enforce his lien, concurrently or successively, and is entitled to possession as a means of enforcing payment, there being no contrary provision in the contract. *W. E. & M. Co.* v. *Railroad Co.*, 349.

Since the amendment of the statute of frauds, R. S., chapter 113, section 5, an unrecorded agreement that the title in chattels delivered under a conditional sale shall remain in the vendor until payment is of no avail against a purchaser or mortgagee in good faith of the chattels from the vendee. *Muskin* v. *Lazarovitch*, 353.

SCALER.

See EVIDENCE. LOGS AND LUMBER.

SEALS.

See DEEDS.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

SHERIFFS AND CONSTABLES.

See OFFICERS.

SHIPPING.

See NEGLIGENCE.

SIGNATURES.

See DOWER.

SPECIFIC PERFORMANCE.

Specific performance of contracts is a purely equitable remedy, being a substitute for the legal remedy of compensation when it is inadequate or impracticable, and lies within sound judicial discretion on consideration of the particular surrounding circumstances.

Brown & Sons v. *B. & M. R. R. Co.*, 248.

Specific performance lies only when the matter can be disposed of by an order enforceable at once, not lying ordinarily to direct the performance of a continuous duty covering several years.

Brown & Sons v. *B. & M. R. R. Co.*, 248.

Specific performance does not lie to enforce a reservation in a railway right of way deed where it would not benefit plaintiff, and would put the company at unnecessary burden and where a decree could not be wholly performed at once. *Brown & Sons* v. *B. & M. R. R. Co.*, 248.

"SPLITTING" CAUSE OF ACTION.

See ACTIONS. JUDGMENT.

STATE PAUPERS.

See PAUPERS.

STATES.

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

In a suit for the price of corporate stock, instructions that the sale gave the defendant an equitable right to have the stock delivered to him, and that if he took possession under the trade the contract was executed and not within the statute of frauds, were not improper, as not sufficiently distinguishing between plaintiff's intangible rights as stockholder and the corporation's ownership of the physical property, nor as making assumption of possession of the corporation's property ipso facto an actual acceptance and receipt of the stock. *Ford* v. *Howgate*, 517.

Proof of acts respecting the subject matter of a contract of sale, concurrent with or subsequent to its making, showing delivery by the seller and acceptance by the buyer, with intent to give the buyer right of possession as owner, or conduct of the buyer consistent only with his ownership, shows sufficient execution to take the contract outside the statute of frauds, requiring certain contracts of sale to be evidenced by writing unless the buyer receives part of the goods or makes part payment. *Ford* v. *Howgate*, 517.

Delivery and acceptance of goods sold, taking the contract outside of the statute of frauds may be inferred from attendant circumstances.
Ford v. *Howgate*, 517.

A contract to sell corporate stock was taken outside the statute of frauds by the buyer entering upon the management of the corporate business as an owner.
Ford v. *Howgate*, 517.

An entire contract to sell corporate stock and an interest in an automobile was taken outside the statute of frauds by acceptance of the automobile by the buyer. *Ford* v. *Howgate*, 517.

A seller of corporate stock need not procure issuance of a certificate of the shares to the buyer, nor procure a certificate to himself and transfer or tender it to the buyer. *Ford* v. *Howgate*, 517.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

See APPENDIX.

STATUTES.

See COMMERCE. COMPROMISE AND SETTLEMENT. CORPORATIONS. COURTS. CRIMINAL LAW. DEATH. DEEDS. DOWER. ELECTIONS. EMINENT DOMAIN. EQUITY. EXCEPTIONS. EXECUTORS AND ADMINISTRATORS. EXEMPTIONS. INSURANCE. INSURANCE (ACCIDENT). INTOXICATING LIQUORS. LOGS AND LUMBER. MANDAMUS. MUNICIPAL CORPORATIONS. NUISANCE. PAUPERS. RAILROADS. REAL ACTIONS. RELIGIOUS SOCIETIES. REPLEVIN. SALES. STATUTE OF FRAUDS. TAXATION. TELEGRAPHS AND TELEPHONES. WAYS.

When the language of a statute is clear and unambiguous, admitting of only one meaning, it is not permissible to interpret what has no need of interpretation. It is not the province of the court to incorporate into the statute by judicial construction provisions which the legislature did not see fit to insert.
Mowry & Payson v. *Fire Ins. Co.*, 308.

In construing a statute, its practical operation and possible consequences may be considered. *Mowry & Payson* v. *Fire Ins. Co.*, 308.

Under Revised Statutes, chapter 1, section 6, paragraph 1, when a court finds a statute clear in its terms and unambiguous in its meaning it must give it the construction conveyed by the common meaning of the language.
Durgin v. *Curran*, 509.

"STICKERS."

See ELECTIONS.

STREET RAILWAYS.

Where there was a collision between the plaintiff's wagon standing in a street and the defendant's street car, *held* that the evidence failed to prove that the car was running at a "high, rapid and excessive rate of speed."
Higgins v. *Railroad Co.*, 39.

Where there was a collision between the plaintiff's wagon standing in a street and the defendant's street car, *held* that it was the duty of the plaintiff to use due care in so placing his team as not to obstruct the passage of the defendant's cars, and having placed it he impliedly invited the employees to pass if there was ample space. From the attitude and conduct of the team they had a right to assume that the plaintiff had so placed it that it would not move.
Higgins v. *Railroad Co.*, 39.

TAX SALES.

See TAXATION.

TELEGRAPHS AND TELEPHONES.

See EMINENT DOMAIN.

TENDER.

Where a tender made by the defendant was too small by 9 cents, *held* that the tender was insufficient. *Rolfe* v. *Insurance Co.*, 345.

TITLE.

See EMINENT DOMAIN. REAL ACTIONS. SALES.

TORTS.

See DEATH. NEGLIGENCE. TRESPASS.

TOWNS.

See MUNICIPAL CORPORATIONS. WATERS AND WATERCOURSES. WAYS.

TRESPASS.

See DEEDS

Verdict was properly directed for one suing for the value of a building removed from land to which she had the legal title, where the issue was title to the building. *Toothaker* v. *Pennell*, 188.

Plaintiff in trespass quare clausum must affirmatively show his title. *Ripley* v. *Trask*, 547.

A stipulation that defendant in trespass quare clausum cut timber on the land under claim of title to the land is insufficient to show prescriptive title in him. *Ripley* v. *Trask*, 547.

That for over 70 years plaintiff in trespass quare clausum and his predecessors had been in uninterrupted possession of a farm under recorded deeds which included the disputed tract, wild and unfenced land, and that plaintiff was in possession when suit was brought, established his title prima facie. *Ripley* v. *Trask*, 547.

TRIAL.

See APPEAL. CRIMINAL LAW. FIXTURES. INFANTS. NEW TRIAL. STATUTE OF FRAUDS. STREET RAILWAYS. WATERS AND WATERCOURSES. WAYS.

Where an exception to a charge to the jury consists of an extract, detached from its context, the whole charge must be examined in order to determine if the exceptions be well taken. *Nielson* v. *Textbook Co.*, 104.

TRUST DEEDS.

See MORTGAGES.

TRUSTEE PROCESS.

See WILLS.

TRUSTS.

See EXECUTORS AND ADMINISTRATORS. MUNICIPAL CORPORATIONS. WILLS.

UNIFORM PROBATE BLANKS.

See EXECUTORS AND ADMINISTRATORS.

USAGE.

See CUSTOMS AND USAGES.

VENDOR AND PURCHASER.

See RELIGIOUS SOCIETIES. SALES.

VERDICT.

See EQUITY. EVIDENCE. MASTER AND SERVANT. NEW TRIAL.

WAIVER.

See CORPORATIONS. EXEMPTIONS. INSURANCE. INSURANCE (ACCIDENT).

A waiver is a voluntary relinquishment of some known right, benefit, or advantage which, except for such waiver, the party would have enjoyed. A party cannot be deemed to waive by word or act a right which he does not know that he possesses. *Rosen* v. *Insurance Co.*, 229.

WATERS AND WATERCOURSES.

The effect of a contract made by a water company with a town to furnish water to the town for protection against fire, stated.
Milford v. *B. R. & E. Co.*, 316.

A water company contracting to furnish water for fire protection is not liable for municipal property burned through the company's failure to furnish an adequate supply, in the absence of an express undertaking to furnish protection to such property. *Milford* v. *B. R. & E. Co.*, 316.

When a riparian owner gives permission, even gratuitously, to divert water from the stream, he cannot recover damages for such diversion made before revocation of the permission. *Merritt* v. *Water Company*, 537.

WAYS.

See MUNICIPAL CORPORATIONS. RAILROADS.

County commissioners have no jurisdiction to lay out a highway under the provisions of Revised Statutes, chapter 23, section 1, unless the petition therefor describes with reasonable definiteness the places where the proposed way is to commence and terminate. *Bliss* v. *Junkins*, 128.

Where the highway prayed for was described in the petition to the county commissioners as commencing on some point on a way which is one and one-half miles long and as terminating on another way which is five miles long, the proposed way was not described with such reasonable definiteness as to com-

WHARVES.

WILLS.

WORDS AND PHRASES.

WORK AND LABOR.

See ATTACHMENT.

WRITS.

See ATTACHMENT. MANDAMUS. PLEADING. PROCESS. REPLEVIN. TRUSTEE PROCESS.

WRONGFUL DEATH.

See DEATH.

APPENDIX

"I smote the Philistine with an appendix and he died."
Samson.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

REVISED STATUTES OF UNITED STATES.

REPEALING ACT (MAINE).

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Page 103, 7th line from top of page, for "inattention" read "intention."

Page 363, second head note, second line, for the word "telephone" between "a" and "company" read "railway."