"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

107

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 29, 1910—FEBRUARY 16, 1911

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1912

Entered according to the act of Congress
BY
CYRUS W. DAVIS,
SECRETARY OF STATE FOR THE STATE OF MAINE.

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TRUTH AND FALSEHOOD

"Truth is always consistent with itself. Facts are like perfect cubes; it matters not from whence they come; they will always harmonize with each other, and with surrounding objects. Falsehood, on the other hand, is inharmonious and irregular, with sharp angles and jagged corners. It is with much difficulty that two falsehoods can be made to coincide and fit together. But if their number be largely increased, they become an incongruous mass of mis-shapen materials, harmonizing neither with surrounding objects nor with themselves."

JUDGE RICE,
State v. *Knight*, 43 Maine, page 47.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

1. LUCILIUS A. EMERY, CHIEF JUSTICE
2. WILLIAM PENN WHITEHOUSE, CHIEF JUSTICE
   ALBERT R. SAVAGE
3. HENRY C. PEABODY
   ALBERT M. SPEAR
   LESLIE C. CORNISH
   ARNO W. KING
   GEORGE E. BIRD
4. GEORGE F. HALEY
5. GEORGE M. HANSON

Justices of the Superior Courts

6. LEVI TURNER, CUMBERLAND COUNTY
7. JOSEPH E. F. CONNOLLY, CUMBERLAND COUNTY
8. OLIVER G. HALL, KENNEBEC COUNTY
9. FRED EMERY BEANE, KENNEBEC COUNTY

1. Resigned July 26, 1911.
2. Term commenced July 26, 1911.
3. Died March 29, 1911.
4. Appointed April 12, 1911.
5. Term commenced July 26, 1911.
6. Died February 19, 1911.
7. Appointed in February, 1911.
8. Term expired April 26, 1911.
9. Appointed April 26, 1911.

ATTORNEY GENERAL

CYRUS R. TUPPER

Resigned April 3, 1911

WILLIAM R. PATTANGALL

Appointed April 12, 1911

ASSISTANT ATTORNEY GENERAL

CYRUS R. TUPPER

Term Expired June 29, 1911

REPORTER OF DECISIONS

GEO. H. SMITH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1912

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: WHITEHOUSE, Chief Justice, SPEAR, CORNISH, BIRD, HALEY, HANSON, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

SITTING: WHITEHOUSE, C. J., SAVAGE, SPEAR, CORNISH, KING, HALEY, A. J.

AUGUSTA TERM, Second Tuesday of December.

SITTING: WHITEHOUSE, C. J., SAVAGE, CORNISH, KING, BIRD, HANSON, A. J.

TABLE OF CASES REPORTED

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TABLE OF MEMORANDUM DECISIONS REPORTED

TABLE OF CASES CITED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE OF MAINE *vs.* JAKE WISE.

Aroostook. Opinion June 29, 1910.

Intoxicating Liquors. Search and Seizure. Appeal. Practice. Revised Statutes, chapter 133, section 18.

At the trial of a search and seizure process in the appellate court it did not appear from the copy sent up by the magistrate that the complaint was sworn to, the signature of the magistrate having been omitted from the jurat. Thereupon the magistrate was allowed to file a new copy of the complaint in conformity with the original which showed that the oath was duly administered and the jurat signed by the magistrate. *Held:* That since the statute R. S., chapter 133, section 18, requires the magistrate to "send to the appellate court a copy of the whole process," it must be the true record which controls, and the appellate court is entitled to a correct and not an erroneous copy of the process; that it is impossible to conceive of a case in which the observance of this rule of practice could be productive of any hardship or injustice, but that, on the other hand, a contrary rule would open a door through which criminals would frequently stalk unwhipped of justice.

On exceptions by defendant. Overruled.

Search and seizure process originating before a trial justice. The defendant was found guilty and he appealed to the Supreme Judicial Court. On trial in the appellate court the defendant was found guilty. The defendant excepted to certain rulings during the trial.

The case is stated in the opinion.

Eugene A. Holmes, County Attorney, for the State.
Charles Carroll, for defendant.

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

WHITEHOUSE, J. At a hearing before a magistrate, the defendant was found guilty on a search and seizure process and appealed to the Supreme Judicial Court. At the trial in the appellate court it did not appear from the copy sent up by the magistrate that the complaint was sworn to, the signature of the magistrate having been omitted from the jurat. Thereupon the county attorney moved to amend the record in the appellate court; and against the objection of the defendant's counsel, the magistrate was allowed to file a new copy of the complaint in conformity with the original, which showed that the oath was duly administered and the jurat signed by the magistrate. A verdict of guilty was rendered against the defendant and the case comes to this court on exceptions to the ruling of the presiding Justice allowing the magistrate to file a corrected copy of the complaint.

The ruling of the presiding Justice was correct. The amendment was clearly allowable. Section 18 of chapter 133, R. S., requires the magistrate to "send to the appellate court a copy of the whole process." As it must be the true record which controls, the appellate court is obviously entitled to a correct and not an erroneous copy of the process, and for three-fourths of a century it has been the settled practice in this State and Massachusetts for the court to receive such amended copies at any time before the case is given to the jury. *Com.* v. *Phillips*, 11 Pick. 29; *Com.* v. *Magoun*, 14 Gray, 398; *State* v. *Libby*, 85 Maine, 169. See also *State* v. *Young*, 56 Maine, 219; *State* v. *Smith*, 99 Maine, 164; *Com.* v. *Carney*, 153 Mass. 444; *Com.* v. *Sullivan*, 138 Mass. 191.

The court is not convinced by the elaborate argument of the defendant's counsel that this reasonable practice should be reversed. It is impossible to conceive of a case in which the observance of

this rule could be productive of any hardship or injustice. On the other hand it is manifest that a contrary rule would open a door through which criminals would frequently stalk unwhipped of justice.

Exceptions overruled.
Judgment for the State.

ADOLPH ARONS et al. *vs.* SAMUEL CUMMINGS.

Penobscot. Opinion June 30, 1910.

Sales. Acceptance by Buyer. Breach of Contract by Buyer. Goods Sold and Delivered. Special Assumpsit.

Where a buyer ordered clothing to be delivered "on or about September 1st, 1908," and the goods were shipped so that they arrived at destination August 11th, though the buyer had expressly stated to the seller that he would have no room for the goods in his store before September 1st, and, in reply to the seller's notice that they had been shipped, promptly refused to accept them, the sellers in return assuring him that the order called for September 1st delivery, that the bill was so dated, and that he had no cause for complaint and the goods were burned August 17th in a freight shed of the common carrier, *held* that there was no acceptance by the buyer, the premature shipment being a breach of the terms of the order.

The prima facie evidence of acceptance by the buyer arising from a delivery to the carrier as the buyer's agent being overcome by the positive refusal of the buyer to accept the goods, which refusal was justified by the premature and unauthorized shipment, *held* that the sellers could not recover for the goods as for a breach of contract.

An action for goods sold and delivered cannot be maintained without proof of an actual delivery to and acceptance by the buyer.

For the refusal to accept goods sold and tendered to the buyer according to the contract, the remedy of the seller is an action of special assumpsit for a breach of the contract of bargain and sale.

On report. Judgment for defendant.

Assumpsit on an account annexed to recover $413 for clothing alleged to have been sold and delivered by the plaintiffs to the defendant. Plea, the general issue. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

B. L. Fletcher, for plaintiffs.

B. W. Blanchard, and W. P. Thompson, for defendant.

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

WHITEHOUSE, J. This was an action of assumpsit on an account annexed to recover the sum of $413, for clothing alleged to have been sold and delivered by the plaintiffs, who were doing business in New York, to the defendant who was doing business in Bangor, Maine. After the evidence had been introduced, the writ was amended by the insertion of two additional counts, one for goods bargained and sold and one for a breach of contract for non-acceptance. The case is reported for the decision of the Law Court.

On the 4th day of May, 1908, the defendant gave a written order to the plaintiff's agent, for a quantity of winter clothing of the value above stated, to be delivered "on or about September first, 1908," and shipped by the Maine Steamship Company to Portland, thence by the Maine Central Railroad to Bangor. The goods sued for were delivered to the Maine Steamship Company for shipment to Portland August 1, 1908. They arrived in Bangor, August 4th, 1908, and were burned August 17, 1908, in a freight shed of the Maine Central Railroad Company. By the terms of the sale the goods were to be paid for within sixty days from September 1st, and if paid for in ten days from that date, a discount of seven per cent was to be allowed.

On the 31st day of July, 1908, the defendant received notice by letter from the plaintiffs that the goods would be shipped the next day. The defendant promptly replied under the same date saying, "We cannot keep the goods now as we told you not to send them

before September 25. Please advise us what to do about it." To this note the plaintiffs replied under date of August 4, saying "We have looked over your copy of order and the instructions call for September first delivery, and you will notice that the bill is dated September first, you therefore have no kick coming. Hoping this will be satisfactory to you, we remain," etc. August 19, 1908, the defendant notified the plaintiffs by letter that the goods had been burned in the Maine Central freight shed, and suggested that the plaintiffs put in their claim at once. To this the plaintiffs replied under date of August 24, saying, "We are sorry that we cannot make any claim against the Maine Steamship Company for the reason the goods were consigned to you and we were the shippers and the goods does not belong to us any more." Under date of August 28, 1908, the plaintiffs addressed the following letter to the defendant, namely; "We have received today a letter from B. W. Blanchard of your city and we are very much surprised that you have given this over to an attorney. There is no necessity for that as we never expected to sue you for it. If you do not want to bother yourself regarding this shipment, please return the bill of lading and we will make the claim at this point. Hoping this will meet with your satisfaction, we remain," etc. The plaintiffs accordingly presented their claim against the railroad company, but the case is silent as to the result.

The goods in question were designed for winter clothing and the defendant expressly stated to the plaintiffs at the time the order was given on the 4th day of May, that he did not wish to have the goods delivered until September first, for the reason that he then had in stock in his small store, all of his spring and summer goods and would have no room for winter goods before September first.

It is conceded by the plaintiffs that Maine is one of the states in which an action for goods sold and delivered cannot be maintained without proof of an actual delivery to and acceptance by the purchaser, and that for a refusal to accept goods sold and tendered to the purchaser according to the contract, the remedy is an action of special assumpsit for a breach of the contract of bargain and

sale. See *Atwood* v. *Lucas*, 53 Maine, 508; *Greenleaf* v. *Gallagher*, 93 Maine, 549; *Greenleaf* v. *Hamilton*, 94 Maine, 118. But the plaintiffs claim that their case falls within the rule, which is also the settled law of this State as well as in Massachusetts, that when a delivery is made to a common carrier according to the stipulation in the contract, the carrier is thereby made the agent of the buyer and such delivery to the carrier implies an acceptance and is prima facie sufficient to pass the title and enable the seller to maintain an action for goods sold and delivered. In support of this proposition the plaintiffs' counsel cites *White* v. *Harvey*, 85 Maine, 212; *Lombard Co.* v. *Paper Co.*, 101 Maine, 114; *Cox* v. *Anderson*, 194 Mass. 136; *Medicine Co.* v. *Johnson*, 178 Mass. 374; *Wigton* v. *Bowley*, 130 Mass. 252.

But it is equally well established both upon reason and authority that this presumption of acceptance arising from delivery to a carrier is only prima facie evidence and that the rule is not applicable when it appears that the goods are not according to the contract, or that the seller has failed to act in conformity with the authority given him by the buyer, respecting either the method of shipment or the time and place of delivery. In commenting upon this rule in *White* v. *Harvey*, 85 Maine, supra, PETERS, C. J., says: "The delivery at a place agreed is for the buyer's accomodation. Instead of his taking the goods they are sent to him at his direction. Then the seller's responsibility is ended, and an acceptance is implied. The buyer, in effect, agrees that such delivery shall operate as a complete transfer of the property. The buyer is not, however, precluded from the right of inspection or examination, unless such right has been previously exercised, and of subsequently objecting that the goods are not according to the contract. To that extent the acceptance may be considered as conditional."

So if the delivery or shipment is not made in accordance with the terms of the order or the stipulation in the contract between the parties, it is not considered that the delivery is made to the buyer's agent and the title and risk remain in the seller. 24 A. & E. Enc. of Law, 1071-4, and cases cited. In *Soper* v. *Creighton*, 93 Maine, 564, the contract contemplated a prompt delivery to a carrier in

Boston, of goods consigned to the defendants at Thomaston, but such delivery was never made, and the court said: "The defendants might well cancel their order, or which is the same thing, refuse to receive the goods not shipped for a month after they should have been. . . . The title to the goods did not pass to the defendants, nor were the goods seasonably shipped so as to enable the plaintiffs to have damages." See also *Rhoades* v. *Cotton*, 90 Maine, 453.

So with respect to premature delivery, the title does not pass unless such disregard of the terms of the order is waived by acceptance. The buyer is not bound to accept delivery before the time specified. 24 A. & E. Enc. of Law, 1074, and cases cited. In *Maddox* v. *Wagner*, 111 Ga. 146 (36 So. E. 609) the defendant in error was not authorized by the terms of the order to ship the goods from New York to Atlanta until he was notified so to do by the plaintiffs. "When therefore" said the court by C. J. Lumpkin, "he made the shipment without being so notified, he took the risk of acceptance by the plaintiffs. Certainly he had no right to compel their acquiescence in a shipment made in the teeth of the contract, and necessarily shipped the goods at his risk."

In the case at bar it has been seen that by the terms of the defendant's order, the goods were to be shipped "on or about September 12, and the plaintiffs do not deny the statement made by the defendant in his letter of July 31, that he had told the plaintiffs "not to send them before September 25." Thus assuming that the indefinite phrase "on or about" employed in the order might reasonably admit of a departure of several days or a week either way from the first day of September, the plaintiffs well understood that the defendant preferred that this variation should be in the direction of a later instead of an earlier date. Furthermore the language of the plaintiffs' reply of August 4, saying that "the instructions call for September 1st, delivery, that the bill is dated September 1, and that "you therefore have no kick coming," clearly implies that the plaintiffs did not claim that under the terms of the order they had the right to ship the goods before September 1st. It was equivalent to an assurance that they did not expect the defend-

ant to accept the goods before September 1st, that they had shipped them as a matter of convenience to themselves and at their own risk, and that the defendant was in the same position that he would have been if the order had definitely fixed the first day of September as the time for delivery, and the goods had not been shipped until that date. It was a distinct waiver of any claim that delivery to the carrier thirty days earlier might be deemed a compliance with the terms of the order. And this view is confirmed by the plaintiffs' letter of August 28, in which they frankly state that they never expected to sue the defendant, and by their claim against the Maine Central Railroad to recover the value of the goods.

It satisfactorily appears from all the evidence that the time of delivery was mutually understood by the parties to be an essential element in their contract, and the conclusion is irresistible that the shipment made thirty days before the date named in the order was manifestly premature and in contravention of the terms of the order reasonably interpreted.

It is therefore obvious that the plaintiffs' action cannot be maintained on the original count for goods sold and delivered, for the reason that the defendant not only never received the goods in fact but expressly refused to accept them at that early date. It is equally obvious that the action cannot be maintained for a breach of contract for not accepting the goods, because the prima facie evidence of acceptance arising from a delivery to the carrier, as the defendant's agent, is entirely overcome by the positive refusal of the defendant to accept the goods, and the fact that he was justified in this refusal by a premature and unauthorized shipment which did not operate to pass the title to the defendant.

The certificate must therefore be,

Judgment for defendant.

ANNETTE F. DUDLEY, Petitioner, *vs.* J. W. NICKERSON.

Waldo. Opinion June 30, 1910.

Deeds. Delivery. Detention of Deed by Grantor. Rights of Grantee's Creditors.

Where, while a grantee was at the home of the grantor, she told him to hand her a tin box where she kept her papers, and handed him the deed therefrom, saying that she might as well give it to him then, she having held it until that time, because the grantee was in debt and there might be an attachment put on the farm, and the grantee said that he was in debt more than ever, and that she had better hold the deed longer, and that he did not want during her life to have an attachment put on the farm, whereupon she took the deed and put it back in her box which she kept, and he visited her three of four weeks before she died, when she told him that she was going to give him the deed before he went home, and that she wanted him to take it before he went and he left without taking it, *held* that there was no delivery of the deed.

Neither the retention of a deed by the grantor nor its surrender by the grantee to the grantor after a valid delivery will defeat the right of the grantee's creditors to attach the property conveyed.

While delivery of a deed may be inferred from the acts or words of the grantor and grantee, such acts and words must be construed in the light of the object sought to be accomplished and, in making such construction, the presumption that the law is known is not to be disregarded.

On report. Judgment for partition.

Petition for partition of certain real estate in Swanville which the plaintiff claimed to own in common and undivided with the defendant. The defendant filed an answer which, omitting formal parts, is as follows:

"Now comes the defendant, J. W. Nickerson, by Dunton & Morse his attorneys and says that partition ought not to be made of the real estate described in plaintiff's petition, because, he says that the said petitioner, Annette F. Dudley, is not seized in fee simple and as tenent in common of and in said real estate, and is not the owner of one undivided half part or any part thereof with this defendant but that this defendant, J. W. Nickerson, is seized in fee simple of the whole of the real estate described in said petition.

"Wherefore he prays judgment that said petition may be dismissed and for his costs."

At the conclusion of the evidence the case was reported to the Law Court for determination with the following stipulation: "If the Law Court find that there was a legal and valid delivery of the deed from Laura C. Thurston to James W. Nickerson, the petition for partition is to be dismissed with costs, otherwise judgment for partition is to be rendered."

The case is stated in the opinion.

Thompson & Blanchard, for plaintiff.

Dunton & Morse, for defendant.

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

BIRD, J. This petition is brought for the partition of a parcel of land in Swanville, which petitioner claims is owned in common and undivided by herself and defendant as residuary legatees under the last will and testament of Laura C. Thurston, who died on the thirteenth day of September, 1905. Defendant resists partition, alleging seizin in himself of the whole of the parcel, and, in support of his contention, relies upon the deed of said Thurston which he claims was executed, acknowledged and delivered to him by her during her lifetime. The petitioner, while not contesting the execution and acknowledgment of the deed, denies delivery.

The case is before this court upon report wherein it is stipulated that if we find that there was legal and valid delivery of the deed, the petition is to be dismissed, otherwise judgment for partition is to be rendered.

It appears from the record that subsequently to the execution of her will, which bears the date of January 19, 1901, Laura C. Thurston caused to be made a warranty deed of the parcel of land which she executed and acknowledged on the twentieth day of May, 1903. This it is equally apparent was in accordance with her desire expressed both before and after the execution of the deed to make a gift of the land to her brother, the defendant. After her decease,

the deed was found in a box of deceased with other papers. Whether it was delivered or not depends wholly upon the evidence of the defendant.

He testifies that, in June or July of the year 1905, he was at her home and that she told him to hand her the tin box she kept her papers in which he did; that she opened the box and took out the deed and said "I might as well give you this deed now; by what they say you are capable of holding it;" that she gave him the deed which he took and looked over; that her reason for having held it so long was that he was in debt and there might be an attachment put on the farm and that he told her he was in debt more than he ever was; that he told her he couldn't find words to express himself but was very thankful; that in the talk he thought perhaps she had better hold it longer; that he knew he was in debt and, if his creditors should force him then, they would have to take the place; that he didn't have real estate enough to pay his debts and didn't want while she lived to have an attachment put on the farm and that she had better hold it longer; that she took the deed and put it back in her box and put the latter on the writing desk.

He visited her again some three or four weeks before she died and testifies that she told him in the morning she was going to give him that deed before he went home and in the afternoon, when he left there, she wanted to know if he was going home that night and he told her he expected to; that she said "You are coming back before you go?" and, on his replying in the affirmative, she said "I want you to take that deed before you go." He did not return before her death.

Upon this evidence we are forced to conclude that there was no delivery. It is evident that it was the intent, in June or July, 1905, of both grantor and grantee that, in view of the financial embarrassment of the latter, the title should not then pass and the property be exposed to attachment by creditors of grantee. Neither retention of the deed by the grantor nor its surrender by the grantee to the grantor after a valid delivery could defeat the attachment of creditors (*Marshall* v. *Fisk*, 6 Mass. 24, 32) and, while delivery undoubtedly may be inferred from the acts or words of the grantor and grantee,

such acts and words must be construed in the light of the object which the parties are seeking to accomplish and, in making such construction, the presumption that the law is known is not to be disregarded.

The testimony of the witnesses as to deceased's intent to give the farm to her brother and to give him the deed are indicative not of a perfected gift but of a purpose to make one.

The evidence does not overcome the presumption of non-delivery arising from the retention of the deed by the grantor during her lifetime; *Patterson* v. *Snell*, 67 Maine, 559, 561.

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

Judgment for partition.

JOSEPH C. HOLMAN *vs.* WOODARD LEWIS.

Franklin. Opinion July 12, 1910.

Real Actions. Burden of Proof. Evidence. Deeds. Attested Copies. Nonsuit. Lis Pendens. Trial. Rule of Court No. XXVI. Revised Statutes, chapter 84, section 125.

In a real action to recover land the burden is on the plaintiff to prove title to the land demanded.

While Revised Statutes, chapter 84, section 125, and Rule of Court No. XXVI, does not permit the grantee of a deed, or one claiming as heir of the grantee, or justifying as servant of the grantee or his heirs, to introduce in evidence an attested copy from the registry of deeds instead of the original deed, yet it does allow a grantee from such heir to introduce such office copy in his own behalf, though in a previous suit the heir to recover the same land she was not permitted to introduce the office copy, and conveyed her interest to the grantee, her attorney in that suit, and then became voluntarily nonsuit, it not appearing that the conveyance was not made in good faith and with intent actually to pass the title.

In the absence of any circumstances tending to remove the presumption therefrom, an attested copy of a deed from the registry of deeds is prima facie proof not only of the execution of the deed but also of the delivery thereof.

A voluntary nonsuit in an action to recover land as an heir, does not bar a subsequent suit by the heir's grantee.

A judgment of nonsuit is not a bar to a subsequent suit, even when ordered by the court, because, while the facts introduced may be held insufficient in law to support the action, they have not been adjudged—that is, decided—in the defendant's favor.

A nonsuit is not equivalent to a judgment for the defendant.

A grantee of land in litigation takes it subject to such judgment as may eventually be rendered.

On report. Judgment for plaintiff.

Real action to recover one undivided half part in common and undivided of certain real estate in New Vineyard, Franklin County. Plea, the general issue with brief statement that the plaintiff obtained his title pendente lite and was precluded from maintaining his action because of a subsequent judgment of nonsuit in the action then pending.

An agreed statement of facts was filed and the case was then reported to the Law Court for determination with the stipulation that "if, on the above statement of facts, the plaintiff is legally precluded by that judgment of nonsuit from maintaining this action for the land in consequence of said suit of said McCleery becoming nonsuit and after the costs in the said suit had been paid by said McCleery, and before the commencement of the present suit by plaintiff, then plaintiff is to become nonsuit; otherwise judgment is to be rendered for the plaintiff for the land in question in this suit and for his costs of suit."

The case is stated in the opinion.

MEM. See *McCleery* v. *Lewis*, 104 Maine, 33.

Joseph C. Holman, pro se.

Frank W. Butler, for defendant.

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

CORNISH, J. Writ of entry to recover one undivided half of certain land. Plea, nul disseisin with a brief statement that plaintiff obtained his title pendente lite, and is precluded from maintaining this action because of a subsequent judgment of nonsuit in the action then pending.

The burden rested on the plaintiff to prove title to the land demanded. This he did by introducing in evidence the original deed from his grantor Eliza A. McCleery, dated September 22, 1908, and an attested copy from the registry of deeds, of a deed from Joshua Miller, to Rispah Hewey, the mother of both Mrs. McCleery and the defendant, dated October 27, 1855, conveying a life estate to the mother who is now dead, and the remainder to said children.

This met the burden of proof in the first instance, because under R. S., chap. 84, sec. 125, "in all actions touching the realty or in which the title to real estate is material to the issue, where original deeds would be admissible, attested copies of such deeds from the Registry may be used in evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." See also Rule of Court, No. XXVI. The plaintiff comes within none of these exceptions and therefore was entitled to the benefit of the provision allowing an office copy to be used. *Baring* v. *Harmon*, 13 Maine, 361. In the absence of any circumstances tending to remove the presumption arising therefrom, such copy was prima facie proof not only of the execution but of the delivery of the deed. *Whitmore* v. *Learned*, 70 Maine, 276; *Egan* v. *Horrigan*, 96 Maine, 46, page 49.

The agreed statement is barren of any facts tending to remove the presumption of execution and delivery and therefore the plaintiff's case is so far made out.

The defendant, however, rests his defense upon the following facts which are not in controversy.

In September, 1906, the plaintiff's grantor, Eliza A. McCleery, brought a writ of entry against this defendant to recover the same premises. The plaintiff Holman was her attorney in that action. At the trial Mrs. McCleery claimed title under the deed before mentioned from Joshua Miller to her mother, Rispah Hewey, dated October 27, 1855. Her mother had died several years prior to the commencement of that action, and Mrs. McCleery was unable to procure the original deed or to produce any witness who ever saw

such a deed or heard it read. She offered, as her only evidence of title, an office copy of the deed, which was admitted subject to exception, and, the jury having returned a verdict for the plaintiff, the case was carried to the Law Court where the exceptions were sustained and a new trial granted on the ground that the party offering the office copy claimed as heir of the grantee and therefore could not avail herself of the statute and rule of court before referred to. See *McCleery* v. *Lewis*, 104 Maine, 33. After the decision of the Law Court and before final entry, Mrs. McCleery conveyed the premises in question by a warranty deed to her attorney, Mr. Holman, the plaintiff in the case at bar. He purchased them pendente lite and with full knowledge of the situation. After the conveyance to Mr. Holman, and at a subsequent term of court, Mrs. McCleery voluntarily became nonsuit in her then pending action, and after the costs had been paid, the present action was begun by Mr. Holman.

The only question submitted to the court is whether the entry of nonsuit in the original case is a bar to the maintenance of the present action. In the opinion of the court it is not. It is indeed true that the plaintiff, having obtained title with full knowledge of the pending suit, is bound by the result of that suit as his grantor would have been had she kept the title. "It is a well settled rule of law that he who takes a conveyance of land in litigation takes it subject to such judgment as may eventually be rendered in that case." *Berry* v. *Whittaker*, 58 Maine, 422. The transfer to the plaintiff under the circumstances gave him no better title than his grantor had. In the matter of proving title he had an advantage because he could avail himself of the provisions of R. S., ch. 84, sec. 125, while his grantor could not; but so far as the title itself was concerned, it remained in his hands as in hers, subject to the attack of any judgment that might be rendered in the pending suit. His title was her title, no more and no less. The fact is, however, that the title itself was wholly unaffected by that suit. The court rendered no binding judgment on that question. Mrs. McCleery was unable to introduce legally admissible evidence of her title. She could not prove her case. Failing in this, she voluntarily

became nonsuit. But that did not preclude her from beginning another action the very next day, if perchance she had found the original deed to her mother and could have proved its execution and delivery. It was a question of evidence and the new action would be sustained if the evidence were sufficient and the costs of the first suit were paid.

A judgment of nonsuit is not a bar to a subsequent suit even when ordered by the court, because while the facts introduced may be held insufficient in law to support the action, they have not been adjudged, that is, decided in the defendant's favor. A nonsuit is not equivalent to a judgment for the defendant. *Knox* v. *Waldoboro*, 5 Maine, 185; *Pendergrass* v. *York Mfg. Co.*, 76 Maine, 509; *Day* v. *Philbrook*, 89 Maine, 462. A voluntary nonsuit should certainly have no greater effect. If Mrs. McCleery could have maintained another suit upon adequate evidence, it necessarily follows that the plaintiff, her grantee, has the same right. The judgment of nonsuit is no more a bar against him than against her. The plaintiff has commenced this new action and with the aid of the statute before referred to, has introduced sufficient evidence in the first instance to maintain it. What was inadmissible evidence in his grantor's case was admissible in his, and that evidence is not rebutted.

There is no suggestion that the conveyance to the plaintiff was not made in good faith with intent actually to pass the title. What would be the effect of a mere colorable conveyance made for the benefit of the grantor to enable him to avoid the exception in the statute is a question not now before us.

In accordance with the stipulation of the parties, the entry must be,

Judgment for the plaintiff for the premises demanded and costs.

MARIETTA LEAVITT, Petitioner for Partition,

vs.

FRED A. TASKER.

Waldo. Opinion July 12, 1910.

Divorce. Wife's Interest in Land of Husband. Wild Land. Dower. Statute 1895, chapter 157. Revised Statutes 1840, chapter 95, section 2; 1883, chapter 103, section 2; 1903, chapter 62, section 9; chapter 77, section 1, paragraph 1.

Under the provisions of Revised Statutes, chapter 62, section 9, providing that "when a divorce is decreed to the wife for the fault of the husband, for any cause, except impotence, "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," such divorced wife is entitled to one-third in common and undivided of all the real estate, except wild lands, of which the husband was seized during coverture, unless she has barred her right therein.

The expression "wild lands" as used in Revised Statutes, chapter 62, section 9, does not include a wood lot or other land used with the farm or dwelling house, although not cleared. *Held*, that a wife divorced for the fault of her husband, to wit desertion, was entitled to one-third, in common and undivided, of a certain 28 acre wood lot used with the farm.

In the case at bar, *held* that the plaintiff is entitled to one-third in common and undivided of all the real estate described in her petition, and should have judgment for partition.

At common law dower applied to all the lands of which the husband was seized and possessed during coverture, including wild and unimproved lands, subject to certain exceptions.

On report. Judgment for partition.

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

"To the Honorable Justice of the Supreme Judicial Court next to be held at Belfast, for the County of Waldo, on the third Tuesday of April next:—

"Respectfully represents Marietta Leavitt, of Dixmont, in the County of Penobscot, that she is seized in fee simple and as tenant

in common of and in certain real estate situated in Monroe in said County of Waldo, to wit: (Description omitted in this report); also a certain parcel of land situated in Jackson, in said County of Waldo, being part of lot No. 93, according to the plan of said town, and bounded as follows: (Description omitted in this report), being the same two parcels of real estate as were conveyed to John F. Tasker by Stephen Tasker by warranty deed dated August 14, 1880, recorded in Waldo Registry of Deeds, Book 221, page 286; that your petitioner is the owner of one undivided third part thereof with Fred A. Tasker, of said Monroe, who is seized of two undivided third parts thereof, and that your petitioner desires to hold her said interest in severalty.

"Wherefore she prays that notice to all persons interested, to wit, said Fred A. Tasker, may be ordered, commissioners appointed, and her said interest set out to her to be held in fee and in severalty."

The following plea was filed by the defendant:

"The said Fred A. Tasker, respondent, by way of brief statement says that the partition ought not to be made of the real estate described in said petition as prayed for, because, he says, that the said Marietta Leavitt was not at the date of said petition, the owner of one undivided third part or any other part of the real estate described in said petition, and was not then and is not now a tenant in common or joint tenant in said real estate with this respondent.

"And this respondent further says that he is the owner in fee simple of the whole of said real estate."

At the hearing on the petition, an agreed statement was filed and oral evidence introduced. The agreed statement is as follows:

"John F. Tasker, former husband of the petitioner, was the owner in fee of the real estate described in the petition on the third day of September, 1903, and on that day gave his son, Fred A. Tasker, the defendant, a warranty deed of the same. The petitioner was, on the date of said conveyance, the lawful wife of said John F. Tasker and did not sign the deed and has never conveyed her right to said real estate. On the thirty-first day of October, 1908, a divorce from said John F. Tasker was legally decreed to the petitioner for the cause of desertion."

At the conclusion of the testimony, the case was reported to the Law Court for determination and to render such judgment as the "law and the evidence require."

The case is stated in the opinion.

Martin & Cook, for plaintiff.

Dunton & Morse, for defendant.

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

KING, J. Proceedings for partition of real estate. The case is before this court on report.

On September 3, 1903, John F. Tasker, then the husband of the petitioner, conveyed to the defendant, by warrantee deed, the real estate described in the petition. The plaintiff did not join in that conveyance, and has not since barred her right of dower or interest by descent in the premises. October 31, 1908, a divorce was decreed to the plaintiff against John F. Tasker for his desertion of her.

As such divorced wife she claims to be the owner in fee of an undivided third of said real estate by virtue of the following provisions of sec. 9, c. 62, R. S. "When a divorce is decreed to the wife for any other cause" (except impotence) "she shall be entitled to one-third in common and undivided of all of his real estate, except wild lands, which shall descend to her as if he were dead."

The defendant replies, (1) that under that statute the plaintiff is not entitled to any interest in real estate which her husband had conveyed before the divorce, even without her joinder in the conveyance, and (2) that a part of said real estate is "wild land" and therefore expressly excepted from the operation of the statute quoted.

1. The defendant contends that the words "all his real estate" necessarily limit the provision to real estate which remained the husband's at the time of the divorce. We think that contention cannot prevail. The statute should be construed so as to give effect to the legislative intent as disclosed in all its provisions taken together.

Prior to the enactment of chapter 157 of the Laws of 1895 the statutory provision for a divorced wife in her husband's real estate

was as follows: "When a divorce is decreed to the wife for the fault of the husband for any other cause" (except impotence) "she shall have dower in his real estate to be recovered and assigned to her as if he were dead." That provision was construed in *Lewis* v. *Meserve*, 61 Maine, 374, to entitle the divorced wife to dower (then a life estate only) in all dowable real estate of which her husband was seized during coverture, if she had not barred her right therein, the same as if her husband were naturally dead.

By chapter 157 of the Laws of 1895 the right of *widows* in the real estate of their deceased husbands were enlarged from dower to an estate in fee, so that upon the death of a husband there should descend to his widow *in fee* the same share in his real estate that she would otherwise have had, for her life, as dower, and "also including wild lands of which he died seized, but excepting wild lands conveyed by him." By the express terms of that enactment (now par. I, sec. I, c. 77, R. S.) the widow's right extended to "all such real estate of which the deceased was seized during coverture," and in which she had not barred her right.

By the same chapter 157 of the Laws of 1895, the then existing statutory provision for divorced wives in the real estate of their husbands was also changed by amendment to its present form. The change was the substitution for the words, "she shall have dower in his real estate, to be recovered and assigned to her as if he were dead," of the words, "she shall be entitled to one-third, in common and undivided of all of his real estate, except wild lands, which shall descend to her as if he were dead."

If this statutory change had not been made the plaintiff would have been entitled to dower in the dowable real estate described in her petition, notwithstanding her husband's conveyance of it.

What did the legislature intend by that change? Presumably not to lessen the value of a wife's right in her husband's real estate in case he should be so unworthy as to subject her to the necessity of obtaining a decree of divorce against him, but rather to increase the value to her of that right. If the construction contended for by the defendant should be adopted, it would be in the power of the husband, after committing acts of such character as would compel a

self-respecting wife to obtain a divorce from him, to transfer all his real estate and thus deprive her of all interest therein. Such construction is too narrow. To hold such to have been the legislative intent would be to ascribe to the legislature a purpose to deprive an innocent wife, entitled to such divorce, of a valuable right which she then had in her husband's real estate.

Taking all the provisions of chapter 157 of the Laws of 1895 together they disclose clearly, we think, a legislative intent to make the provision for a divorced wife in her husband's real estate, when the divorce is for his fault, similar to the provisions for a widow, so that she will be entitled to the same share in the same real estate, except wild lands, as she would be entitled to "if he were dead."

It follows that the plaintiff is entitled to one-third in common and undivided of so much of the real estate described in her petition as is not "wild lands" within the meaning of that exception as used in the statute.

2. Two lots of land are described in the petition, one being a homestead farm situated in the town of Monroe and containing one hundred acres, more or less, the other being a wood or lumber lot containing twenty-eight acres situated in the town of Jackson about two miles from the homestead. It is not contended that the homestead farm is "wild lands" within the exception to the statute under which the plaintiff claims. But the defendant urges that the 28 acre wood or lumber lot situated in Jackson is "wild lands" and therefore that the plaintiff is not entitled to any interest in it. The plaintiff replies that the 28 acre lot is a wood lot used with the homestead, and for that reason is not to be regarded as "wild lands" within the meaning of those words as used in the statute. The question thus presented is: Do the words "wild lands," as used in the statute under which the plaintiff claims, include a wood lot or other land used with the farm or dwelling-house? We think not.

At common law dower applied to all the lands of which the husband was seized and possessed during coverture, including wild and unimproved lands, subject to certain exceptions. It was early

held, however, in Massachusetts, while Maine was a part of that State, that a widow was not dowable of wild or unimproved lands. *Connor* v. *Shepherd*, 15 Mass. 164. The reason for the exception is that wild and unimproved lands can yield no rents and profits while in that state, and, as well expressed in the case last cited, "there would seem, then, to be no reason for allowing dower to the widow in property of this kind. If she did not improve the land, the dower would be wholly useless; if she did improve it, she would be exposed to disputes with the heir, and to the forfeiture of her estate, after having expended her substance upon it."

This exception to the common law rule, however, has always been coupled with the express provision that the disallowance of dower in wild or unimproved lands does not apply to such land if used with a farm or dwelling-house. *White* v. *Willis*, 7 Pick. 143; *Stevens* v. *Owen*, 25 Maine, 94. The exception with this modification appears in the Revised Statutes of 1840, chap. 95, sec. 2, in these words: "A widow shall not be endowed of wild lands, of which her husband shall die seized, nor of wild lands conveyed by him, although they should be cleared afterwards; but this shall not bar her right of dower in any wood lot or other land used with the farm or dwelling-house, although such wood lot or other land should have never been cleared." This statutory provision, disallowing dower in wild lands, but subjecting to dower "any wood lot or other land used with the farm or dwelling-house" remained unchanged until the amendment of 1895, whereby dower, as such, was abolished, and instead thereof the widow was given an undivided portion of her husband's real estate in fee, "including a wood lot or other land used with the farm or dwelling-house although not cleared, and also including wild lands of which he dies seized, but excepting wild lands conveyed by him, though afterwards cleared." Chap. 157, sec. 1, Laws 1895, now chap. 77, sec. 1, R. S. Thus it appears that in the early decisions introducing the modification of the common law rule to the effect that a widow should not be endowed of wild lands, and in the subsequent legislative enactments to the same effect, down to and including the amendment of 1895, a wood

lot or other land used with the farm or dwelling-house has been expressly included in the real estate subject to dower, and to the *widow's* right by descent.

It is, therefore, apparent that the expression "wild lands," as used in the decisions and statutes to indicate the kind of real estate not subject to dower, does not include a wood lot or other land when used with the farm or dwelling-house.

We have above expressed the opinion that the legislature did not intend by the amendment of 1895 to diminish but to enlarge the right which the then existing statute provided for a divorced wife in her husband's real estate. Prior to the amendment she was entitled to "dower in his real estate," and dower then extended to "any wood lot or other land used with the farm or dwelling-house, although not cleared." (R. S., 1883, chap. 103, sec. 2.)

Under the amendment she is "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." If "wild lands" as used in the exception is to be construed to include a wood lot or other land used with the homestead, then the real estate to which the divorced wife's right applies was lessened by the amendment. Such construction would contravene the manifest legislative purpose, and would be out of harmony with the reasoning of the decisions and the letter and spirit of the statutory provisions that have designated certain real estate as not subject to dower and to the widow's right by descent, with which provisions, we think those enacted in behalf of a divorced wife were undoubtedly intended to be in substantial accord. It is therefore the opinion of the court that the expression "wild lands" as used in sec. 9, chap. 62, R. S., does not include a wood lot or other land used with the farm or dwelling-house although not cleared.

After a careful examination and consideration of the evidence presented in the report it is the opinion of a majority of the court that the 28 acre lot situated in Jackson is a wood lot or other land used with the homestead, and that it is not wild land within the meaning of the exception contained in the statute under which the plaintiff claims.

It follows as the judgment of the court that the plaintiff is entitled to one-third in common and undivided of all the real estate described in her petition.

Judgment for partition accordingly.

ERNEST B. MARCH *vs.* FRANCIS BARNFIELD et als.

Cumberland. Opinion July 21, 1910.

Execution. Arrest. Bond to Release Debtor. Satisfaction.

The bond allowed by Revised Statutes, chapter 114, section 49, to obtain the release of a debtor from arrest upon execution, is satisfied if and when the debtor seasonably and actually does "deliver himself into the custody of the keeper of" the proper jail, even though he does not furnish the jailer with a copy of the bond, or execution, or with any other precept.

Hussey v. *Danforth*, 77 Maine, 17, affirmed.

On agreed statement of facts. Judgment for defendant.

Action of debt on a bond given under Revised Statutes, chapter 114, section 49, to secure the release of the defendant from an arrest on execution, brought in the Superior Court, Cumberland County, against the defendant as principal and Kathleen Barnfield and W. Harry Lynch, as sureties. An agreed statement of facts was filed and the case then reported to the Law Court for determination.

The case is stated in the opinion.

Reynolds & Sanborn, for plaintiff.

Harry E. Nixton, for Francis & Kathleen Barnfield.

Michael T. O'Brien, for W. Harry Lynch.

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

EMERY, C. J. This is an action on a bond given under R. S., ch. 114, sec. 49, to secure the release of a debtor of the plaintiff

from an arrest upon execution. Among other things it was stipulated in the condition of the bond, as provided by the statute, that the bond should be regarded as fulfilled and cancelled if the debtor should, within six months thereafter, "deliver himself into the custody of the keeper of the jail to which he is (was) liable to be committed under said execution."

Before the last day of the term named in the bond the debtor went to the jail to which he was liable to be committed, and offered to surrender himself, informing the jailer that he did so to save his sureties on a poor debtor bond; but he produced no copy of the bond or of the execution. The jailer at first declined to receive him but later did receive him as requested and locked him up in the jail without such copy or any precept. The plaintiff was notified of such surrender and that he would be held responsible for the debtor's bond. The debtor also made written complaint, under section 81 of ch. 114, R. S., of his inability to support himself or furnish security for his support in jail. After remaining in jail some three weeks, his board not being paid, the debtor was allowed to go free at his own request.

The plaintiff contends that the debtor's delivery of himself into the custody of the jailer without any copy of the bond, or execution or other precept, is not such a delivery as is contemplated by the statute and the bond given in pursuance of the statute. His argument is substantially as follows: An arrest upon execution is allowed to compel payment or a disclosure of the debtor's property affairs. If the debtor, instead of making such payment or disclosure, gives the bond permitted by the statute, and again fails to pay or disclose during the term of the bond, he should so deliver himself into the custody of the jailer that he can be lawfully held in jail against his will, so that he may be compelled to make the desired payment or disclosure to obtain his release. If the jailer receives the debtor without any precept or papers showing authority to hold him in jail, the imprisonment is without authority, the debtor is under no compulsion and the purpose of the arrest and bond is defeated.

This action, however, is upon the bond and is to be determined by the terms of the bond, whatever the result. In the bond it is

expressly stipulated that it should be void if the debtor within six months should "deliver himself into the custody of the keeper of the jail," etc. This the debtor did do. He not only offered to do so, but he completed delivery. He was actually received into custody. The jailer accepted him as a prisoner in his custody. The bond did not require the debtor to furnish any precepts or copies but only to "deliver himself." He did all that he and his sureties engaged he should do. The case, *Hussey* v. *Danforth*, 77 Maine, 17, to the same effect is affirmed.

Whether the jailer should have received the debtor without any papers, or having received him should have kept him in custody until he made payment or disclosure, are questions not before us.

Judgment for the defendants.

OSCEOLAR ROBBINS

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec. Opinion August 15, 1910.

Master and Servant. Incompetent Servant. Retention of Incompetent Servant. Negligence. Evidence.

In a legal sense, incompetency or unfitness of a servant is not predicated solely upon a want of ability and comprehension. It may be found side by side with even eminent skill, respecting the particular thing to be done, and yet that skill so often and persistently exercised in violation of rules, orders and regulations as to establish a character for such reckless acts as to render a person, who is in every way mentally competent, legally incompetent.

Past acts of negligence on the part of a servant in the performance of his duties have a direct and natural tendency to prove unfitness and incompetency, are prima facie admissible, and their admission is not in conflict with any rule or policy of law.

Specific acts of prior negligence of a servant are admissible to prove his incompetency where his employer has or ought to have knowledge thereof.

Whatever to the ordinary reasoning mind is logically probative of a fact in issue is prima facie admissible, and should not be excluded unless its admission violates a rule of law or policy.

Specific acts of prior negligence of a servant are admissible to prove the employer's knowledge of his incompetency.

A ruling admitting evidence is not reviewable where it does not appear that exception was taken thereto.

In an action against a street railroad to recover damages for personal injuries to the plaintiff, a motorman, caused by a collision of street cars, *Held:* 1. That the other motorman was incompetent and negligent, and that that incompetency was known to the defendant both when the plaintiff was injured and prior thereto, yet the incompetent motorman was retained in the defendant's employ. 2. That the defendant was liable in damages to the plaintiff.

On motion and exceptions by defendant. Overruled.

Action on the case for personal injuries received by the plaintiff while in the performance of his duties as a servant of the defendant, claimed to have been caused by the negligence of the defendant in the choice and retention of one Merton L. Taylor and one Dana P. Sanborn, fellow-servants of the plaintiff, or one of them. Plea, the general issue. Verdict for plaintiff for $7500. The defendant excepted to certain rulings and also filed a general motion for a new trial.

The case is stated in the opinion.

The plaintiff's writ contains three counts. The first count setting out the cause of action generally, is as follows:

"In a plea of the case for that on the 20th day of July, A. D. 1907, the defendant company, to wit, the Lewiston, Augusta & Waterville Street Railway was a corporation duly organized by law and as such owned and operated a certain street railway or electric railway between the town of Winthrop and the city of Augusta, as a common carrier of passengers for hire, and as part of its business and in the usual course, thereof, owned and operated through its servants and agents, certain electric cars, so called, or cars the motive power of which was electricity. And the plaintiff was then and there an agent or servant of said defendant company's. And on the day, aforesaid, to wit, the 20th day of July, A. D. 1907, was duly and regularly employed as motorman aforesaid, and in the

regular course of his employment was driving a certain car belonging to said company from Winthrop aforesaid to Augusta, aforesaid. And the plaintiff says that the defendant company then and there owed him the duty of providing a reasonably safe and suitable place in which, and reasonably safe and suitable appliances with which to perform his labor, as aforesaid, and the plaintiff says the defendant company then and there owed him the duty of using reasonable care and diligence in the engaging, hiring or employing of reasonably careful and prudent servants or agents having a view to the nature of the work to be performed so that he would not in the ordinary and regular course of his employment be exposed to undue and unnecessary risk from the negligence or carelessness of negligent and careless fellow-servants. But the plaintiff says the said defendant company wholly unmindful of its duty in this regard and totally disregarding same, carelessly and negligently engaged or employed certain servants or agents, to wit, Merton L. Taylor and Dana Sanborn, as motorman and conductor, respectively on one of the defendant company's cars, and the plaintiff says these men were totally and absolutely unfit for the work to which they were assigned because of immaturity of age, want of experience and a careless, negligent and wilful tendency to disregard the rules of the defendant company's and the orders of their superiors in authority. All of which the defendant company then and there well knew, or in exercise of ordinary and reasonable care and diligence might have known and all of which the plaintiff was ignorant of and not at all informed of. And the plaintiff says that while in the due discharge of his duty and in the exercise of due care and in no way due to his fault, but entirely and solely due to the reckless, careless, wilful and wanton negligence of Merton L. Taylor and Dana Sanborn, aforesaid, the car in and upon which the plaintiff was at work as motorman, aforesaid, while coming toward Augusta and while in the town of Winthrop was suddenly crashed into by a car driven by said Merton L. Taylor and on which said Dana Sanborn was conductor and the plaintiff was then and there crushed, maimed and greatly injured about his head and chest, his spine and spinal cord and the structures thereto attendant, his stomach and bowels, his arms and

legs, receiving a great shock to his nervous system, injuring his brain, rendering him unconscious and otherwise greatly injuring him in mind and body, and as a result the plaintiff has suffered great pain and anguish both of mind and body, has been put to great expense for medical treatment, medicine and nursing, has been wholly unable to work or labor from the day of the accident to the date of this writ and is permanently injured and will be unable ever again to do work or labor."

Benedict F. Maher, for plaintiff.

Heath & Andrews, for defendant.

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

SPEAR, J. This case comes up on motion and exceptions. The case is stated in the defendant's brief as follows:

On July 20, 1907, the plaintiff was a motorman on defendant's trolley car then running from Winthrop to Augusta, on a road which is operated by the block signal system. The track between the substation at East Winthrop and Island Park is governed by a block with lights at each end. Plaintiff, when about to leave the substation, found a white light in front of him, indicating, according to the system, that there was no car in the block coming toward him from Island Park. He was justified in going ahead into the block as he did. The due care of the plaintiff throughout is admitted.

Two cars had left Augusta running opposite to plaintiff, one the regular car bound for Winthrop, the other a special car with orders to run only to Island Park and to there cross plaintiff. The special had no right to go beyond Island Park. It was to follow the regular from Augusta to Island Park. The regular carried a sign "Car following" to indicate to all crossing cars that they should wait for the special. Plaintiff's car and the regular from Augusta should have crossed at Island Park, if both had been on time. On arriving at Island Park, plaintiff's car not being there, the regular properly proceeded on towards the substation, as the light at Island Park was white indicating that plaintiff had not arrived at the substation. When the regular so entered the block it threw the light at the sub-

station red indicating to plaintiff that he must wait for the regular before entering the block. The regular on crossing plaintiff at the substation took off the sign "Car following," as they knew the orders were for the special to remain at Island Park. When the regular passed plaintiff at the substation, he was justified in believing there was and would be no car in the block. The regular as it left the block turned the light white, a mechanical order to plaintiff to proceed to Island Park.

The special, without orders and against orders, left Island Park shortly after the regular and, unseen by the regular, continued to follow it to the substation. This had no effect upon the substation light which could be changed from red to white only by the action of the forward car, the regular. If the following car violates orders and enters a block behind a regular, the protection of the crossing car is in the "Car following" sign.

As a result the car of plaintiff and the special collided in the block, severely injuring plaintiff. That Taylor the motorman and Sanborn the conductor in charge of the special were both guilty of negligence in so entering the block was admitted. The damages were assessed at $7500. The defendant does not contend that the Law Court would be justified in finding the damages to be unreasonably excessive.

From this statement it will be seen that the plaintiff's action rests upon the claim that the defendant was negligent in the selection and retention of its servants, Taylor and Sanborn, especially Taylor, the motorman, when it knew, or by the exercise of due care should have known, his incompetency. The negligent act complained of was the running into the block without orders and against orders in violation of the rule.

The fate of the motion depends upon the result of the exceptions. If the exceptions prevail, the evidence in support of the verdict disappears. If the exceptions fail, the verdict is well founded. In other words, the evidence, if admissible, amply sustains both the charge of unfitness of the servant and such notice thereof to the defendant that it knew or by due care ought to have known of his incompetency.

But it is contended that the negligent acts of the servant, which by the verdict we must assume to be proven, were not of such a character as to fairly warrant the conclusion of incompetency. We think differently. Time after time he ran his car, in violation of rules and orders and against the protest even of the conductor, round curves at an excessive rate of speed. So persistently and recklessly did he do this that one conductor, after repeated reports of these wilful acts of misconduct to the superintendent of the defendant company, resigned his position rather than continue the hazard of further employment with this young man acting as motorman. He violated the controller handle rule which forbids a motorman to leave the car without taking his controller handle with him; he ordered the substation to shut down the power, clearly exceeding his authority; he refused to exchange passengers as ordered thereby disobeying the direct order of the superintendent; he refused to obey the conductor's signal bells.

These varied acts of insubordination seem to us more potent in their tendency to establish character for wilful disobedience, than the repetition for an equal number of times of the same act, involving the precise element of character. The conduct of this servant as manifested by these various acts fully brings him within the rule of legal incompetency. In the legal sense, incompetency or unfitness, is not predicated solely upon a want of ability and comprehension. It may be found side by side with even eminent skill, respecting the particular thing to be done, and yet that skill may be so often and persistently exercised in violation of rules, orders and regulations as to establish a character for such reckless acts as to render a person, in every way mentally competent, legally incompetent. Such is the tenor of the decisions.

In *Consol. Coal Co.* v. *Seniger*, 179 Ill. 370, 53 N. E. 733, the court say: "One is incompetent who is wanting in the requisite qualifications for the business intrusted to him. (He) was incompetent—if he was wanting in the qualifications required for the performance of the service, whether arising out of lack of knowledge or capacity, or other imprudence, indolence, or habitual carelessness." In *Maitland* v. *Gilbert Paper Co.*, 97 Wis. 476, 72 N. W., at

1129 the court say: "A competent man is a reliable man. Incompetency exists not alone in physical or mental attributes but in the disposition with which a person performs his duties, and though he may be physically and mentally able to do all that is required of him, his disposition towards his work, and toward his employer and towards fellow servants, may make him an incompetent man." And it has been said in the recent case of *Hamann* v. *Bridge Co.*, 127 Wis. 550, 105 N. W. 1084: "Incompetence in the law of negligence, means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's abilities and experience properly."

See also *Young* v. *Milwaukee Gas Co.*, 133 Wis. 9, 113 N. W. 59; *Still* v. *San Francisco & N. W. Ry.*, 154 Cal. 559, 98 Pac. 672; *Beers* v. *Prouty & Co.*, 200 Mass. 19, 85 N. E. 864; *Baird* v. *New York Cent. & H. R. R. Co.*, 172 N. Y., 65 N. E. 1113.

Therefore, if the evidence of these specific acts of the servant was admissible to prove both incompetency and knowledge, then, the defendant being amply charged with knowledge, the jury were authorized to find the servant incompetent and to declare it negligent in longer retaining this young man in its employ as a motorman.

This brings us to the question raised by the exceptions: Is the evidence of specific acts of prior negligence admissible to prove (1) incompetency, (2) knowledge to the master. All the exceptions but one, which will be discussed later, present the same question of law and may be considered together.

The defendant does not question the assertion that the great weight of authority is in favor of the admission of such testimony, and cites only Massachusetts and Pennsylvania in opposition. On the other hand it appears from the plaintiff's brief that twenty-nine of the thirty-one States that have passed upon this question have decided in the affirmative. The precise question has never been raised in this State. We are, therefore, free to adopt that rule which seems best calculated upon the principles of reason and authority to attain the best results. Upon a careful examination of the authorities

it is the opinion of the court that the rule admitting specific acts of prior negligence, tending to prove the incompetency of a servant, when the master has actual knowledge of such acts or by the exercise of due care should have had such knowledge, is the safer and better rule to establish.

In arriving at this conclusion we have carefully reviewed and considered the reasons advanced by the courts for the directly opposite views by them declared.

The Massachusetts and Pennsylvania courts base their decision upon the doctrine of surprise and multiplicity of issues. See *Hatt* v. *Nay*, 144 Mass. 186; *Frazier* v. *Pennsylvania R. R.*, 38 Penn. 104. While many strong reasons may be adduced in favor of this doctrine, it has yet been found so impracticable in its application to concrete cases that even the later Massachusetts cases have felt compelled to modify it. See *Cox* v. *Central Vermont R. R.*, 170 Mass. 129; *Ledwidge* v. *Hathaway*, 170 Mass. 348; *Olsen* v. *Andrews*, 168 Mass. 261; *Peaslee* v. *Fitchburg*, 152 Mass. 155.

It should be observed, however, that the court stood squarely upon the original doctrine in *Coney* v. *Commonwealth Ave. St. Ry.*, 196 Mass. 111, and that the rule of exclusion is the law of Massachusetts today.

The opposite rule seems to be based upon the ground of natural admissibility. In Thayer's Preliminary Treatise Law of Evidence, page 530, is found the following:

"In like manner, in the whole of the secondary and adjective part of the law there should be little opportunity to go back upon the rulings of the trial judge; there should be an abuse, in order to justify a review of them by an appellate court. In order to make this practicable, the rules of evidence should be simplified; and should take on the general character of principles, to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief. (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."

From this it may be stated as a general principle that whatever, to the ordinary reasoning mind, is logically probative of a fact in issue, is prima facie admissible; and should not be excluded unless its admission is in conflict with some principle of law or in violation of some rule of policy. Past acts of negligence on the part of a servant in the performance of his duties have a direct and natural tendency to prove unfitness and incompetency, are prima facie admissible, and their admission is not in conflict with any rule or policy of law as the cases clearly show. In the *Pittsburg, Fort Wayne and Chicago Railway Company, Appellant*, v. *Ruby*, 38 Ind. 294, 10 Am. Rep. 111, it was held:

"In an action by a servant against the master to recover damages for injuries occasioned by the negligence of a co-servant, held, that evidence of particular acts of carelessness and negligence on the part of the co-servant was admissible to show that the master had retained said co-servant in his service after he knew, or ought to have known, that said servant was careless and negligent."

A review of this opinion will disclose that the case was carefully considered and the opposite doctrine fully condemned. *Baulec* v. *New York and Harlem Railroad Co.*, 59 N. Y. 356, 17 Am. Rep. 325, involves the precise point in issue. After specifically rejecting the Massachusetts and Pennsylvania doctrine and fully approving the rule enunciated in the 38 Indiana, the court proceeds to give the following sound and cogent reasons for its opinion:

"Then as here the general fitness and capacity of a servant is involved the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence or other acts of misconduct or neglect of servants or employes, whose acts and omissions of duty have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. . . . When character as distinguished from reputation is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfit-

ness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation and by which their characters are known and described, and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent or careless man. He would be held liable to the fellow-servants of the employe for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned to him and which might expose his fellow-servants and others to peril and harm."

The same rule is found in various states as shown by the following cases: *Staunton Coal Co.* v. *Bub*, 218 Ill. 125, 75 N. E. 770; *Evansville & T. H. R. Co.* v. *Guyton*, 115 Ind. 450, 17 N. E. 101; *Pfuld* v. *Romer Sons*, 107 Minn, 353, 120 N. W. at 303-304; *Hilts* v. *Chicago & G. T. Ry. Co.*, 55 Mich, 437, 21 N. W. 881; *Tucker* v. *Miss. & K. Tel. Co.*, 132 Mo. App. 418, 112 S. W. 8; *Galveston, H. & S. A. Ry. Co.* v. *Davis*, 4 Tex. Civ. app. 468, 23 S. W. 305; *First National Bank* v. *Chandler*, 144 Ala. 286, 39 So. 828; *L. & N. R. R. Co.* v. *Wyatt's Admr.*, 29 Ky. Law Rep. 437, 93 S. W. 604; *Stoll* v. *Daly Min. Co.*, 19 Utah 271, 57 P. 295; *Green* v. *Western Am. Co.*, 30 Wash. 87, 70 P. 320.

In *Smith* v. *Chicago P. & St. L. Ry. Co.*, 236 Ill. 369, will be found this significant language: "The mere happening of an accident would not ordinarily raise a presumption of incompetency. . . . but the conduct of a person on a single occasion may be entirely sufficient to demonstrate his unfitness, and, after such an occurrence, to charge the employer with a failure of duty in keeping him in the service."

We feel clear upon both reason and authority that the exception to the class of evidence above discussed should be overruled.

The exception to the admission of acts of prior negligence to prove the knowledge of the master has been coupled with the exception to the admission of such evidence to prove incompetency, inasmuch as, if the latter was determined to be competent evidence, the former, a fortiori, must be admissible. This conclusion is fully supported by the cases already cited upon the main proposition, and need not be further discussed. This exception should also be overruled.

The third and only other exception to be considered relates to the admission of the testimony of Maud Smith of a conversation which she heard related, at one time, by her husband to the superintendent of the road as to an accident, and injuries received by him while alighting from a car, upon which Merton Taylor was acting as motorman, and repeated at another time to one of the directors of the defendant company. This exception refers generally to the testimony of the witness to be found in the case enclosed in brackets. As no brackets appear to enclose any part of the evidence, we are able to consider only the pages referred to in the defendant's brief. But these pages do not disclose that any exceptions were taken. Therefore, we are unable to examine this exception further than to say that the evidence seems to be entirely competent upon the question of notice to the defendant.

It is conceded that the plaintiff, when injured, was in the discharge of his duties and in the exercise of due care. The evidence discloses that he was injured by the negligence of the defendant's servant; that the servant was in fact incompetent; and that his incompetency was known to the defendant, when the plaintiff was injured and prior thereto, and yet he was retained in its employ.

Motion and exceptions overruled.

JOSEPH C. TREMBLAY *vs.* OTIS W. KIMBALL.

Androscoggin. Opinion September 1, 1910.

Druggists. Degree of Skill Required. Care. Ordinary Care. Duties. Prescriptions. Negligence. Burden of Proof. Evidence.

A registered apothecary or any one who undertakes to act as a qualified druggist in preparing medicines and filling prescriptions must possess a reasonable and ordinary degree of knowledge and skill respecting the duties he professes to be able to perform, but he need not possess the highest degree of knowledge and skill known in his profession; it being sufficient that he have that reasonable degree of learning and skill ordinarily possessed by other druggists in good standing as to qualifications in similar communities.

A druggist must use reasonable and ordinary care in applying his knowledge and skill in compounding medicines, filling prescriptions, and performing other duties of an apothecary, but he need not use extraordinary care of a higher degree than is ordinarily used by other qualified druggists.

A druggist must give his patrons the benefit of his best judgment in compounding medicines, filling prescriptions, etc., but is not necessarily responsible for an error of judgment consistent with ordinary skill and care.

The ordinary care required of a druggist in compounding medicines and filling prescriptions requires a degree of vigilance and prudence commensurate with the dangers involved, and the highest practicable degree of prudence, thoughtfulness, vigilance, and the most exact and reliable safeguards consistent with reasonable conduct of the business that human life may not be exposed to the danger resulting from substitution of deadly poisons for harmless medicine.

In an action against an apothecary for negligence in filling a prescription, the burden was on the plaintiff to prove that in delivering corrosive sublimate tablets, instead of chlorodine tablets called for in the prescription, the apothecary failed to use the degree of care required by law.

Evidence *held* to sustain a finding that an apothecary sued for negligently substituting corrosive sublimate tablets for chlorodine tablets as called for by a prescription failed to use ordinary care.

On motion by defendant. Overruled.

Action on the case to recover damages for the alleged failure of duty on the part of the defendant, a registered apothecary, in filling a physician's prescription by substituting corrosive sublimate tablets for chlorodyne tablets.

The declaration in the plaintiff's writ states the case as follows:

"For that the said defendant on the eighth day of May A. D., 1909, at East Livermore in the County of Androscoggin in the State of Maine, was employed as a duly registered apothecary in a drug-store, and had sole charge of compounding, putting up and dispensing drugs and medicines under the provisions of chapter 30 of the Revised Statutes of the State of Maine, for a consideration to said defendant from the plaintiff was using medicines and drugs in preparing, compounding and putting up or filling written prescriptions of physicians. And the plaintiff avers that said defendant was then and there bound to use such due care, judgment and skill in preparing, compounding and putting up prescriptions and dispensing medicines and drugs to customers or patients having prescriptions from physicians as is required to prevent the misuse and misapplication of all medicines, and drugs, and especially of all deleterious or poisonous substances, so as to avert all possible danger to patients and customers. But that on said 8th day of May at said drug-store in said East Livermore, said defendant did so carelessly, unskillfully, and negligently perform his said duty as a registered apothecary aforesaid, that in putting up or filling for the plaintiff a physician's prescription of the following tenor to wit:

'L. Geo. Belisle, M. D. Chisholm, Maine.

R 5521—5-8-09 Chlorodyne Tablets No. XXV

Sig. Une pilule a Toutes les 4 heures

L. Geo. Belisle, M. D.'

Which he then and there received, took, and undertook to put up or fill. That he substituted for and instead of chlorodyne tablets, antiseptic tablets each containing a fatally poisonous dose of corrosive sublimate to wit: 7 grains of corrosive sublimate in each tablet with directions in writing upon the box containing said tablets to take one tablet every four hours, and delivered said box containing said tablets with said directions to the plaintiff and received from the plaintiff the sum of twenty-five cents in payment therefor, and the plaintiff avers that he then and there confiding in the skill,

judgment and care of said defendant in his business and duty did take into his mouth and swallow into his stomach one of said corrosive sublimate tablets aforesaid, which said tablet then and there immediately caused and produced burning heat in his throat: Severe pains in his stomach and intestines, great thirst, nausea, and retching, feeble pulse, cold sweating, cramps and inability to talk, a boiling sensation in his stomach and froth foamed from his mouth, and his stomach and intestines were burned, poisoned and corroded and have remained so hitherto, and have become and are now strictured, whereby and by reason whereof he has suffered great pain and anguish, and become sick and unable to perform any labor then or since, and was put to great expense for medical attendance and nursing to wit: the sum of two hundred dollars and lost a large sum of money which he would otherwise have received for his labor to wit: the sum of two hundred dollars, and other wrongs and injuries sustained all to his damage in the sum of five thousand dollars. And the plaintiff further avers that L. Geo. Belisle, M. D., from whom he procured the aforesaid prescription is a physician and surgeon practicing his said profession in the village of Chisholm in the State of Maine. And that he acted in good faith and in the exercise of due care, and free from negligence or contributory negligence in the purchase and use of said tablets, but through the negligence and carelessness of said defendant, his health and prospects have been ruined."

Plea, the general issue. Verdict for plaintiff for $1400. The defendant then filed a general motion for a new trial.

The material facts are stated in the opinion.

B. Emery Pratt, for plaintiff.

Newell & Skelton, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $1400 for an alleged failure of duty on the part of the defendant, who was a registered apothecary employed by the Hamel Brothers in their drug store at Livermore Falls, and in that capacity filled a physician's

prescription for the plaintiff calling for chlorodine tablets by substituting corrosive sublimate tablets containing about 7.3 grains of bichloride of mercury and 7.3 of muriate of ammonia. One grain of this mixture was sufficient to cause death. Neither of the Hamel Brothers was a registered apothecary or pharmacist, and the sole responsibility of compounding medicines and filling prescriptions was imposed upon the defendant. It is not in controversy that the plaintiff presented to the defendant a prescription from a regular physician calling for chlorodine tablets and that instead of this harmless medicine the defendant delivered to the plaintiff the corrosive sublimate tablets, the deadly poison above described. According to the directions accompanying the prescription, the plaintiff immediately took one tablet and thereby suffered the injuries of which he complains, his life being saved only by the prompt administration of appropriate remedies. The physician states that the plaintiff is now suffering from a stricture of the pylorus or lower part of the stomach and that in his opinion he will never be able to perform any hard work in the future. It is alleged in the plaintiff's declaration that in filling this prescription, the defendant performed his duty as an apothecary, carelessly, unskillfully and negligently. On the other hand, it is contended by the defendant that the mistake was made by one of the Hamel Brothers in having two bottles side by side marked chlorodine tablets, one of which, however, contained the poisonous tablets in question, and that these tablets so closely resembled each other that it was not negligence on the part of the defendant to fill the prescription as he did. The jury returned a verdict for the plaintiff as above stated and the case comes to the Law Court on a motion to set aside this verdict as against the evidence.

The rules of law governing this class of cases are closely analogous to those applicable to physicians and surgeons. A registered apothecary, or any person who undertakes to act in the capacity of a qualified druggist in preparing medicines and filling physicians' prescriptions, is required by law in the first place, to possess a reasonable and ordinary degree of knowledge and skill with respect to the pharmaceutical duties which he professes to be competent to perform.

He is not required to possess the highest degree of knowledge and skill to which the art and science may have attained. He is not required to have skill and experience equal to the most eminent in his profession. He is only required to have that reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing as to qualifications in similar communities.

In the second place the law imposes upon the druggist the obligation to exercise all reasonable and ordinary care and prudence in applying his knowledge and skill in compounding medicines, filling prescriptions and performing all of the other duties of an apothecary. He is not bound to use extraordinary care and prudence, or a greater degree of care than is ordinarily exercised by other qualified druggists. Ordinary skill is the test of qualification and ordinary care is the test of the application of it.

Finally, in applying his knowledge and exercising care and diligence, the druggist is bound to give his patrons the benefit of his best judgment. For even in pharmacy there is a class of cases in which judgment and discretion must or may be exercised. The druggist is not necessarily responsible for the results of an error of judgment which is reconcilable and consistent with the exercise of ordinary skill and care. He does not absolutely guarantee that no error shall ever be committed in the discharge of his duties. It is conceivable that there might be an error or mistake on the part of a qualified druggist which would not be held actionable negligence. *Pullen* v. *Wiggin*, 51 Maine, 596; *Leighton* v. *Sargent*, 7 Foster (N. H.) 460; *Small* v. *Howard*, 128 Mass. 131. As to druggists see *Thomas* v. *Winchester*, 6 N. Y. 397; *Norton* v. *Sewall*, 106 Mass. 143; *McDonald* v. *Snelling*, 14 Allen 290; *Brown* v. *Marshall*, 47 Mich. 576.

But while as has been seen, the legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase "ordinary care," yet it must not be forgotten that it is "ordinary care" with reference to that special and peculiar business. In determining what degree of prudence, vigilance and thoughtfulness will fill the requirements of "ordinary care" in compounding medicines and filling prescriptions, it is

necessary to consider the poisonous character of so many of the drugs with which the apothecary deals and the grave and fatal consequence which may follow the want of due care. In such a case "ordinary care" calls for a degree of vigilance and prudence commensurate with the dangers involved. The general customer ordinarily has no definite knowledge concerning the numerous medicines and poisons specified in the "U. S. Dispensatory and Pharmacopoeia," which registered apothecaries are by our statutes expressly allowed to keep, but must rely implicitly upon the druggist who holds himself out as one having the peculiar learning and skill and conceptions of legal duty necessary to a safe and proper discharge of that duty. "Ordinary care" with reference to the business of a druggist must therefore be held to signify the highest practicable degree of prudence, thoughtfulness and vigilance and the most exact and reliable safeguards consistent with the reasonable conduct of the business in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine. As observed by Judge Cooley in *Brown* v. *Marshall*, 47 Mich. 576, "The case it must be conceded is one in which a very high degree of care may justly be required. People trust not merely their health but their lives to the knowledge, care and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved. *Maxfield* v. *R. R. Co.*, 100 Maine, 80 and cases cited. *Raymond* v. *Railroad Co.*, 100 Maine, 531.

In the case at bar no question appears to have been raised in regard to the skill and experience of the defendant as a registered apothecary, and it was incumbent upon the plaintiff to prove that in delivering to him corrosive sublimate instead of the chlorodine tablets called for in the prescription, the defendant failed to exercise the high degree of care and prudence required of him under the rules above stated.

When the physician who prescribed the chlorodine tablets for the plaintiff, returned to the defendant the poisonous tablets of corrosive sublimate and informed him that "there must be a mistake," the

defendant freely admitted that there had been a mistake but claimed that at the time of the removal of Hamel Brothers from Chisholm to Livermore Falls, one of the firm had by mistake put these large white tablets into a bottle having upon it the manufacturer's label "chlorodine tablets." The defendant testifies that Hamel stated to him that he "put those tablets in there" and when the stock was removed from the other store 'the tablets got mixed or that bottle was mixed in with the others' and that was the explanation." It is also contended in the argument for the defendant that not only were those two bottles alike that were labeled "chlorodine tablets" but that the tablets in the two bottles were alike in color, size and shape.

But the evidence fails to support the contention that the tablets in both bottles had the same appearance. On the contrary, the physician distinctly states in his testimony that the tablets in the two bottles shown him by the defendant were wholly and strikingly different in both color and size, that in one were large white tablets "marked 'poison' in big letters on the tablets," and in the other were the "real chlorodine tablets" small and very dark green in color, and having the same appearance as the small dark tablets exhibited in evidence to the court. The defendant denies that the word "poison" was stamped on the white tablets, but admits that the genuine chlorodine tablets with which he filled the plaintiff's prescription, after the discovery of the mistake, were taken from the other one of the two bottles on the shelf labeled "chlorodine tablets," and that those tablets "looked like" the two small dark green ones in evidence. He further states that the bottle from which the white poisonous tablets were taken disappeared without his knowledge." There is evidence that chlorodine tablets are of different colors, but no evidence of white ones. The physician states that he never saw any white ones. There is a conflict of testimony, as already stated, upon the question whether the word "poison" was stamped on the white tablets delivered to the plaintiff by the defendant. One of these tablets exhibited in court has been so discolored and worn by handling that no letters can now be distinguished even with the aid of a magnifying glass.

Although the two bottles of tablets in question both had the manufacturer's labels upon them, it must be remembered that the tablets were not sold in unopened bottles as original packages, but were taken out of a large quantity in a bottle that had been opened, and thus the defendant had full opportunity to inspect and examine the tablets. It is inconceivable that if he had given thoughtful attention to the matter he could have failed to note the striking difference in the appearance of the tablets in the two bottles bearing the same label, and the extraordinary if not unprecedented fact that in one of them the supposed chlorodine tablets were white. Yet, so far as appears, no special examination or effort was made to determine the real character of the white tablets but apparently without question or hesitation they were delivered to the plaintiff as harmless medicine. The explanation of the mistake was evidently unsatisfactory to the jury.

It is the opinion of the court that there was sufficient evidence to support the conclusion manifestly reached by the jury that although the defendant may have been a skillful and competent druggist, he unfortunately omitted on the occasion in question to exercise such care and prudence and to take such reasonable precautions as the safety of his customer and the measure of his own legal duty required.

Motion for new trial overruled.

CYRUS W. DAVIS et al. *vs.* WELLINGTON T. REYNOLDS.

Kennebec. Opinion September 2, 1910.

Fraud. False Representations. Sale of Real Estate.

In order to be actionable, a false representation in the sale of real estate must be a determining ground of the transaction.

Representations as to the value of real estate or the price for which it can be sold, or that a third person will shortly purchase it for a certain sum are but expressions of opinion which are not actionable.

The statement of a vendor of real estate that a third person has paid or will pay a certain sum for an undivided interest in the property is not actionable.

On exceptions by defendant. Sustained.

Action on the case to recover damages for alleged fraudulent misrepresentations in the sale of certain real estate in Somerset County. At the return term of the writ, the defendant filed a general demurrer which was joined by the plaintiffs. The demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

Pattangall & Plumstead, for plaintiffs.

Heath & Andrews, for defendant.

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

BIRD, J. This action on the case is brought by plaintiffs to recover damages for alleged fraudulent misrepresentations in the sale of real estate. To the declaration defendant demurred and the case is here upon exceptions to the pro forma ruling of the court below overruling the demurrer.

The declaration alleges that defendant on the first day of September, 1903, owning an interest in a bond for the conveyance of a

certain mill and timber land, employed one Frank R. Reynolds to falsely and fraudulently represent to plaintiffs that he, said Frank R. Reynolds, owned a bond for the conveyance of said mill and timber land and that they could be purchased for $52,000, that the mill and land were worth and would then sell for a sum of money largely in excess of $52,000 and that he, said Frank R. Reynolds, knew of a customer who would shortly purchase said mill and timber land and pay largely in excess of $52,000 therefor; that said Frank R. Reynolds, being the agent of the defendant and at his instance and request, made to the plaintiffs the representations he was so employed to make by the defendant; that the plaintiffs not knowing the representations so made to be false, but relying upon and believing them to be true, offered to purchase a two-thirds interest in the mill and land and pay two-thirds of the price of $52,000 provided Frank R. Reynolds would purchase the other third and become with them tenant in common in the property; that Frank R. Reynolds then informed defendant of the offer of the plaintiffs, "whereupon the said defendant, knowing that said mill and timber land were not worth said fifty-two thousand dollars, and intending to deceive the plaintiffs as to the actual value of said mill and timber land, then and there agreed to loan to the said Frank R. Reynolds nine thousand dollars on his promissory note, with which to effect a purchase of a one third interest in said mill and timber land, and after said purchase should be effected, to give him back his said promissory note without compensation therefor, and then and there meaning and intending to deceive the said plaintiffs as to the actual value of said timber land and mill, the said defendant then and there employed the said Frank R. Reynolds to represent to the said plaintiffs that he, the said Frank R. Reynolds, would purchase one third interest in said mill and timber land with the said plaintiffs and pay therefor one third of said purchase price of fifty-two thousand dollars," meaning and intending that plaintiffs should believe that Frank R. Reynolds was furnishing said $9000.00 from his own estate and knowing the same to be false; that defendant procured for Frank R. Reynolds upon his note the sum of $9000 which Frank R. Reynolds paid in as a part of the purchase price of

his one-third interest in the mill and land; that the note was returned to the maker without payment by him; that the representation made as to value, as to customers and the price offered by the latter were false to the knowledge of defendant and were relied upon and believed to be true by plaintiffs; that the plaintiffs did not know that Frank R. Reynolds did not furnish said $9000 from his own estate but believed he did; that believing and relying upon said statements and representations as to value, alleged customer and price offered by the latter plaintiffs purchased with Frank R. Reynolds the mill and land and paid for their two-thirds interest therein two-thirds of said purchase price of fifty-two thousand dollars, and thereby lost a large sum of money, to wit, the sum of fifteen thousand dollars, which, by reason of the fraud and deceit of the defendant, they seek to recover.

The plaintiffs, in support of their declaration, urge five false representations made by defendant, through his agent, to plaintiffs as their grounds of action:—1, That the agent owned a bond for the conveyance of the real estate; 2, That the real estate could be purchased for $52,000; 3, That the real estate was worth and would then sell for a sum of money largely in excess of $52,000; 4, That he, the agent, knew of a customer who would shortly purchase the real estate and pay largely in excess of $52,000 therefor; and 5, That the agent would purchase one-third interest in the real estate paying therefor one-third of $52,000, when in fact he paid $9000 less than one-third of $52,000.

The first allegation, to the effect that the agent owned a bond for the conveyance of the real estate in question is not catagorically denied to be true but, waiving that, the declaration contains no allegation that the plaintiffs were induced by the representation to make the purchase or relied upon it in so doing; *Long* v. *Woodman*, 58 Maine, 49, 52. It does not appear from the declaration that this alleged false representation was "a determining ground of the transaction," nor do the plaintiffs allege any defect of title.

The second, third and fourth allegations are practically of the same character and may be considered together. Under the

decisions of this court, neither is a ground of action. The second allegation is not false as the declaration shows that the real estate was purchased for $52,000 or less. The third and fourth are but expressions of opinion, or merely dealer's talk. *Bishop* v. *Small*, 63 Maine, 12, 13; *Thompson* v. *Phoenix Ins. Co.*, 75 Maine, 55, 61; *Holbrook* v. *Conner*, 60 Maine, 576.

As to the fifth ground there is no allegation that defendant either directly or through his agent ever stated to plaintiffs that the agent had paid or would pay one-third of $52,000 for one-third of the mill and land. Assuming it communcated to plaintiffs, it is a representation as to either an existent fact or a future event. If the former, it was a representation of the party, against whom the action is brought, the vendor (not a third person) that a certain price had been paid for an undivided interest in the property; if the latter, it was promissory—an expression of an expectation. In neither event is the representation actionable: *Holbrook* v. *Connor*, ubi supra; *Long* v. *Woodman*, ubi supra.

Exceptions sustained.
Demurrer sustained.
Declaration adjudged bad.

In Equity.

GEORGE W. PARSONS *vs.* WILBUR F. STEVENS et al.

Kennebec. Opinion September 14, 1910.

Equity. Procedure. Orders and Decrees. Date of Taking Effect. Entering and Filing Decree. Final Decree Right to Vacate. "Consent Decree." Revised Statutes, chapter 79, sections 11, 28, 38, 39.

1. In this State equity procedure is not from term to term but is from day to day, and orders and decrees in equity cases date and have effect as of the day they are made, though made during a regular term of court.
2. The signing, entering and filing a decree as and for the final decree in an equity suit is equivalent to the enrollment of the final decree under the older procedure, and has the same effect to end the suit if no appeal be taken.
3. After the signing, entering and filing a final decree in equity, the proper remedy for any error therein (other than clerical) is by appeal, or by bill or petition for review.
4. When, after issue joined, a decree has been intentionally and regularly signed, entered and filed as and for the final decree in an equity suit, it cannot be withdrawn or otherwise vacated, except by consent, even by the justice who made it, because of alleged errors therein, at least in cases where the remedy by appeal or petition for review has not been lost without fault of the aggrieved party.
5. A decree not made upon default or nil dicit, but after answer filed, issue joined, and evidence taken, is not a "decree pro confesso."

In equity. On appeal and exceptions by plaintiff. Exceptions sustained.

Bill in equity praying that a certain deed of warranty given by the plaintiff to the defendants "be rectified and reformed in accordance with the mutual intent of the parties thereof at the time said deed was made, executed and delivered, by adding to the description thereof" certain words so that the deed as reformed should except a certain right of way from the description and covenants. This cause grew out of an action of law brought by the defendants against the plaintiff upon the covenants of warranty in the aforesaid deed in

which said action at law the defendants claimed damages for breach of the covenants in said deed and assigned as said breach the fact that the said premises so conveyed to them were subject to the aforesaid right of way. The defendants filed an answer to the plaintiff's bill and the plaintiff filed a replication. The bill of exceptions further states the case as follows:

"This cause came on to be heard on the twenty-ninth day of October, 1909, and issues of fact were framed for a jury.

"After the cause was opened to a jury and a part of the evidence for the plaintiff introduced, court adjourned for the noon recess. At the time of adjournment the presiding Justice stated that he should rule that a certain right of way conveyed by the plaintiff to one Jones would be confined to a right of way 'as used' at the time of such conveyance. The words 'as used' were actually employed by said Justice to signify 'in the same location as.'

"Before the coming in of court in the afternoon in the presence of the presiding Justice the defendants' counsel proposed that a final decree by consent be entered sustaining the plaintiff's bill and reforming the deed named therein as prayed for. Such final decree was drawn, signed by the presiding Justice, filed in court and consented to by both parties.

"The presiding Justice then announced that the cause had been settled by the parties and dismissed the jury from its consideration.

"On the fifth day of November, 1909, the defendants moved that said decree be set aside on the ground that they understood the words 'as used,' as employed by the presiding Justice, to refer not to location but as equivalent to the words 'for the same uses as.' The plaintiffs were in no wise responsible for such misunderstanding. The presiding Justice found the foregoing facts and also that the defendant did so misunderstand the meaning in which he employed the words 'as used,' in such statement, and that such misunderstanding was the sole motive which induced them to propose the said decree to the plaintiff and to consent to its being entered, signed and filed.

"The court thereupon ruled that it was within its discretion to withdraw the decree and allow the action to stand for trial."

The plaintiff excepted to the aforesaid ruling and also filed an appeal.

The decree of the presiding Justice granting the motion of the defendants to have the aforesaid final decree withdrawn, is as follows: "Motion granted and final decree ordered to be withdrawn, said decree having been signed, entered and agreed to because of a mistake of fact, and a misunderstanding between the sitting Justice and counsel for defendants as to the scope of the proposed ruling, on the strength of which the defendant counsel and his clients consented to the settlement and the final decree without completing the trial. This motion is granted hereon upon the payment by the defendants to the plaintiff of the sum of forty dollars to reimburse him towards expenses and costs."

Williamson & Burleigh, for plaintiff.

L. T. Carleton, for defendants.

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

EMERY, C. J. The material allegations of fact in the bill of exceptions in this case may be summarized as follows: Stevens brought an action of covenant broken against Parsons for breach of his covenant of warranty against incumbrances in his deed of conveyance of certain land to Stevens. The breach alleged was the existence of a right of way in a third party across the land. Upon the bringing of that suit, Parsons brought this bill in equity against Stevens to procure a reformation of the deed he had given Stevens so that it should except the right of way from the description and covenants. In this equity suit an answer was filed and also the usual replication.

At the next term of this court in the county the parties appeared and both suits were set for trial together before the same jury, issues of fact in the equity suit having been framed for the jury. After some evidence had been introduced by Parsons, the plaintiff in the equity suit, the court adjourned for the noon recess. At the time of such adjournment the presiding Justice stated that "he should

rule that a certain right of way conveyed by Parsons to one Jones would be confined to a right of way 'as used' at the time of such conveyance." During the recess, Stevens' counsel, in the presence of the presiding Justice, proposed that the entry "Neither party, no further action for the same cause" be made in the action at law, and that a final decree by consent be entered in the equity suit sustaining the bill and reforming the deed as prayed for. Counsel for Parsons accepted the proposition, and the entry agreed upon was made in open court in the action at law, and in the equity suit the decree agreed upon was drawn, signed by the presiding Justice, filed and entered. The presiding Justice thereupon announced that the cases had been settled and dismissed the jury from further consideration of them.

The decree was as follows, viz: "That the deed dated May 19, 1906, from said plaintiff to said defendants be reformed by adding thereto after the words "well situated on said premises," the words "also excepting and reserving to said Maude M. Jones, her heirs and assigns, a right of way over and across the west side of said Wing lot from Main Street to the fence first mentioned herein as the second bound of the land herein conveyed, as reserved to said Maud M. Jones in deed from said grantor to said Maud M. Jones, dated May 17, 1906, and recorded in Kennebec County Registry of Deeds, Book 470, Page 399."

Seven days afterward, but during the same term, Stevens' counsel, instead of taking an appeal, moved the single Justice to withdraw and set aside the decree in equity, on the ground that he understood the words "as used" in the statement by the presiding Justice as to what his ruling would be, to refer, not to location, but as equivalent to the words "for the same uses as." The Justice, intended to convey the former idea, viz, "in the same location as" and employed the words "as used" for that purpose, and he found as facts that Stevens' counsel understood the words to signify "for the same uses as," and but for such understanding would not have agreed to the entry and decree. Neither Parsons nor his counsel was in any way responsible for such misunderstanding.

The presiding Justice against the objection of Parsons' counsel in the same case withdrew the decree filed in the equity suit, and ordered the case to stand upon the docket for trial. Parsons' counsel thereupon excepted to this ruling. The question presented is important, being whether, upon the facts stated, the case was so finally disposed of and ended, that the single Justice should not have undertaken upon mere motion of counsel summarily to adjudicate upon the questions of law and fact involved, but should have remitted the complaining party to his right of appeal or to the usual and more deliberate procedure of review provided for obtaining relief from alleged mistakes in judgments and agreements.

There must of course be some point or stage in every court procedure, legal or equitable, when the particular cause is finally disposed of, its thread cut, and the parties are out of court, to be brought in again only by some new process duly served upon them. Where the court is open during regular terms only, it is common learning that the final adjournment of the term ends the power of the court over final judgments and decrees passed at the term. Its orders, decrees and judgments then existing, made as intended at the time, must stand until corrected or reversed upon some new proceeding by way of review. *Bank of U. S.* v. *Mass.*, 6 How. 31 at page 38; *Bronson* v. *Schulten*, 104 U. S. 410. This rule, or principle, applies to suits in equity as well as to actions at law. *Brooks* v. *Railroad Co.*, 102 U. S. 107, was a suit in equity (see same case 101 U. S. 443) in which it was decided that a petition for rehearing presented after the term at which the decree was made could not be entertained. The court said, "At the end of the term parties are discharged from further attendance on all cases decided, and we have no power to bring them back. After that we can do no more than correct any clerical errors that may be found in the record of what we have done." In *Mummys* v. *Morgan's Heirs*, 3 Littell (Ky.) 295, it was said, "Where a final decree is once given and enrolled and the term has passed at which it was done the decree if defective or erroneous can only be altered or reversed by the same court on a bill of review filed for that purpose." See also *Lilly* v. *Shaw*, 59 Ill. 72; *Sturtevant* v. *Stanton*, 47 Conn. 579; *Bataille*

v. *Hospital*, 76 Va. 63; *Jones* v. *Turner*, 81 Va. 709; In *Ernest Tosetti, Brewing Co.* v. *Kochler*, 200 Ill. 369, 65 N. E. 636, the court held that a motion to vacate a decree, filed after the term, was too late, saying "The decree was regularly signed and filed and was entered of record and the power of the court over the case was thereby exhausted." In 2 Beach on Modern Equity Practice, sec. 850, the law is stated as follows: "The power of the court over the action and over the parties to it is exhausted by the final adjournment of the term at which the final decree is entered, and it cannot resume jurisdiction either over the subject matter or the parties without a new proceeding and the service therein of the ordinary original process."

But where a court is not confined to terms, is always open, and can make orders, decrees, etc., including final decrees, on any day without regard to terms of court, there evidently can be no such test of finality. There must be some other point of time at which a decree, intentionally made as a final decree, becomes actually final and operative; when that suit is ended and the parties dismissed. In England that point was when the final decree was enrolled, irrespective of terms. *Pitman* v. *Thornton*, 65 Maine, 96, 99; *Clapp* v. *Thaxter*, 7 Gray, 384; *Brown* v. *Aspden*, 14 How. 26; 2 Smith's Chancery Practice, pages 5 et seq.

In this State it is well settled, at least since the Equity Procedure Act of 1881, that there are no terms in equity proceedings, that final decrees, as well as other decrees and orders may be made upon any day except the few upon which no court can be held, that the signing, entering and filing a final decree is equivalent to its record or enrollment, and that the decree becomes operative from that time. R. S., ch. 79, secs. 11, 28. *Pitman* v. *Thornton*, 65 Maine, 96, page 98. *Gilpatrick* v. *Glidden*, 82 Maine, 201, at pages 203, 204. *Allan* v. *Allan*, 101 Maine, 153, at page 156. It is the same in Massachusetts since the Act of 1859. *Thompson* v. *Goulding*, 5 Allen, 81; *White* v. *Gove*, 183 Mass. 333.

In view of the statute of 1881 as construed above, it must be evident that the fact that the decree in this case was filed during a stated term of the court did not delay its operation to the end of the

term, and the fact that the motion to vacate was made during the same term does not give it any better position than if filed after the term. The idea of "term" should be eliminated from the mind, and the case considered as if the decree was filed and the motion made out of term time.

If the end of the term is the end of the court's power to vacate, reverse or materially change a final decree made as of that term except upon some new process and notice as for review as held in the cases above cited to that point, it would seem that where the final decree is made as of a particular day without regard to court terms, that day is the end of such power. There is also direct authority to the same effect. In *Brown* v. *Aspden*, 14 How. 26, it was said "By the established rule of chancery practice a rehearing in the sense in which that term is used in proceedings in equity cannot be allowed after a decree is enrolled." As said above, signing, entering and filing a decree is equivalent to enrollment. In *Maynard* v. *Pereault*, 30 Mich. 160, the court held that by the enrollment of the decree the case had reached a stage in which it was subject to be opened for re-examination only on bill of review. In *Bennett* v. *Winter*, 2 Johns, ch. (N. Y.) 205, a petition accompanied with due notice to open a final decree was denied upon the sole ground that "a final decree regularly obtained and enrolled cannot be opened or altered in this court but upon a bill of review." See also *Cummings* v. *Parker*, 63 N. H. 198; *Jones* v. *Davenport*, 45 N. J. Eq. 77; *Thurston* v. *Devecmon*, 30 Md. 210, 217; *Thompson* v. *Goulding*, 5 Allen, 81, and the Virginia cases above cited, 76 Va. 63, 81 Va. 709. The statute cited in the Massachusetts case was similar to our statute of 1881, now R. S., chapter 79, section 11 et seq. In Whitehouse Eq. Pr., section 526, it is laid down that in this State "after a final decree has been signed, filed and entered errors involving the merits of the case cannot be corrected by rehearing on motion or petition, the only remedy being by bill of review or the statutory petition for review." Much less it would seem could such a decree be wholly vacated upon simple motion. In *White* v. *Gove*, 183 Mass. 333, a decree dismissing the bill had been made and entered. The plaintiff afterward, within

thirty days, filed a motion that the decree be vacated and a rehearing granted, first, because the agreed statement of facts in the case was not authorized by the plaintiff; second, because the agreed statement was erroneous in many particulars; third, because it omitted many facts essential to the plaintiff's case. The motion was supported by affidavit. The Justice ruled he had not the power to vacate the decree and grant a rehearing. The Law Court held that the ruling was correct. The court said (page 340), "This ruling was founded upon the established principle that after the entry of a final decree in equity, as after the entry of a final judgment in a suit at law, the case is finally disposed of by the court subject to such rights of appeal, if any, as the statute gives, and the court has no further power to deal with the case except upon a bill of review. The principle thus declared to be established was fully and explicitly affirmed in the later case *Larkin* v. *Lawrence*, 195 Mass. 27, where the motion was filed only three days afterward. See also *Marshall Eng. Co.* v. *New Marshall Eng. Co.*, 203 Mass. 410, 416.

The probate court case, *Bergeron* v. *Cote*, 98 Maine, 415, does not conflict with the above cited authorities. There the decree was inadvertently made without hearing and without actual adjudication, was not in fact the judgment of the judge, and did not end the proceedings. Further, as was said by the court in that case, the new petition for an order of distribution reciting different facts was practically a petition for a revocation of the former order; and upon this new petition notice was given to all parties. The revocation therefore was not summary upon motion, but deliberate, on new petition and notice with right of appeal.

From the foregoing authorities, as well as from the nature of judicial proceedings, it must be held to be established as a general and necessary rule of equity procedure governing this court, that a decree once deliberately formulated, signed, entered and filed, cannot afterward be summarily revoked or vacated on motion for alleged mistakes of a party or even of the court; but that relief from such mistakes must be sought for through the more deliberate procedure provided for review, at least where such procedure would be

open to the complaining party but for his own fault. This view is in harmony with the language of the Maine Equity Procedure Act, R. S., chapter 79. In section 38 express provision is made for granting reviews for mistakes, etc., on petition upon which reasonable notice shall be given the other party of the time and place for the hearing. Sec. 39 affirms the power of the court "to hold all interlocutory orders and decrees subject to revision at any time before final decree." It is noticeable that the power of revision thus saved to the court in a given suit is limited to interlocutory decrees and is to be exercised before the final decree is made.

Of course the rule above stated does not prohibit an equity court from afterward, on motion, completing or perfecting its final decrees, by correcting clerical errors of omission and commission in preparing the draft. In some jurisdictions, also, it is held that final decrees of the class known as "decrees pro confesso," or decrees upon default, or nil dicit, without hearing, may in some cases be opened for hearing on petition, but we find no case where a final decree deliberately made after answer filed, issue joined and evidence heard, has been afterward vacated upon mere motion as in the same suit. In *Battaile* v. *Hospital*, 76 Va. 63, it was held that relief from the final decree could not be obtained by motion since "the decree was not upon a bill taken for confessed."

How a final decree upon a bill taken pro confesso may be vacated under the established rules of procedure in this State need not now be considered. Also in cases where a manifest injustice in the decree is alleged and the remedy by appeal or review has been lost without fault of the injured party, it may be that an equity court has inherent power upon due petition and notice to open the decree so far as to correct the injustice alleged and proved. What would be the power of this court in such cases, and how it should be exercised, with what notice and deliberation, with what right of appeal and exception, need not now be considered, since in this case the remedy by proceedings for review is still open, and it does not appear that any relief to which the plaintiff may be entitled cannot be obtained by those proceedings.

Recurring now to the decree in this case, it certainly is not within the class of "pro confesso" decrees. It answers none of the definitions of such decrees. It was not made upon default, or nil dicit. Answer was filed, issue was joined and evidence taken. The case and both parties were in court, at least by counsel, when the terms of the decree were settled. If not a "consent decree," it must be regarded as a decree embodying the then opinion of the court and made as such after consideration of the bill, answer and evidence. Not only was the opinion of the court thus actually formed and stated, but a final decree in accordance therewith was drafted, signed, entered and filed, the case announced as ended, and the parties dismissed. It is in all respect the decree which the court adjudged upon the pleadings and evidence to be the proper decree. Indeed, the motion of the defendant is not for any correction of the decree, but to have it wholly revoked that he may have another and second hearing and trial. Under the well settled rules of chancery practice above stated and illustrated, it must be held that the motion should not have been sustained and decree revoked, but that the defendant should have been remitted to remedies by way of appeal or review. At the time of the motion, the case had been decided upon pleadings and evidence, the parties had been dismissed, and the ordinary remedies for the correction of mistakes by appeal or bill for review had not been barred.

Exception sustained.
Order withdrawing final decree annulled.
The final decree ordered restored.

DISSENTING OPINION BY SPEAR, J., WHITEHOUSE, J., Concurring.

SPEAR, J. I am unable to concur in the opinion. I agree with all the Chief Justice has said with respect to the power of the court over orders, judgments and decrees before adjournment of the term in which they are made, and concede that the equity court is without terms and always open. I do not, however, think that it can be declared that final decrees in equity in all cases are beyond the recall of the sitting Justice unless it is held that R. S., chap. 79, sec. 38, providing for review, was intended to be established as the exclusive remedy for the purpose of opening or modifying final decrees. The statute does not in terms make this the exclusive remedy. It therefore seems to me, in view of the purposes and scope of equity, that the statute should not be construed to prevent the sitting Justice from recalling or opening the decree not decided upon its merits, when, by that decree through error, an injustice has been done. In other words, I believe that, in equity proceedings, this provision of the statute should be supplemented by the power of the court, to the end that the two working in conjunction, may effectuate a just result. In the term "just result" is to be implied that neither delay, method of procedure nor any other contingency should be permitted to work an injustice to the adverse party.

In the case at bar we start out with the concession that the decree sought to be opened was calculated, if allowed to stand, to do an injustice to the petitioner. The sitting Justice, who heard a portion of the evidence upon the merits of the case, and who consequently knows more about it than any other Justice can, undoubtedly entertained that view. If the opinion of the Chief Justice is to stand, it is quite clear to my mind that review will not reach the error, and that the unjust judgment must prevail. I have always supposed that equity was a rule calculated to do right where the law could not. It is, in a sense, an enemy to the common law. It came from the civil law, and was introduced into English jurisprudence after a hard struggle. It was calculated, upon due consideration of every person's rights, to do justice regardless of common law rules. Its purpose is to break the common law when the latter will not

bend. It cannot therefore be applied according to any fixed theory of procedure. It must meet each case upon the facts presented.

In this connection it may be observed that even the common law is not in all respects consistent. The doctrine of estoppel is not common law, but a rule devised to defeat the common law. The defacto doctrine is also exotic and established for the same purpose. Many other exceptions might be cited. It would therefore appear that even the common law has been forced to become inconsistent with theoretical rules in order to establish legal rights.

In view of these suggestions, it seems to me that equity looks to justice — not speed. It is better to be slow than to be wrong. It should not be beheaded by mistake, accident or misapprehension.

I assume that in applying the rules of equity every technicality should be resolved in favor of justice inasmuch as it has been declared that where the rules of law and equity conflict, the latter shall prevail. In other words, the broadest and most liberal interpretation should be given, where such interpretation is to enable the rules of equity to attain a just end. It seems to me that in the opinion, the technical rule has been applied to defeat the ends of justice rather than to promote them.

It is intimated at least in the opinion, if I understand it correctly, that the decree sought to be withdrawn, may be a consent decree. If that be true I concede that the petitioner's case is at an end. A consent decree can neither be withdrawn nor opened on review. I do not think this interpretation should be given the decree. A decree which works an injustice should not be considered a consent decree unless it so appears in the decree itself. It does not so appear in the decree in question. It is a decree in the ordinary form, without even a suggestion of consent. I think it also fair to affirm that the statement of facts, upon which the sitting Justice predicated his action in withdrawing the decree, should be assumed to be correct. It appears from the words of the sitting Justice that the decree was ordered to be withdrawn "because of a mistake of fact, and a misunderstanding between the sitting Justice and counsel for defendants as to the scope of the proposed ruling." It should also be further assumed that the amount ordered to be paid by the

petitioner in the nature of costs was a just amount and that the withdrawal of the decree did no pecuniary harm to the respondents. The facts further show that the rights of third parties in no way intervened, and that all the parties to the controversy were placed in statu quo in every respect. It is therefore evident that absolutely no injustice could result to the respondents by the withdrawal of the decree. The question, therefore, arises whether we shall establish a rule that works justice and not injury, or one that works injury and not justice. I further assume that no Justice of the Supreme Judicial Court, worthy of the name, would ever, through ignorance or prejudice, withdraw a decree in equity to the wrong of the party in whose favor it had been made. Hence, if this be true, no possible danger could ever arise from sustaining the authority of a sitting Justice to withdraw a decree, under circumstances like those in the case before us.

In *Bergeron* v. *Cote*, 98 Maine, 415, where a Judge of Probate exercised the authority of withdrawing an appeal, the court says: "We do not believe that any danger can result from the establishment of the doctrine that this power is vested in the Probate Court. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is entrusted with the original jurisdiction over all such matters." And here it may be said, as the cases to which I shall allude will show, that every case is peculiar to itself, *Robertson* v. *Miller*, infra, and does not become a precedent for any other particular case.

I now think it will appear that courts in equity have hitherto proceeded upon the theory of the suggestions herein made, as to the power and purpose of equity, and not on the theory of the opinion that litigation must end somewhere, and that a final decree is that end and cannot be recalled or opened. Now it is apparent, if final decrees are to be regarded as final judgments except upon review, there can be no exceptions to the rule.

But the books are full of exceptions, even the Massachusetts cases upon which the opinion relies admit this. And here it should be said that the discussion of the court in *Clapp* v. *Thaxter*, 7 Gray, 384, is not controlling, as the procedure in this case bears no

relation whatever to the procedure in the case before us. If I read the case correctly, the bill was dismissed by the Law Court and certified to the clerk, where judgment was entered, under a statute, as of the previous term of court. It was a decree upon this judgment which the petitioner sought to *reverse*, after the adjournment of the term at which the judgment had been entered, and all of the discussion with respect to final decrees is based upon the effect of this judgment. The implication from the finding of the court, however, is that if the petition for withdrawing the decree had been filed before these proceedings, ending in judgment, took place, the decree might have been withdrawn, for the court say: "This petition for a re-hearing comes too late." And then quote the statute providing for the entry of the judgment "as of the then last term of court, in the county where the action is pending, whether it be a law term or not." I hardly see how this case can be regarded as a precedent of any value.

In *Thompson* v. *Goulding*, 5 Allen, 81, the court discuss the same question and upon the point of setting aside the decree, cite *Clapp* v. *Thaxter*, supra, as their only authority. The court then makes the significant admission that there are, however, exceptions to this rule. Cases do not come within it where some clerical errors, mistakes and computations or irregularities in making up the record have occurred, or where a final decree has been made on default of a party through negligence or mistake of his solicitor, or by reason of want of notice to him of the pendency of the suit. It then says that the present case does not fall within any of the exceptions. This case, however, negatives the assumption that a final decree is necessarily the end of the litigation. It admits that in some cases it can be withdrawn.

In support of the doctrine that a final decree is not the end of litigation the authorities are ample. But the opinion of the Chief Justice says: "There must of course be some point in every court procedure, legal or equitable, when the particular case is finally disposed of, the thread cut, and the parties are out of court to be brought in again only by some new process 'duly served upon them.'"

Therefore the main ground upon which the opinion is based, that a final decree is the end and cannot be withdrawn, seems to be untenable.

Before proceeding to an analysis of the decisions directly relating to the withdrawal or opening of final decrees, I desire to cite *Bergeron, appellant*, from the decree of the Judge of Probate, 98 Maine, 415, as a case similar to the one before us, with reference both to the effect of a decree and the inherent power of the court to withdraw or cancel it. A final decree of a Judge of Probate should certainly be entitled to as much respect, either upon the ground of expedition or force of judgment, as a decree in equity. Yet the court held that such a decree, if erroneous, could be recalled. The principle herein stated is also applied to all courts in this language: "And this case is by no means an isolated one, for in the proceedings of *all courts* inadvertent errors will sometimes occur, frequently without the fault of any of the parties. The power to correct mistakes of this kind in its decrees, before such decrees have been acted upon, must necessarily exist in the court that made them, and such a power is essentially necessary for the promotion of justice." Then the court proceeds to say what is already above quoted from this case.

But the opinion undertakes to distinguish the *Bergeron* case by saying: "There the decree was inadvertently made without hearing and without actual adjudication, was not in fact the judgment of the Judge, and did not end the proceedings. Further, as was said by the court in that case, the new petition for an order of distribution reciting different facts was practically a petition for the revocation of the former order; and upon this new petition notice was given to all parties. The revocation therefore was not summary upon motion, but deliberate, on new petition and notice with right of appeal." I do not so read the case: The decree was certainly as advertently made as the decree before us. A petition for distribution, setting forth the facts, was filed, notice ordered and a decree of distribution made. No appeal was taken; the case was absolutely ended. Appeal was the only way to reach the error of the decree. There was no negligence on the part of the Probate Judge. He

acted upon the petition, without any one appearing, as is probably done in nine cases out of ten, involving a similar question. The only error was in the statement of facts in the petition. There was no inadvertence or error on the part of the Judge in the performance of anything he had to do. But he found an injustice had been done without remedy, unless he recalled the decree; and this he did and the Law Court sustained his action as it ought to have done.

The opinion further says that the decree "was not in fact the judgment of the Judge." It was the judgment of the Judge upon the case presented, and had he not been vested with the power to recall the decree would have remained his judgment in spite of the error. It is also said it "did not end the proceedings." I certainly understand this differently. The decree was an order for distribution. After such order the administrator has nothing further to do with the court with respect to the distribution, and the court has no authority over an administrator in regard to the matter. The final act had been performed by the Judge. It then became an individual matter between the administrator and the distributees.

It is further said that notice was given to the parties. But the important thing to be observed is that no new process was required. A motion for revocation of the probate decree was all that was filed. Precisely what was done in the case at bar. It still seems to me that the *Bergeron* case is to all practical purposes a precedent for the action of the presiding Justice in the case before us, as here there was an actual inadvertence on the part of the Justice in so making a statement of the law, that it was capable of two interpretations.

In Whitehouse Equity Practice, section 303, he says: "Also the final decree based on the allegations of the bill taken as true, may be open on motion in writing (i. e. petition) for good cause shown even after several years have elapsed." In sec. 305 he also says: "A final decree on a bill taken pro confesso may be open upon motion in writing to enable a defendant to make a meritorious defense which has not been heard through surprise, accident or mistake." A decree pro confesso has the force of any regular decree, *Robertson* v. *Miller*, infra.

I have not been able to examine the English cases upon this point, but their bearing readily appears from the citations in the American cases.

Parker v. *Grant*, 1 Johnson Ch. 630, is a case in which after the filing of a final decree a motion was made to set it aside to permit the defendants to answer. Chancellor Kent says: "This is an application to the grace and favor of the court, to let in a party to defend, after a decree has been regularly entered against him by default." In this case, however, he dismissed the petition saying: "But I am now put in possession of the real defense, and, admitting all that is stated in the petition, it was undeserving of favor."

Livingston v. *Woolsey*, 3 Johnson Ch. 364, is a case in which the final decree was entered by default. Upon motion the decree was set aside, Chancellor Kent saying, quoting Lord Hardwicke: "If there is an irregularity in proceedings of the plaintiff, and the plaintiff insists upon a strict default of the defendant, as the courts of law say, 'It is very necessary that a person insisting upon a rigor should hit the bird in the eye.' "

Lancing v. *McPherson*, 3 Johnson, 425, is a case which Chancellor Kent stated as follows: "The defendant, McPherson, applies for two things. 1. That the decree taken pro confesso against him be set aside, on the ground of misapprehension, and that he has a good and substantial defense in respect to the claim against him for any deficiency, etc." In denying the first request the Chancellor said: "As to the first point the delay has been too long to justify the indulgence without a very special case made." It would therefore appear that if application had been made in season, the decree would have been set aside "on the ground of misapprehension." But the Chancellor did set aside a sale made by virtue of the decree upon the ground that "justice would seem to require it."

Robertson v. *Miller*, 3 N. J. Equity, 451, is a case in which the court quite fully discuss the ground upon which decrees are opened, the nature of the application to the court, the duty of the court and the rules to be applied. In this case a petition was filed to open a decree five and one-half years after it was made, which was refused. With respect to the nature of the petition the court says: "Appli-

cations of this character address themselves to the sound discretion of the court, arising out of considerations of each case as it is presented. No general rule can be found which will apply to all. They should be listened to, generally, with great caution, and ought not to be granted, where the result must be injurious to the complainant, who has conformed himself to the law of the court." As nearly all the cases cited relate to decrees upon bills taken pro confesso, it is here pertinent to note that a final decree taken pro confesso has the force and effect of any other final decree. The court say: "There is a great difference between opening an order to take the bill pro confesso and opening a decree pronounced upon it subsequently." 1 Hoff. Prac 551. "Such decrees are placed on the same footing as other decrees regularly made, and are not disturbed except under special circumstances." The court further say in speaking of decrees pro confesso: "The last is considered, when compared with the others, as sacred, and to be disturbed only for weighty reasons," and quotes *Lansing* v. *McPherson*, supra. While the reasons must be weighty, yet if sufficient, the final decree will be opened.

Here it is pertinent to observe that the only way in which the opinion undertakes to avoid the effect of the cases cited is to suggest a distinction between final decrees pro confesso and other final decrees. This the well settled rules of law do not warrant. No State court is entitled to greater consideration for perfection of its rules of equity procedure and the force of its equity decisions than that of New Jersey. But the New Jersey case above cited is an absolute answer to the position of the opinion upon this point.

It should also be noted in this case that the very distinction which the opinion seeks to establish came squarely before the court and was deliberately decided. The attitude of the New Jersey court it seems to me is the only logical one, in view of the results to be attained in recalling a decree. It will not be denied that the object of a final decree is to put an end to the litigation. Final means end. If final, there can be no difference between an enrolled decree, pro confesso, and any other enrolled decree except in the various steps that lead to the end. Why then can any final decree be recalled,

whether pro confesso or otherwise? It is evidently because the case has not been heard upon its merits, the various steps leading to the end not having been all completed, and, fearing that some injustice may have resulted from an exparte procedure, the court sometimes years afterward recalls a decree and opens a case. Why, when the same reason exists for recall should not any enrolled decree be recalled? The result of a call in the one case is precisely the result of a recall in the other,— to enable the case to be heard upon its merits, without putting the parties to the unnecessary expense of a new proceeding. But in the case at bar it was not a matter of fear that the proceeding was incomplete and that the decree might have done an injustice. It was a matter of knowledge.

And here it may be remarked that notwithstanding the opinion declares that the case was heard upon its merits, the record clearly shows otherwise. The opinion says: "Answer was filed, issue was joined and evidence taken. . . . It must be regarded as a decree embodying the then opinion of the court and made as such after consideration of the bill, answer and evidence." But the case shows the cause was not heard upon its merits. The motion to recall the decree the facts of which are in no way questioned states that the defendants "have been precluded for defending said suit to which they believe they have a full, complete and ample defense." The decree, signed by the sitting Justice, says that the defendants counsel and his clients consented to the settlement and final decree "*without completing the trial.*" The plaintiff even in his exceptions does not claim that the case was tried upon evidence. On the contrary he frankly concedes that: "After the cause was opened to the jury and a part of the evidence for the plaintiff introduced, the court adjourned," etc. And this was all the testimony produced, the defendants not having been heard at all. Finally in direct opposition to the declaration of facts made in the opinion, the plaintiff's exceptions admit the chief contention of the defendants,— no decision upon the merits and failure thereof by misunderstanding in the statement that: "On the fifth day of November 1909, the defendants move that said decree be set aside on the ground that they understood the words 'as used' as employed by the presiding Justice to refer

not to location but as equivalent to the words "for the same uses as," . . . . The presiding Justice found the foregoing facts and also that the defendants did so misunderstand the meaning in which he employed the words "and thereupon ordered that said decree be withdrawn and the cause continued for hearing."

And it is upon this utter absence of anything in the nature of a hearing that the opinion declares that the decree was one, "embodying the opinion of the Justice after consideration of the bill, answer and evidence," and upon which it undertakes to distinguish the equitable principle applicable to the decree at bar from that applicable to a pro confesso decree. Suffice it to say that the sitting Justice did not base his decree upon the evidence and that the case was not heard at all upon its merits. Not having been heard upon its merits the case comes squarely within the rule of the many cases cited in this dissent. In spirit and substance the decree before us was a pro confesso decree, as the answer was completely ignored and, through the consent of the defendant to the statement of the law capable of two interpretations in its application to the facts in the case, no defense was put in. And it is apparent that the introduction of evidence might have completely changed the interpretation given by the court. Instead of being a full hearing the evidence may have been just enough to mislead. And it is upon this state of facts that the opinion finally says in answer to the many cases showing the withdrawal and opening of final decrees pro confesso, "but we find no case where a final decree deliberately made after answer filed, issue joined and evidence heard has been afterward vacated upon mere motion as in the same suit." Nor do I. For when a case has been once heard upon its merits it is ended. And merits means not only heard but opportunity to be heard. But no distortion it seems to me can place the case at bar in the above catagory.

This analysis leads to what I deem the most important feature in the decision of this particular case, namely, that the opinion in its declaration of law and statement of facts applies to a supposed case and an assumed state of facts and not to the actual case disclosed by the record. I am frank to say, were the facts as stated in the

opinion and did the decree represent the mature judgment of the court, as asserted in the opinion, I should differ from the conclusion of the opinion with at least some hesitation. The erroneous conception of the facts and the misconception of the foundation and purpose of the decree, as demonstrated by the record, to my mind clearly show that the case does not fall within the trail blazed by the opinion, but within the well settled rules of law clearly applicable to the actual situation before us. For this case certainly in spirit, in fact and in truth falls within the catagory of the cases cited. And the rules of law invoked in the opinion while having application to the facts and decree as stated in the opinion, could have no application to the facts and decree as stated in the record.

In *Miller* v. *Rushforth*, 4 N. J. Eq. 174, the head note fairly states the case as follows: A final decree after enrollment, and execution issued thereon, after a lapse of three years from the date of the decree, will be set aside for the purpose of correcting a plain and gross mistake in the master's report, although the defendant appeared and demurred to the bill of the complaint, and afterwards suffered a decree pro confesso to be taken against him, and an exparte report to be made by the master." This case involved the amount due upon a mortgage.

In *Carpenter* v. *Muchmore*, 15 N. J. Eq. 123, the court, while holding that "The general rule is that a decree regularly entered and enrolled cannot be altered except by bill of revivor," say: "Great liberality has been exercised. . . . . where the decree has been taken pro confesso for the purpose of rectifying mistakes apparent upon the face of the proceedings, or where there is a clear case of surprise and merits." This case shows that if the petition for opening the decree discloses merit, it is in the power of the court to act. And it should be here observed that the force of a decree taken pro confesso had already been decided, by this same court, in *Robertson* v. *Miller*.

In *Embury* v. *Bergamini*, 24 N. J. Eq. 227, it is said in a case disclosing merits and surprises: "The court will not hesitate to extend relief in such cases. It will open a regular decree by default, even after enrollment, for the purpose of giving a defendant an

opportunity to make his defense, where such defense is meritorious, and he has not been heard in relation thereto, either through mistake, accident or surprise."

It seems to me that this case may, in its broadest sense, be regarded as a precedent for the case at bar. The decree heard was enrolled and had the force of a judgment as much as did the decree before us. We think it can be fairly said also that the petition for opening the latter decree discloses both merits and surprise. A bill in equity and an action at law involving the same subject matter, were pending. Neither was tried out upon its merits. Upon the suggestion of a ruling, which the court indicated would be made, with respect to the interpretation of certain words used in a deed, the trial ceased without a determination of the case upon its merits. While it would be unfair to claim that the ruling was not regularly made, in giving a legal construction, it is nevertheless established beyond per adventure that the Justice ruling meant one application of the language, and the counsel for the petitioner understood it to convey an entirely different meaning. So misapprehending the language, he did not except. There was no occasion to. But it soon appeared, both to the sitting Justice and to counsel for the petitioner, that the language was susceptible of two meanings, one broad, the other restrictive. The counsel interpreted the language in the latter sense, that is, that the words "as used," referring to the use of a right of way, should be construed as equivalent to the words "for the same uses as," instead of referring to location.

Everything in connection with this transaction is conceded to have been done in the utmost good faith. In fact, the steps leading to this unfortunate complication seem to have been suggested by the court, and not by counsel. Counsel felt, as counsel had a right to, and always should feel, that the court "could do no wrong;" that the suggestion of the court would result in a speedy and satisfactory solution of the litigation. Things transpired so quickly that counsel could not be justly charged with inattention or negligence or want of skill. If any fault can be laid at his door, it is that of confidence in the court. The voluntary and highly honorable act of the court in withdrawing the decree should be regarded

as conclusive proof of the situation as I have described it. Can there be any question that these facts disclose a case of mistake, accident or surprise? Could aught but sophistry or the most technical discrimination persuade a fair mind to the contrary? In Words and Phrases, Vol. 5, page 4540, is found this definition: "The term 'mistake,' in the sense of a court of equity, is that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." See cases cited. In view of this definition it seems to me that the case at bar falls fairly within *Embury* v. *Bergamini*. All the elements that appear in one, appear in the other; surprise, meritorious defense, not having been heard, and a desire to defend.

In *Van Deventer* v. *Stiger*, 25 N. J. Eq. 224, the head note states the case as follows: "Final decrees set aside and defendant let in to answer, on proof of surprise. A complainant who holds a bond and mortgage given him by the mortgagor, as collateral security only, for a debt alleged to be due to him from the latter, should, in proceedings for the foreclosure of a mortgage, prove his debt, and if it be less than the amount due on the mortgage, take a final decree for the amount of his debt and interest only."

In this case not only was the decree final, but execution had been issued upon it. In *Brinkerhoff* v. *Franklin*, 21 N. J. Eq. 334, where two questions are argued and submitted, the court say: "The first is whether the court will in any case vacate the enrollment and open the decree regularly made in order to let in the defense."

Here the precise issue involved was raised. In answer the court say: "It has long been settled that an enrollment will be vacated and decree opened when the decree has been unjustly made against a right or interest that has not been heard or protected, when this has been done without the laches or the fault of the party who applies." See also many cases cited. This is a case, as will be observed, and we think this remark will apply to most of the other cases cited, which might have been opened on petition for review. But the court did not deem it necessary to put the parties to the trouble and expense of new litigation, where the opening of a decree could fully determine the rights of the parties, in the case already pending.

This is precisely the case before us except that it is strengthened by the fact that there was an action of law, involving the same question as the bill in equity, which was also entered "neither party." In *Mutual Life Insurance Company* v. *Sturges*, 32 N. J. Eq. 678, it is held that in order to present what the case terms "meritorious defense" the defendant is "not bound to satisfy the court now that their defense will be successful, but simply that there is sufficient doubt respecting the justice of the present decree, to make the facts upon which the defense rests a fit subject of judicial investigation. *Day* v. *Allaire*, 4 Stew. Eq. 317." In *Millspaugh* v. *MacBride*, 7 Paige, 509, the court goes so far as to say, with respect to a petition for opening a decree after enrollment, it will do so. "Where such defense is meritorious, and he has not been heard in relation thereto, either by mistake or accident, or by the negligence of his solicitors." In other words, this case justly holds that in equity a party who has no knowledge of law or procedure, shall not suffer in his rights, even through the negligence of his counsel. This seems to be not only a safe but a sane application of the rules of equity. In law, of course, this cannot be done, for the general rules must be followed. Negligence of counsel must be endured. But equity has been introduced for the express purpose of relieving the rigor of the law, and we can discover no palpable reason why negligence or mistake of counsel is not as much a cause of equitable relief as any other mistake or negligence. The injury in either case is precisely the same. It seems to me that distinction between mistake of law and mistake of fact in equity is a distinction without a difference. Whatever the cause, it is injury which equity seeks to relieve.

It will therefore appear when we examine the cases, that *Thompson* v. *Goulding*, 5 Allen, 81, does not state all the exceptions to the general rule. We also find in *Hall* v. *Lamb*, 28 Vermont, 85, the court using this language: "We entertain no doubt as to the power of the Chancellor to vacate such a decree as was made in this case, even after it is enrolled, for the purpose of giving the defendants the bill on its merits, when they have been deprived of that defense by mistake, accident, or even negligence."

I might cite many more cases from other jurisdictions in corroboration of the theory herein suggested, but inasmuch as the Chancery Courts of New York and New Jersey are entitled to the greatest respect, I regard it as unnecessary to go further in this direction. These states were the earliest to adopt the rules of chancery practice, while the New England states, including Massachusetts and Maine, were very conservative and tardy in this direction, it being within my day that Maine has clothed the court with full equity powers. The rules, therefore, established by these early courts and the great chancellors who regulated their procedure and formulated their rules, should be accorded the authority of final decision in all matters wherein statutory provisions do not intervene.

We find no case in Maine bearing upon the question at issue and none cited in the opinion. *White* v. *Gove*, 183 Mass. 333, however is relied upon. It is decided without any discussion whatever of authorities, and is practically an ex cathedra opinion, only citing *Clapp* v. *Thaxter*, 7 Gray, 384, already shown to have no bearing as a precedent for the case before us, and *Thompson* v. *Goulding*, 5 Allen, based upon *Clapp* v. *Thaxter*. And it would seem from the statement of the court, that the question at issue in the case at bar was not involved in this case, for the court say: "If the case is rightly presented, the statute gives an ample remedy by way of appeal." It further appears that this was the decision of a divided court, as it is said in the last sentence "In the opinion of the majority of the court, the exceptions must be overruled."

It occurs to me that this is a very weak case upon which to base so important a decision as that involved in the case before us. The court in *White* v. *Gove* does not undertake to give any reasons for the promulgation of a principle, calculated, as it seems to me, to prolong litigation and to impose an unnecessary burden. The whole tenor of authority is in opposition to the doctrine of this opinion. It became law weakened by opposition and devoid of authority.

In Maine it is a new question and is to establish, undoubtedly, for all future time, the practice of our court in equity as to whether the sitting Justice, who has made a decree "because of a mistake of fact, and a misunderstanding between the sitting Justice and counsel

for the defendants," which has not been acted upon by the parties, and where the rights of third parties have not intervened, and where the parties, by the allowance of costs, are in no way injured, and are placed in statu quo, shall be allowed to exercise the power of opening such decree, placing the parties in the situation occupied when the decree was made, for the determination of their rights upon the merits of the case. I challenge the suggestion of any possible harm that can ever result to litigants from the enunciation of this doctrine. On the other hand, it is conceivable that injury may result from the doctrine established in the opinion of the Chief Justice. It seems to me, however, that it is a pretty safe rule to establish, either in law or in equity, which in a given case, operates to repair a wrong and establish a right, and upon which in no case can be predicated the possibility of an injury.

No definite rule of procedure for the exercise of the power of the sitting Justice can be formulated. It is the inability to apply such a rule that vests the court with the exercise of authority in each particular case, as the dictates of justice require. There is, however, a broad, but controlling principle fully established by the authorities for governing the action of the court in this class of cases. Chancellor Kent in *Parker* v. *Grant*, supra, says: "This is an application to the grace and favor of the court." In *Robertson* v. *Miller*, supra, it is held: "Applications of this character address themselves to the sound discretion of the court, arising out of each case as it is presented." In *Hall et al.* v. *Lamb et al.*, 28 Vermont, 85, the court say: "In the case of *Wooster* v. *Woodhull*, 1 John Ch. 540, Ch. Kent observed that such applications were addressed to the discretion of the court, etc." So pertinent is *Wooster* v. *Woodhull* in prescribing the ground upon which the court should proceed in this class of cases, that I quote it at length. "The interference of the court, to relieve a party from the consequences of this default, must depend upon sound discretion, arising out of the circumstances of the case. There is no general and positive rule on the subject; and Lord Thurlow observed, in one case (*Williams* v. *Thompson*, 2 Bro. 279) that if a defendant comes in after a bill has been taken pro confesso, upon any reasonable ground of indulgence,

and pays costs, the court will attend to his application, if the delay has not been extravagently long. If the indulgence be great and frequent, there is danger of abuse of the precedent for the purposes of delay. This objection struck Lord Hardwiche with much force in the case of *Cunningham* v. *Cunningham*, (Amb. 89, Dickins, 145) and he directed precedents to be searched on a similar application, where the defendant applied for a rehearing, two years after a decree, which, on his not appearing at the hearing, had been made absolute. He said it was a question on which side the greatest inconvenience would lie; and he, finally, opened the cause in that case, on payment of the costs of the default, and of all subsequent proceedings. Several other cases were referred to by the counsel who made this motion, in which the party, whether plaintiff or defendant, who had made the default at the hearing, and who had, thereby, suffered his bill to be dismissed, or a decree to be made absolute against him, was relieved upon the usual terms, of payment of costs. *Hobson* v. *Cranwell*, Dickens, 61. *Kemp* v. *Squire*, Dickens, 131. *Fry* v. *Prosser*, Dickens, 298. *Ferran* v. *Waite*, Dickens, 782."

But the opinion says that there must be an end to litigation. I agree, with the modification that there must not only be an end but a just end, if in the power of the court to assure it. It seems to me, therefore, that upon the foregoing rules of law it is thoroughly established that when, for any of the reasons stated in the numerous cases cited, a case has not been heard upon its merits, the decree is not based upon a fair hearing, the rights of third parties have not intervened and the parties to the litigation can be placed in statu quo, it is then a matter which addresses itself to the sound discretion of the Chancellor whether the decree may be withdrawn or opened. By the record this is precisely the case before us.

It is well to establish rules but procedure should be conducive not subversive of justice. There is a precept older than equity that the letter of the law killeth, but the spirit giveth life.

STATE OF MAINE *vs.* VITAL OUELLETTE.

Androscoggin. Opinion September 14, 1910.

Intoxicating Liquors. Nuisance. Evidence. Criminal Law. Revised Statutes, chapter 29, section 49.

Where the State in a trial for maintaining a liquor nuisance relied on payment by the defendant of a federal license tax as prima facie evidence of his guilt within Revised Statutes, chapter 29, section 49, *held* that it was the right of the defendant to explain his action in paying the tax.

Where the State in a trial for maintaining a liquor nuisance relied on payment by the defendant of a federal license tax as prima facie evidence of guilt within Revised Statutes, chapter 29, section 49, circulars received by him from an internal revenue officer, containing lists of alcoholic medicinal preparations for the sale of which a special tax is imposed, were admissible to complete the incidents of the transaction, and as tending to furnish cumulative evidence of the defendant's knowledge that the sale of certain medicines, not unlawful to sell, required payment of the revenue tax, as bearing on his intent.

The admission of such circulars being discretionary with the trial court, their exclusion was not prejudicial error, where the medicines listed in the circulars were those the defendant had in stock, and where the circulars were at most slightly evidential of his motive in paying a federal tax.

On exceptions by defendant. Overruled.

Indictment against the defendant Ouellette and one Archie LeBlanc under Revised Statutes, chapter 22, section 1, for maintaining a liquor nuisance. On trial the defendant LeBlanc was acquitted while the defendant Ouellette was found guilty. During the trial the defendant Ouellette excepted to certain rulings.

The case is stated in the opinion.

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

W. H. Judkins, for defendant.

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

PEABODY, J. This cause was an indictment against the respondent, Vital Ouellette, and one Archie LeBlanc, for maintaining a common nuisance, defined by sec. 1, chap. 22, R. S.

The prohibited acts specified in the indictment were the keeping and maintaining a certain place used for the illegal sale and for the illegal keeping of intoxicating liquors, and where intoxicating liquors were sold for tippling purposes, and which place was a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drank and dispensed.

On trial the respondent LeBlanc was acquitted, and the respondent Ouellette was found guilty by the jury. At the trial the attorney for the State introduced evidence proving that Ouellette had paid a special United States internal revenue tax as a retail liquor dealer, covering the time specified in the indictment, and this was also admitted by him in his testimony.

This respondent claimed in his testimony, as the reason why he took out the license, that he was compelled to do so by Mr. Turner, the internal revenue officer, who, in a conversation with him, after inquiry as to what goods he had on his shelves, said, "Mr. Ouellette, this business that you are connected with in the store, and what you got on the shelf, you have got to have a revenue tax. Well, I told him I didn't know whether I would take one or not. I says, 'Some one has told me if I take a revenue tax that the officer may bring me in court. I had about fifteen or twenty different kinds of goods on my shelf which I have got now which require me to take a license, or I will be in trouble.' That is the notice he give me. Then I says, 'I will see later on.'"

"Q. (By the Court) That is the reason why you took it?

A. Yes, sir. I didn't take it right away, your Honor. I waited and inquired, and he told me I had to, and I took it."

Circulars Nos. 713 and 727, marked Exhibits Deft. 1 and 2, were identified by Ouellette as papers received from Mr. Turner. These circulars were subsequently offered in evidence by counsel for the respondent, and, on objection by the attorney for the State, were excluded by the court. Inspection shows them to be lists of alcoholic medicinal preparations for the sale of which the special tax of liquor dealer is required under rulings of the Commissioner of Internal Revenue.

Payment of the tax was relied upon by the State, under the provisions of section 49, chapter 29, R. S., against the respondent as prima facie evidence of his guilt, and it was his right to explain his action. *State* v. *Morin*, 102 Maine, 290. He contends that what took place at the interview between him and the revenue officer, Mr. Turner, shows a reason for his paying the tax consistent with innocence, and that the circulars given him were themselves part of the acts of the officer and were erroneously excluded. We think they were technically relevant and admissible, not in a strict legal sense, as a part of the res gestae which made their admission in evidence compulsory, but admissible on two grounds; to complete the incidents of the transaction, and as tending to furnish cumulative evidence of the respondent's actual knowledge that the sale of certain medicines, not unlawful to sell, required payment of the revenue tax, as bearing on the question of the intent of his action. 1st. Green. on Ev. sec. 108; *Stewart* v. *Hanson*, 35 Maine, 506; *Com.* v. *Vosburg*, 112 Mass. 419; *Blodgett Paper Co.* v. *Farmer*, 41 N. H. 398; *O'Neal* v. *Wills Point Bank*, 67 Tex. 36. Their exclusion is not necessarily exceptionable; it depends upon the question of whether the respondent was thereby prejudiced.

The respondent admits that he had upon his shelves fifteen or twenty alcoholic medicinal preparations for sale, to which the revenue officer called his attention in the conversation quoted as requiring him to take a license, and at the same time gave him a notice, and to the question by the court, "That is the reason you took it?" he answered, "Yes, sir."

It is impossible to perceive how he could be prejudiced by the exclusion of the contents of the circulars. *French* v. *Stanley*, 21 Maine, 512; *Bryant* v. *K. & L. R. R. Co.*, 61 Maine, 300; *Lord* v. *Kennebunkport*, 61 Maine, 462. It does not affirmatively appear that he read them and consequently paid the tax. *Wright* v. *Tatham*, 5 Cl. & Fin. 670. But assuming that he had read them, they were merely names of medicines of similar character to those he had in stock, and at most slightly evidential of his motive in paying the United States special tax as a liquor seller. Their exclusion by

the Justice was discretionary, and his ruling was not erroneous. 8 Am. and Eng. Enc. 488; 1 Gr. on Ev., section 108; *Mueller* v. *Rebhan*, 94 Ill. 142; *Mears* v. *Cornwall*, 73 Mich. 78.

Exceptions overruled.

JOHN R. MALIA

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY COMPANY.

EDWARD A. MCILHERON *vs.* SAME.

Androscoggin. Opinion September 14, 1910.

Street Railways. Collision with Vehicle. Negligence. Care. Speed of Cars. Evidence.

In actions against a street railway company to recover damages for personal injuries caused by a collision between the carriage in which the plaintiffs were riding and a street car of the defendant, *held* that the evidence was not sufficient to show that the car was defective or that the motorman was negligent in not stopping the car in season to prevent the collision.

The rule as to the degree of care required of street car motormen in approaching street crossings does not apply to cars approaching a team between street crossings, where it appears that the driver will have no occasion to drive across the tracks.

Evidence *held* to show that it was not negligence to run a street car thirteen miles an hour, for a short distance, through a particular street in a city at five o'clock in the afternoon in the month of October.

In actions against a street railway company to recover damages for personal injuries caused by a collision between the carriage in which the plaintiffs were riding and a street car of the defendant, *held* that the driver of the horse drawing the carriage failed to exercise the degree of care and prudence which the exigency required.

On motion in each case by defendant. Sustained.

Two actions on the case to recover damages for personal injuries received by the plaintiffs and caused by the alleged negligence of the

defendant. Plea, the general issue in each case. The two actions were tried together. In the first entitled action the plaintiff recovered a verdict for $494.28, and in the second entitled action the plaintiff recovered a verdict for $156.25. The defendant filed a general motion in each case to have the verdict set aside.

The cases are stated in the opinion.

McGillicuddy & Morey, for plaintiffs.

Newell & Skelton, for defendant.

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

WHITEHOUSE, J. About five o'clock in the afternoon of October 21, 1907, the plaintiffs received personal injuries from a collision between the carriage in which they were riding and the defendant's street railway car on upper Main street in Lewiston, and each recovered a verdict for damages against the defendant company. The two cases arose from the same state of facts and were tried together upon the same evidence. They come to the Law Court on motions to set aside the verdicts as against the evidence.

The following facts appear to be satisfactorily established by the evidence. The two plaintiffs who were policemen in the city of Lewiston, were riding in a single open carriage northerly on Main street towards the Maine State Fair Grounds. The plaintiff McIlheron owned the team and on the afternoon in question was driving out for pleasure and for the purpose of exercising his horse, and the plaintiff Malia was riding with him by invitation. At the place of the accident, nearly opposite the residence of Dr. White and for several hundred feet both northerly and southerly from that point, the track of the street railway is laid along the easterly side of the street, being the right hand side traveling north. Thus an unobstructed roadway was left for carriage travel not less than thirty feet in width, and a short distance southerly from the point of the accident, is a traveled way for carriages known as Strawberry Avenue, leading at right angles westerly out of Main street. The plaintiff McIlheron, was sitting on the right hand side of the carriage driving the horse. They were traveling on the easterly

side of the road within "three or four feet" from the westerly rail of the railroad track. There is a slight curve in the railroad track nearly opposite the residence of George B. Bearce, and from that point southerly, it is a descending grade of three per cent for a distance of at least 250 feet. According to the testimony of both of the plaintiffs, the horse showed signs of fear when the car was 250 feet distant. The motorman admits that as the car was rounding the curve he saw that the plaintiffs' horse began to "prick up his ears and show signs of fright." As the car approached the horse became more frightened and began to rear and jump, and when the car was about fifty feet distant from him, he suddenly bolted to the right across the railroad and before the carriage had crossed the rails, the car struck it, throwing the plaintiffs to the ground and causing the injuries of which they complain.

The plaintiffs contend that the defendant company was legally responsible for the collision, first, because the car was running at a dangerous and unlawful rate of speed, and second, because as the plaintiffs allege, the car was defective in two respects. It is claimed that the reverse power did not work efficiently when applied and that there were flat wheels on the car which made a loud, unusual and pounding noise. Finally it is contended in behalf of the plaintiffs that the doctrine of prior and subsequent negligence applies; that the motorman saw the plaintiffs' team in a place of danger and by the exercise of ordinary vigilance and precaution, he might have avoided the collision either by slackening the speed of his car or stopping it altogether. On the other hand it is denied that the car was being propelled at a dangerous rate of speed and denied that there was any failure of duty on the part of the defendant in any respect towards the plaintiffs on the occasion in question.

The law governing the relations between street railway cars and ordinary teams, has been so carefully examined and fully considered both upon reason and authority in the recent decisions of this court, that any further discussion of the rules applicable to this case is not required. *Denis* v. *Street Railway Co.*, 104 Maine, 39; *Marden* v. *Street Railway Co.*, 101 Maine, 41; *Butler* v. *Street Railway*,

99 Maine, 149; *Robinson* v. *Street Railway Co.*, 99 Maine, 47; *Warren* v. *Railway Co.*, 95 Maine, 115; *Fairbanks* v. *Railway Co.*, 95 Maine, 78; *Atwood* v. *Railway Co.*, 91 Maine, 399; *Flewelling* v. *Railroad Co.*, 89 Maine, 585.

With respect to the plaintiffs' suggestion that the car was defective, it is the opinion of the court that the evidence would not warrant the jury in finding either that the car had flat wheels, or that the "reverser" was out of repair. The testimony of the motorman was that the "reverser didn't take much effect" on account of the slippery condition of the rails caused by the moisture and the fallen leaves; and neither of the plaintiffs testified to any "pounding noise" caused by flat wheels. McIlheron states that the buzzing of the "trolley" made considerable noise and Malia admits that the noise from "buzzing and so on" was about the same as that of any other car. There is nowhere any intimation of flat wheels in the testimony of either of the plaintiffs. In view of their testimony, and the positive denial of the conductor and motorman that there were any flat wheels on that car, the opinion of Newell Preble a laborer at Mr. Bearce's, that he judged from the sound of the car as it passed that it had flat wheels is not convincing. It does not appear that he had any actual knowledge in regard to it, and his testimony is not sufficient to prove negligence on that ground.

But it is insisted that at the time in question the defendant's car was negligently run at an unreasonable and dangerous rate of speed on the descending grade of Main street, and that due care was not exercised by the motorman to have his car under such control as it approached the plaintiff's team that he would be able to stop it in season to prevent a collision in the event that the horse should bolt across the track.

It appears that the schedule time on this trip involved an average speed of twelve miles an hour, and the evidence would not support a finding that at the time the motorman first saw the plaintiffs' team, the speed exceeded thirteen miles an hour. In determining whether this rate of speed was unreasonable under the circumstances existing at that time, it must be considered that this collision did not occur while the plaintiffs were attempting to drive across the

track into another street at right angles to Main street. The rule respecting the degree of caution and vigilance to be exercised by motormen in approaching public street crossings is not applicable here. The plaintiffs were driving up a broad roadway more than thirty feet wide with no other team in sight, and with no street junction on their right hand in that vicinity. The motorman saw the team approaching when the car was 250 feet distant and saw that the plaintiffs would have no occasion to drive across the track before meeting the car. He saw that they were driving within "three or four feet" of the track and that their horse showed some signs of nervousness and fear, but he also saw that there was ample opportunity for the driver to guide his horse to a place of greater safety if he deemed it necessary, either by turning around or driving to the westerly side of the street, twenty-five feet distant from the track, or driving down Strawberry Avenue. He saw that the team indicated no purpose to do either of these things and he was warranted in assuming that the driver understood the disposition of his horse and was confident of his ability to control him and desirous of exercising him near a railway track, that the horse might become accustomed to the sight and sound of moving cars. In confirmation of this view, it appears that this was a young horse and though otherwise of a gentle disposition he had shown similar signs of fright a week before at the appearance of a slowly approaching street car on Court street in Auburn and suddenly turned around and bolted down another street intersecting Court at right angles. On the day of the accident in question, the motorman knew that the plaintiffs had an unobstructed view of the car and was justified in assuming that they were familiar with the ordinary rate of speed of the car on that line, and must have observed its speed in fact at that time.

At the time of the collision there was but one passenger in the car, the young son of an officer of the defendant company. Five o'clock P. M. appears to have been an hour when there were very few passengers in the Main street cars, and the plaintiffs' team was the only one on the street in that vicinity. Under all these circumstances and the other conditions shown by the evidence a speed of

even thirteen miles an hour for a short distance is not necessarily reckless or dangerous one, and cannot be deemed actionable negligence.

Nor does the evidence support the conclusion that there was a failure of duty on the part of the motorman in not stopping the car in season to prevent a collision after discovering the rearing and plunging of the horse the moment before he bolted across the track. The evidence is plenary and uncontradicted by any direct evidence that the motorman applied the brake and reversed the power on the car and did all he could to stop it as soon as he saw the rearing and plunging towards the track. This was a situation of unexpected danger which under all of the circumstances and for the reasons above stated, the motorman in the exercise of reasonable care and forethought could not have anticipated, and a car running at the rate of thirteen miles an hour or nineteen feet in a second, could not be stopped on rails in the condition of those in question in season to prevent a collision.

The horse was frightened, not by the extraordinary speed or unusual sound of the car, but the usual sound and appearance of the car approaching at its customary rate of speed at that point. It has been seen that he was frightened the week before by a "very slowly" approaching car on Court street in Auburn.

The conclusion is irresistible that in exercising his horse on a public street, and in sight of an approaching car, the driver himself failed to exercise the degree of care and prudence which the exigency required, and he must be held to have entered upon the unfortunate experiment at his own risk. It is unnecessary to consider whether McIlheron's want of care would have been imputable to the plaintiff Malia or not, if a failure of duty on the part of the defendant company had been shown. As the evidence fails to prove actionable negligence on its part, neither of the plaintiffs is entitled to recover damages against the defendant.

The certificate in each must therefore be,

Motion sustained.
Verdict set aside.

EDWARD L'HOUX *vs.* UNION CONSTRUCTION COMPANY.

Androscoggin. Opinion September 22, 1910.

Master and Servant. Assumption of Risk. Evidence.

1. Employees in the prosecution of their work must exercise their senses and reasoning faculties for the discovery of the risks attending their employment, and, unless they stipulate otherwise, they assume the risks such exercise would reveal to them.
2. That the testimony of a witness is not contradicted by any other witness does not authorize a finding based on such testimony when the testimony is so contrary to common knowledge and experience as evidently to be untrue.
3. The danger to be apprehended from the breaking off and flying about of bits of steel from the point of a small steel cold chisel held against an iron surface and struck hard with a seven pound hammer is so obvious that an employee of mature years and of experience in the use of steel drills must be held to have appreciated the danger, even against his testimony that he did not.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employment of the defendant. The plaintiff claimed that the injuries were caused by reason of a defective cold chisel, furnished by the defendant, and which he the plaintiff undertook to use under the direction and with the assistance of an agent of the defendant, for the purpose of cutting an iron pipe of the defendant, and that in the course of the operation the chisel broke and a piece of the same flew into his eye, causing the injuries complained of. Plea, the general issue. Verdict for plaintiff for $2,000. The defendant then filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Bisbee & Parker, and Newell & Skelton, for defendant.

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

EMERY, C. J. The plaintiff's version of the reception of the injury for which he seeks to recover compensation is substantially as follows: — He was in the employ of the defendant company in the construction of a system of water works for supplying a town with water, etc., and while in such employ, a Mr. Reed whom the plaintiff supposed to have authority, and who appeared to have authority, from the defendant to do so, came to the plaintiff at the tool house, selected a small steel "cold chisel" and a seven pound striking hammer, and directed the plaintiff to take those tools and go with him to cut off some iron pipe. The plaintiff did so without objection. On reaching the place, Mr. Reed held the chisel upon the pipe and directed the plaintiff to strike the head of the chisel with the hammer. The plaintiff struck a first blow "not very hard" and then a second blow "pretty near" as hard as he could. As a result of the second blow a fragment broke off the point of the chisel and flew up into his eye.

There was no evidence that the chisel or the hammer was visibly imperfect or that the chisel was improperly held for the plaintiff to strike upon it, or that the plaintiff was directed to strike so hard. The only proposition upon which the plaintiff bases his claim for compensation is that Reed was negligent in selecting so small a chisel and so heavy a hammer. In answer it is contended by the defendant that the danger of breakage in striking so heavily with such a hammer upon such a chisel placed against an iron pipe was so obvious that the plaintiff must be charged with knowledge of it, that the plaintiff alone was responsible for striking so hard as to break the point of the chisel and hence must be held to have assumed the risk.

It appears from the plaintiff's own testimony that he was 37 years old; that he had worked for 17 years in the construction of water works, railroads, etc; that he had used a striking hammer on a steel drill every year when there was blasting to do; that he knew steel drills used on stone hammered down on top and sometimes broke off at the point; that he had this chisel made from a piece of steel he took to the blacksmith. He saw clearly the kind of hammer and the kind of chisel proposed to be used.

It would seem to be a matter of common knowledge that when steel hammers are struck with great force upon steel chisels or drills held against iron surfaces, chips or particles of steel are liable to break off from the chisel as well as from the hammer or the iron surface and fly up and about. Especially would it seem that a man of the plaintiff's age, experience, opportunities for observation, and knowledge of the liability of the steel drills to break off at the point when held against stone, would know there was such danger when such a chisel was held against iron and struck so hard with a seven pound hammer. If this were all that appeared in the evidence, there would be no question that the plaintiff assumed the risk of the consequences resulting from this heavy blow, under the familiar rule that a servant, if he does not stipulate otherwise, assumes such risks in his employment as are known to him or would be known to him by the exercise of ordinary observation and forethought. *Golden* v. *Ellis*, 104 Maine, 177.

But the plaintiff further testified that he in fact did not know that in striking as hard as he did with that hammer upon that chisel held against the iron pipe there was any danger or liability of bits of steel breaking off from the chisel and flying about. His counsel argues that that testimony warranted the jury's finding that he did not assume the risk. Despite his assertion to the contrary, however, it is so clear that he must have known the danger or liability had he been, as it was his duty to be, ordinarily observant and thoughtful, the jury's finding, resting as it does on that assertion alone, cannot be sustained. We must assume that he was ordinarily observant and caretaking, since such was his duty. Workmen are not excused from the exercise of their senses and reasoning faculties, and, unless they stipulate otherwise, they assume the risks that such exercise would reveal to them.

Motion sustained.
Verdict set aside.

C. A. WESTON COMPANY *vs.* KATIE E. COLBY, Administratrix.

Sagadahoc. Opinion September 22, 1910.

Descent and Distribution. Liability of Heir. Lien for Debt to Intestate. Enforcement. Revised Statutes, chapter 77, section 7; chapter 83, section 60.

1. R. S., chapter 77, section 7, imposes a lien in favor of the administrator of a solvent estate upon the share of an heir who may be indebted to the intestate at the time of his death. The lien is made enforceable by suit and attachment by the administrator within two years after administration granted, and is made to have priority to any other attachment of the share.
2. A creditor of a person to whom a share in a solvent estate has descended is chargeable with notice of such lien, and any attachment made by him of such share is subject to the lien, though made before any attachment by the administrator.
3. In enforcing the lien by suit and attachment, it is not necessary that the writ or the officer's return should contain a description of any particular parcels of land to be attached, since the lien is upon the entire share. It is sufficient if the writ and return show that the attachment is made to enforce the lien.
4. Nor is it necessary to allege in the declaration that the estate was solvent, since the right of action is not based on the statute but is independent of it.
5. Nor is it necessary that the certificate of the attaching officer returned to the register of deeds, under R. S., chapter 83, section 60, should contain a statement that the plaintiff sues as administrator. That statute only requires "the names" of the parties to be stated.

On report. Judgment for defendant.

Real action to recover two undivided ninths of certain real estate which was a part of the estate of the defendant's intestate and which descended to his two sons. Plea, the general issue. An agreed statement of facts was filed and the case was then reported to the Law Court for determination.

The material facts are stated in the opinion.

Barrett Potter, for plaintiff.

Wm. T. Hall, Jr., for defendant.

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

EMERY, C. J. R. S., chapter 77, section 7, is as follows: —

"Sec. 7. When an estate is solvent, and a person, to whom a share of it descends, is indebted to the intestate at the time of his death, such debt creates a lien on his share, having priority to any attachment of it; and such lien may be enforced by suit and attachment of the share within two years after administration is granted, and by levy within thirty days after judgment. In such action, or in one brought by the heir, all claims between the intestate and heir may be set off and adjusted, and the balance due may be established."

Charles S. Colby died intestate and solvent leaving real estate of which one undivided ninth descended to each of his sons James and Charles O. The plaintiff claims title to these two-ninths under attachment, judgment and levy of execution thereon against the two sons above named. The defendant claims title under attachment, judgment and levy of execution thereon against the same parties in her favor as administratrix of the decedent. The plaintiff's was the prior attachment, but the defendant's attachment was within two years after administration granted. If the defendant's suit enforced her lien under the above statute she has the better title and is entitled to judgment in this action; otherwise the plaintiff is entitled to judgment.

The case may be considered and determined as if the two sons and heirs were themselves the parties plaintiff, since the Weston Company claims only under them as an attaching creditor but has not the advantage of an attaching creditor without notice. When the plaintiff attached the land it was subject to the statutory lien, and the plaintiff was chargeable with notice of the lien and that suit might be brought and attachment made by the administratrix to enforce it. The plaintiff's attachment did not destroy nor in the least affect the right of the administratrix; did not require of her any greater care or particularity in framing her writ or declaration, nor of the officer in his procedure.

The plaintiff here urges but three objections to the efficacy of the defendant's (the administratrix) proceedings to enforce her lien,—(1) that while the writ did direct the officer to attach the goods and estate of the defendant "and particularly and especially his share of the estate of the late Charles S. Colby on which the plaintiff claims a lien," and while in the declaration it was alleged that "said plaintiff claims a lien on the share of said defendant in the estate of Charles S. Colby by virtue of R. S., chapter 77," yet neither in writ nor declaration was there any other description of the property to be attached or upon which the lien was claimed; (2) that neither in the writ nor declaration was there any allegation that the estate of the decedent was solvent, though it is admitted that such was the fact;—(3) that while in the officer's certificate of attachment sent to the Register of Deeds he did state that he had "particularly and especially attached his (the there defendant) share of the estate of the late Charles S. Colby on which the plaintiff claims a lien as Administratrix of said estate," yet in stating the names of the parties he stated that of the party plaintiff as "Katie Colby" without stating the capacity in which she sued.

As to the first objection, the case is quite different from those of "Mechanics liens" and other kindred cases. In those cases the lien is limited to some particular article or articles, or to some particular parcel of land, and hence the process to enforce the lien should describe the particular article or parcel of land upon which the lien is claimed. In this case the lien is not limited to any particular article, or parcel of land, but is imposed upon the entire share of each heir of the decedent. It is not necessary, therefore, and the statute does not require that any particular part of that share be designated either in the writ or declaration. It sufficiently appears in both that the suit and attachment were to enforce the lien imposed by the statute R. S., chapter 77, section 7.

As to the second objection, the rule invoked is not applicable viz, that in actions based on a statute all the facts stated in the statute as constituting the right of action should be stated in the declaration. The suit of the administratrix was not based on the statute in question, but was upon the indebtedness of the heirs to her intes-

tate. She had full right of action to recover that indebtedness independent of the statute. The indebtedness, the personal liability of the heirs, was the cause of action. The statute merely annexed to that right of action an incident viz, a lien upon the debtor's share in the estate of the decedent. It does not require that its terms be set out in either writ or declaration.

As to the third objection, the statute invoked (R. S., ch. 83, sec. 60) only requires that the certificate of the attaching officer shall contain "the names of the parties." It does not require any statement of the capacity in which they sue or are sued. If necessary for inquirers at the registry to be informed of that capacity, sufficient information was given by the certificate.

With these three objections overruled, the plaintiff here (the Weston Co.) admits (what we hold) that the proceedings of the defendant (the admx.) to enforce her lien were sufficient, thence the entry must be,

Judgment for the defendant.

In Equity.

DENNIS MCGUIRE *vs.* EDWARD P. MURRAY et als.

Penobscot. Opinion September 23, 1910.

Limitation of Actions. Notes. Fraudulent Conveyances. Reconveyance. Statute of Frauds. Estoppel. Equitable Estoppel. Specific Performance. Part Performance. Revised Statutes, chapter 75, section 14.

A witnessed note given in 1893 was not barred in 1905.

A note given by a testatrix was not barred by any special statute of limitations where the executor never gave notice of his appointment as required by statute.

One who has conveyed property to avoid anticipated claims cannot invoke the aid of equity to obtain a reconveyance.

An estate cannot defeat a note given by a testatrix for land conveyed to her by her daughter, though the testatrix knew the conveyance was intended to defeat claims that might arise against her daughter.

The statute which prohibits suit to charge one on a contract concerning land, unless it is in writing, applies only where he is charged upon the contract, and not to equities resulting from res gestae subsequent to and arising out of the contract; the ground being equitable fraud, not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense.

After having induced or knowingly permitted another to perform in part an agreement on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, one cannot insist that the agreement is void.

A daughter deeded land worth $5,000 to her mother to avoid prospective claims against her, which did not materialize, taking a note for $2,000 as the price. The daughter and her husband remained in possession, paying the taxes, and the note was never paid. Several years afterwards, and after the mother and daughter died, the note and deed were discovered, whereupon it was agreed by the husband and the mother's heirs, etc., that the note be canceled, which was done, and that the land be deeded to the husband. *Held*, that equity will enforce a conveyance according to the agreement.

The statute of frauds having been enacted for the purpose of preventing frauds, should not be used fraudulently.

In equity. On report. Bill sustained. Decree according to opinion.

Bill in equity brought by the plaintiff against the defendant Edward P. Murray and ten others, praying the court to decree that the defendant Murray held the legal title to a certain dwelling house and lot in Bangor in trust for the plaintiff and to compel the defendants to convey the property to him free of all liens and incumbrances. The defendants answered, the evidence was taken out, and the cause was then reported to the Law Court for determination.

The material facts are stated in the opinion.

Benning C. Additon, and Matthew Laughlin, for plaintiffs.

Fellows & Fellows, and Edward P. Murray, for defendants.

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

WHITEHOUSE, J. This bill in equity is brought to obtain from the court a decree that the defendant Murray holds the legal title to a certain dwelling house and lot in Bangor in trust for the plaintiff, and to compel the defendants to convey the property to him free of all liens and incumbrances. The case comes to the Law Court on report.

The material facts alleged and not denied and those satisfactorily established by the evidence, may be succinctly stated as follows:

On the 22nd day of February, 1893, Mary J. McGuire, wife of the plaintiff, being seized in fee of the house in question, valued at $5000, conveyed it to her mother Ellen Cassidy by a warranty deed in which the consideration was stated to be two thousand dollars, and received therefor a promissory note for $2000 signed by Mrs. Cassidy and witnessed by William Cassidy, her husband. At the date of this deed Mrs. McGuire, the grantee, had a suit for slander pending against one Largay, and this conveyance is said by one of the plaintiff's witnesses to have been made to "cover up the property" in anticipation of a possible cross action by Largay against Mrs. McGuire. No such cross action was ever brought, however, and there were no existing or subsequent creditors who were or could have been defrauded by this conveyance to Mrs. Cassidy.

Mrs. Cassidy, the grantee in this deed, died in the year 1902, leaving her husband William Cassidy surviving her, and as her heirs five children, namely, Mary J. McGuire, wife of the plaintiff, and William J. Cassidy, Ellen C. Buckley, Annie M. Crane and Margaret E. Welch. She left a will by the terms of which, after disposing of certain specific items of real estate, she devised and bequeathed all of the residue of her estate, real and personal to her husband, William Cassidy, in trust for the purposes therein specified, during the lifetime of her husband William Cassidy, and provided that at his death the trust should cease and that the entire residue and remainder of the estate, with the exception of three parcels of real estate otherwise disposed of, should be divided equally among her children William J., Annie, Margaret and Ellen if living. As a result of these testamentary provisions, the defendant William Cassidy, took the legal title to the McGuire premises in question and the heirs above named took only contingent remainders, although the will makes no specific mention of this particular piece of real estate.

In the year 1903, the year following the death of Mrs. Cassidy, Mary J. McGuire the wife of the plaintiff, and the grantor in the deed in question, died testate, and by the terms of her will, her husband who was made executor, succeeded to all of the rights of the testatrix in the homestead in question. Nearly two years after the death of his wife the plaintiff found among her papers the promissory note for $2000 in question signed by Ellen Cassidy and given to Mrs. McGuire by Mrs. Cassidy at the time of the conveyance of the property to her. As a result of the investigations which followed the discovery of this note, the plaintiff ascertained for the first time that the legal title to the homestead, which he and his wife had occupied and controlled and upon which they had paid the taxes as absolute owners, without interruption or change during all these years, had been conveyed to his wife's mother in 1893 and by operation of the provisions of her will transferred to the defendants. Neither did the defendant William Cassidy have any knowledge of the transaction until the deed of 1893 was found on record as a result of the examination following the discovery by the plaintiff

of the $2000 note. This note which then amounted to $3440 was a legal claim against the estate of Ellen Cassidy, which was estimated to have a value of at least $20,000. The note was not barred by the general statute of limitations, because it was a witnessed note, and it was not barred by any special statute for the reason that William Cassidy, executor of the will of Ellen Cassidy never gave the notice of his appointment required by the statute. It may be conceded that Mrs. McGuire's conveyance of the property in 1893 was for the purpose of avoiding anticipated claims against her, and that she could not invoke the aid of a court of equity to obtain a reconveyance. But none of the defendants invoked this principle in the conferences between the parties immediately after the discovery of the deed and note, or made any claim to hold title to the property by virtue of that conveyance,—certainly not without payment of the note for $2000 and interest, held by the plaintiff against the estate of Mrs. Cassidy. On the contrary it was known that at the time of the execution of her will Mrs. Ellen Cassidy had expressly stated to the scrivener that this property in question belonged to her daughter Mrs. McGuire. It was thereupon mutually agreed between the plaintiff on the one side and William Cassidy who was then trustee under the will of Ellen Cassidy, and the heirs of Ellen Cassidy named as defendants being all parties in interest, that the plaintiff should surrender the note for $2000 then amounting to $3440, to the representatives of the estate of Ellen Cassidy, and in consideration thereof that the trustee William Cassidy and the heirs of Ellen Cassidy should convey the legal title to the real estate in question to the plaintiff Dennis McGuire. The defendants above named thus promptly and voluntarily recognized the existence of an oral trust in favor of Mrs. McGuire. In execution of the mutual agreement above stated, the plaintiff on May 8, 1905, surrendered the $2000 note and it bears upon its face this memorandum signed by the attorney who delivered the note to Mr. Cassidy: "Settled by reconveyance of the property for which this note was given." William Cassidy and the heirs of Ellen Cassidy gave the plaintiff quitclaim deeds of their respective interests in the property. The

plaintiff also signed and delivered to the defendant William Cassidy, a memorandum of that date stating that these two transactions were in full settlement of all matters between the two estates.

It is not now questioned that in Ellen Cassidy's will the terms of the devise of her real estate to her husband William Cassidy as trustee, were sufficiently comprehensive to include the McGuire lot in question; but it is manifest from the form of the quitclaim deed to the plaintiff of May 8, 1905, in which William Cassidy is described as "widower" considered in connection with all the other facts and circumstances, that the parties in interest understood that by the terms of Ellen Cassidy's will, her children took vested interests in the real estate in question and that the quitclaim deeds in one of which William Cassidy joined as "widower" would have the effect to vest in the plaintiff the same full title in fee simple to the property which Mrs. McGuire conveyed to Ellen Cassidy by her conveyance of 1893. It is perfectly obvious, however, that in making that settlement completed May 8, 1905, all of the parties were acting under an entire misapprehension in regard to the state of the title and the effect of the conveyances then made to the plaintiff. It is not now in controversy that by the provisions of Ellen Cassidy's will the legal title to the McGuire property in question was vested in William Cassidy, the trustee named in the will, and that under the residuary clause of the will, the children took only contingent remainders which could not be conveyed by them either by quitclaim or warranty deeds. See *Robinson* v. *Palmer*, 90 Maine, 246. And by the terms of the will creating a trust the trustee was authorized to sell and convey only unimproved lots.

William Cassidy resigned as trustee in 1905, and William B. Pierce was appointed in his place. Pierce resigned in 1908, and the defendant Edward P. Murray is his successor. It is accordingly not questioned that the legal title to this property is now vested in the defendant Edward P. Murray.

It is provided by section 14 of chapter 75, R. S., that "there can be no trusts concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed

by the party or his attorney." The oral evidence in this case fails to establish any fact from which a trust might arise by implication of law, such as the payment of the consideration by one for land conveyed to another, and in the absence of fraud or grounds for an equitable estoppel, the admission of oral evidence to prove any declaration of trust would be in direct contravention of the express provisions of the statute. *Wentworth* v. *Shibles*, 89 Maine, 170. Inasmuch, therefore, as the trust alleged to have resulted from the original conveyance by Mrs. McGuire to Mrs. Cassidy in 1893 is not manifested or proved by any writing signed by Mrs. Cassidy, it is not contended that it is a trust which can be recognized or enforced in a court of equity. The plaintiff is not seeking to enforce an oral trust arising from the original transaction. But he confidently insists that the oral agreement and settlement consummated on the 8th of May, 1905, afford a sufficient and complete basis for equitable relief, either upon the ground of a part performance of the agreement by the plaintiff in the faith of its full performance by both parties or, independently of the doctrine or part performance, upon the general principle that relief in equity will be granted when the defendant has been guilty of fraud which induced the plaintiff to change his position irretrievably for the worse.

At the time the $2000 note was surrendered to William Cassidy, executor and trustee, it was undoubtedly a valid subsisting claim against the estate of Ellen Cassidy, to the amount of more than $3400. The note was signed by Ellen Cassidy by "her mark" and the name of William Cassidy appears on the note as an attesting witness. All the parties in interest had full opportunity to examine this note during the conferences connected with the agreement for the settlement which continued from June, 1904, to May, 1905, and William Cassidy never at any time before the commencement of this cause, questioned either the genuineness of his own signature or the validity of the note, but willingly joined in the agreement, as he expressed it, "to give McGuire the place and take up that note." But for the apparent purpose of proving that it was not a witnessed note and therefore barred by the statute of limitations at the time of the settlement, he testified as a witness in this cause that his name

written on the note was a "very good forgery" but not his signature, and that he never had any knowledge of the note whatever until it was presented at the time he saw the deed. The conclusion is irresistible, however, that this testimony is so discredited by the overwhelming evidence to the contrary as well as by the conclusive significance of his own conduct during the year following the discovery of the note at the time of the settlement, that it must be rejected as a reckless and flagrant disregard of the truth. The note was a genuine and valid promissory note and a legally enforceable claim against the estate of Ellen Cassidy. Even though given by Mrs. Cassidy as the consideration for a conveyance from Mrs. McGuire to defeat any subsequent claims that might possibly arise against her, such a fraudulent purpose, though known to the grantee, cannot be set up in defense to an action on the note. *Butler* v. *Moore*, 73 Maine, 151; *Dyer* v. *Homer*, 22 Pick. 253; *Harvey* v. *Varney*, 98 Mass. 118.

It also satisfactorily appears that neither William Cassidy nor any of his children ever asserted a right or expressed any purpose to hold the property on the ground that the original conveyance was in fraud of creditors, but upon discovery of the note and deed they all joined in the agreement to convey the property to McGuire in consideration of his surrendering the note to the executor of the estate. That such an oral agreement was made is established beyond question. It is sufficiently alleged in the bill, distinctly supported by all of the direct testimony in the case, not denied by Mr. Cassidy himself and absolutely and decisively confirmed by the deeds given in attempting to effect the settlement.

The plaintiff performed his part of the contract by surrendering the note and acknowledging in the memorandum that it was "settled by a reconveyance of the property." No action at law can now be maintained upon the note thus surrendered and canceled. The plaintiff continued in the possession of the house, exercising dominion and control over it, paying the taxes and making repairs upon it, in the confident belief that he was the lawful owner of the property.

At the time of the execution of these deeds to the plaintiff, the defendants undoubtedly believed that they had performed the agree-

ment on their part to "give the place to McGuire" upon the surrender of the note to the executor. But after discovery that the legal title to the property still remained in the trustee under the will of Ellen Cassidy, they seek to repudiate the settlement, insist that the trustee shall continue to hold this real estate and the $3400 due on the note, of the payment of which the estate has been relieved, and the defendants now refuse their consent for the court to authorize and direct the trustee to convey the property to the plaintiff according to the true intent and purpose of the agreement. The plaintiff has thus lost house and note and has been led to change his position irretrievably for the worse, and adequate relief can only be afforded by a specific performance of the contract by the defendants.

With respect to the specific performance of such oral contracts on the ground of part performance, it is said in *Madison* v. *Alderson*, L. R., 8 App. Cas. 467, that when the statute says no action is to be brought to charge any person upon a contract concerning land unless it is in writing, "it has in view the single case in which he is charged upon the contract only and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract." And in 4 Pom. Eq. Jur. sec. 1409, the author says: "The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense." So in *Woodbury* v. *Gardner*, 77 Maine, 68, it was held that a parol agreement for the conveyance of land should be enforced in behalf of the vendee whose partial performance has been such that fraud would result to him unless the vendor were compelled to perform on his part. In the opinion the court said: "The ground of the remedy is equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void. . . . In other words, the statute of frauds having been enacted for the purpose of preventing frauds, should not be used fraudulently."

See also *Green* v. *Jones*, 76 Maine, 563, and *Goodwin* v. *Smith*, 89 Maine, 506. In *Low* v. *Low*, 173 Mass. 580, the law is thus stated: "The provisions of the Statute of Frauds are not a bar to the relief sought, because the refusal to complete the transfer of title is in the nature of a fraud and the defendants are estopped to set up the Statute of Frauds in defense."

Again in Pomeroy's Equity Jurisprudence, Vol. 6, (Eq. Rem. Vol. 2,) section 830, the author says: "Independently of the doctrine of part performance, relief may be granted when the defendant has been guilty of fraud which leads to an irretrievable change of position."

In the case at bar the refusal of the defendant to complete the transfer of title to the plaintiff according to the manifest purpose of the agreement, is an equitable fraud upon him. By the plainest principles of justice and conceptions of common right he is entitled to relief from the consequences of that fraud, and the court is not prohibited by any reason or authority from granting such relief, but on the contrary is warranted in so doing by the established principles of equity jurisprudence.

It is accordingly the opinion of the court that the plaintiff is entitled to a decree authorizing and directing the defendant Edward P. Murray in his capacity as trustee, to convey to the plaintiff by quitclaim deed with the usual covenants, all the right, title and interest in the real estate in question which he holds as trustee under the will of Ellen Cassidy.

Bill sustained with costs.
Decree in accordance with opinion.

JONATHAN P. CILLEY *vs.* LIMEROCK RAILROAD COMPANY.

Knox. Opinion September 24, 1910.

Pleading. Amendment. New Cause of Action.

In an action of trespass quare clausum, when the plaintiff's close is described in the declaration as "beginning at the westerly corner of land owned" by H. F. thence proceeding by courses and distances around a tract of land "to the bounds first mentioned," and no monuments are mentioned except the starting point, an amendment substituting the "southerly corner" of land of H. F. for the "westerly corner," as the point of beginning, is not allowable. The description as amended would include land not included in the original declaration, and such an amendment would introduce a new cause of action.

On exceptions by defendant. Sustained.

Action of trespass quare clausum alleging damages in the sum of $1000. Plea, the general issue. On motion therefor, the plaintiff was permitted to amend his declaration by substituting the word "southerly" for the word "westerly" in the beginning of the description of the plaintiff's close, and the defendant excepted.

The case is stated in the opinion.

Cilley & Burpee, for plaintiff.

Arthur S. Littlefield, for defendant.

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

SAVAGE, J. This is an action of trespass quare clausum. In the original declaration the plaintiff's close was described as "beginning at the westerly corner of a piece of limerock quarry owned by Harris Farrand or by Harris Farrand and another person unknown," thence proceeding by courses and distances around a tract of land "to the bounds first mentioned." No monument is mentioned except the starting point, that is, "the westerly corner" of the Farrand quarry. Against the objection of the defendant the plaintiff was permitted to amend his declaration by substituting the word "southerly" for the word "westerly," in the beginning of the

description, so that the declaration as amended describes a parcel "beginning at the southerly corner" of the quarry of Farrand, thence proceeding by the same courses and distances as before "to the bounds first mentioned." To the allowance of the amendment the defendant excepted, and the case is now before us on its exceptions.

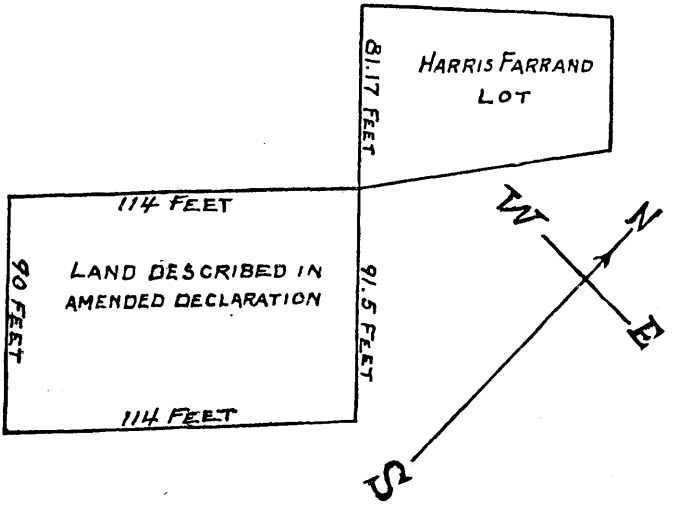
If the declaration as amended described another close than the one described in the original declaration, or if it enlarged the close, or included land not included in the original, the amendment introduced a new cause of action and was not permissible. *Robinson* v. *Miller*, 37 Maine, 312; *Wyman* v. *Kilgore*, 47 Maine, 184. It is otherwise if the amendment merely gave a more particular description of the locus originally described.

Whether the new declaration describes the same land as the old is to be ascertained by applying the description to the face of the earth. And in case of an ambiguous or doubtful call, it would be permissible at the hearing upon the motion to amend to show by extraneous evidence where the respective boundary lines would fall. In this case, upon the face of the declaration itself it is evident that a parcel bounded by a line beginning at the "westerly" corner of a designated tract and thence proceeding by courses and distances alone around "to the point of beginning," is not the same parcel as one described as beginning at the southerly corner of the same tract, and proceeding by identically the same courses and distances around "to the point of beginning." The boundary lines are not coterminous at any point. The latter description must include land not included in the former.

But in the matter of identifying descriptions in deeds, the words "southerly" and "westerly" are not always used to indicate a direction that is due south or due west. A corner may be called a westerly corner when it lies between west and south, or west and north. And so of a so called southerly corner, it might be between south and west or between south and east. And if a corner were due southwest from the center of the tract, it might not be fatal to designate it either as a westerly corner or as a southerly corner. The corner intended might be made certain, for instance, by monu-

ments named by the other calls in the deed. This case, however, does not involve considerations such as these. There is no monument mentioned except the starting point. The other calls do not aid. They state only courses and distances.

A plan is made a part of the bill of exceptions. But this plan does not aid the plaintiff. The plan shows the lot described in the amended declaration, which the bill states is the lot upon which the alleged acts of trespass were committed. The plan also shows other lots contiguous, or in the vicinity. It shows two lots owned by "H. Farrand" and others. But we assume, as the plaintiff claims, that the Farrand lot intended in the declaration is the more easterly one of the two. The situation is shown approximately by the following sketch.



One corner of the Farrand lot is almost a true westerly corner, and another is almost a true southerly corner. There is no ambiguity or uncertainty about it. The term westerly is properly applicable to only one of the corners, and the term southerly to another. A lot laid out according to the given courses and distances and beginning at the westerly corner of the Farrand lot will include a part of the territory described in the amended declaration, but not

the whole of it. The amendment therefore enlarged the close, and introduced a new cause of action, so far as it related to land not included in the original description. Such an amendment is not allowable.

Exceptions sustained.

In Equity.

HARMON G. ALLEN et als. *vs.* THE TRUSTEES OF NASSON INSTITUTE.

York. Opinion September 27, 1910.

Wills. Construction. Testator's Intent. Charities. Educational Gifts. Cy Pres Doctrine. Insufficient Funds. Rights and Powers of Trustees. Private and Special Laws, 1909, chapter 205.

The primary rule of testamentary construction is to ascertain and execute the testator's intent.

A testamentary gift to provide funds to establish and maintain an institution for the education of young women, to promote their moral, intellectual, and physical education, provides for a school of a different and higher type than a high school, for the education of young women only, and does not authorize use of the funds in whole or in part in assisting in maintaining a town high school or other school for both sexes, though the funds be insufficient to effect the donor's purpose.

If the original purpose of a public charity under a trust fails, and there are no objects to which, under the specific terms of the trust, the funds can be applied, a court may determine whether, in the event that has happened, it was not the donor's probable intention that the gift be applied to some kindred charity as nearly like the original purpose as possible; but if it appears that the gift was for a particular purpose only, and there was no general charitable intention, the court cannot by construction apply the gift cy pres to the original purpose.

Under a testamentary gift to provide a fund to establish and maintain an institute for the education of young women, the fact that the fund amounts to only $32,000 does not warrant a holding that the original purpose has failed so as to permit application of the cy pres doctrine to direct its use to some nearly allied purpose.

If the trustees of a testamentary gift to be used in establishing and maintaining an institute deem the funds inadequate, they may permit them to accumulate.

Under a testamentary gift to provide funds to establish and maintain an institute for the education of young women, the trustees could expend less than one-half of the funds in erecting a building, but could not authorize male pupils to be received with or without payment of tuition, nor contract with the town to run a school for pupils of both sexes by the trustees paying female teachers the unexpended funds in the trustees' hands.

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

Bill in equity brought to obtain a judicial construction of the residuary clause of the last will and testament of George Nasson, late of Sanford. The defendants answered, a replication was filed, a hearing had and the evidence taken out and then by agreement the cause was reported to the Law Court on bill, answer, replication and so much of the evidence as was legally admissible, for that court to "render such decree as the rights of the parties require."

The case is stated in the opinion.

Foster & Foster, and George A. Goodwin, for plaintiffs.

Howard Frost, for defendant.

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

CORNISH, J. This is a bill in equity brought to obtain a judicial construction of the residuary clause of the will of George Nasson, late of Sanford, who died on September 17, 1882. This clause is as follows:

"Seventeenth: I give, devise and bequeath unto Asa Low, Esq., Irving A. Butler and Charles H. Frost and to their successors, all the rest and remainder of my real estate in trust for the following purposes, to wit: They shall hold, lease and manage said real estate according to the best of their discretion, during the lives of my two sisters Julia and Joanna, and each year after deducting the expenses of said property and trust, shall pay over to my said sisters in equal shares during their joint lives one half of the net income of said real estate, and after the death of either of them shall pay said half to the survivor. The other half of the net income of said real

estate shall be safely and carefully invested and the same and the interest and income thereof shall be held until the death of both of my sisters. Then all said real estate except a suitable lot for the building and purposes hereinafter mentioned and situate in my field back of Ridley lot and entrance on Main street in Springvale, Maine, shall be sold and the fund derived from such sale or sales together with the previous income from said real estate and interest thereon, shall be used to establish and maintain an Institute for the education of young ladies to be known as the Nasson Institute, which shall be carried on to promote the moral, intellectual and physical instruction and education of young women. My said trustees for the time being are to have full power and authority to prescribe such fees, terms and rules of admission to said Institute as they may think proper, it being however my wish and direction that female teachers only be employed in said Institute. One half of the fund aforesaid may be used in erecting a suitable building for said Institute and laying out the grounds therefor and the remaining half shall be safely invested and the income thereof only used toward the expenses of said Institute. I advise my trustees to keep the funds invested in bonds of the United States or some northern state, and to make no other investment without the consent of the Hon. Judge of Probate for the time being. If either of the trustees named shall decline to serve or whenever either of said trustees shall move away from the state or shall resign or die, I wish the Hon. Judge of Probate to appoint some suitable person to fill such vacancy."

The will was dated March 24, 1881, was admitted to probate November 7, 1882, and other trustees have succeeded to those named in the will. Both the sisters Julia and Joanna have long since deceased and the amount of the trust fund is now about $32,000, $12,000 of which consists of real estate and $20,000 of personal property. The paragraph in question is neither indefinite nor ambiguous. The testator's intention could hardly have been expressed with greater precision or clearness. The purpose of this bill therefore is not so much to obtain judicial construction of a

doubtful bequest as to obtain the authority of the court to use the fund in assisting the town of Sanford to maintain a High School in that part of the town known as Springvale.

It is apparent that the testator had no such intention when he made his will. He was himself a resident of Springvale and presumably acquainted with the school system of the town and its needs. That system is supported by taxation and evidently he did not desire to make donations to the town schools which would afford relief to the taxpayers of the town but would not necessarily tend to the improvement of the schools themselves. His sole purpose was to establish a different type of institution from any existing in the town or perhaps in the state, "an Institute for the education of young ladies to be known as the Nasson Institute, which shall be carried on to promote the moral, intellectual and physical instruction and education of young women." The institution was to be of a higher type than a high school, with a wider patronage, designed for pupils of maturer age, confined to the female sex, and preferably with only female teachers employed. It was to bear his name. It was, in his mind, to become in time what many similar institutions in other states have become, a prosperous young ladies seminary.

This being the testator's intention, clearly and unequivocally expressed, we fail to see on what ground this court can justify itself in diverting the trust property to a purpose so radically different as the assistance of a town high school. It is the province of the court to construe a will, not to construct one.

We are urged, however, to do this first on the ground that when the will was made, coeducation was an experiment while now it is an established fact, and it is argued that had the testator realized this, he would not have even advised that an institution be established for the exclusive education of young ladies. The contention is unsupported by the facts. In 1881, when the will was made, all the academies and three of the colleges in the state were open to women and had been for many years. No educational doors then closed to women have been opened since. Conditions have not changed since the will was made, and even if they had, such change, while it might tend to prove the unwisdom of the bequest in the light

of subsequent events, would not authorize its diversion to objects not contemplated by the testator.

In the second place it is suggested that the amount of the trust fund is not sufficient to carry out the wishes of the testator, and therefore under the doctrine of cy pres, the court can direct the use of the trust fund for some nearly allied purpose.

The scope and limits of the cy pres doctrine, as a rule of judicial construction adopted and administered by this court, have been so exhaustively set forth in *Doyle* v. *Whalen*, 87 Maine, 414, and *Brooks* v. *Belfast*, 90 Maine, 318, that their further consideration here is unnecessary. A simple statement of the familiar principle will show its non-application to the case at bar. "If the original purpose of a public charity fail and there are no objects, to which under the specific terms of the trust, the funds can be applied, the court may determine whether, in the event that has happened, it was not the probable intention of the donor that his gift should be applied to some kindred charity as nearly like the original purpose as possible. . . . . But if it appears that the gift was for a particular purpose only, and there was no general charitable intention, the court cannot by construction apply the gift cy pres to the original purpose." *Doyle* v. *Whalen*, supra. This is not therefore the exercise of an arbitrary power but it is in conformity with the one central rule of testamentary construction, the ascertainment and execution of the intention of the testator. It applies only when two prerequisites exist, viz, when the court can see in the instrument a general charitable purpose as well as a specific gift, and when the specific gift fails. In such a case the failure of one object should not work the failure of both and thus thwart the intention of the testator.

In the will under consideration, neither of these prerequisites exists. The trust has not failed. It has been administered by the trustees these many years and presumably the fund has increased in amount. The same trustees who bring this bill have obtained a legislative charter whereby they are incorporated "by the name and style of the trustees of an academy under the name of the Nasson Institute" for the purpose of establishing and maintaining

the very institution provided for in this will. Priv. Laws, 1909, chapter 205. It is true that the amount of the trust fund at the present time is not as large as it should be to establish and maintain such an institution on an extensive scale, but we do not regard it as so paltry as to render the plan impracticable or impossible of fulfilment. A similar objection was raised in *Gilman* v. *Hamilton*, 16 Ill. 225, where a trust fund had been created for the establishment of a theological institution and the answer of the court is in these words. "The fund was mostly in land, which continued for eight or ten years to be of little value and insufficient for the erection of buildings, and the endowment and support of the institution. This is the only reason I have heard assigned, to show the impracticability of executing the trust, and a failure of the objects of the charity. I do not think this satisfactory evidence. It may not now, but may be sufficient at a future day for that purpose. But I might admit even a conclusion that it never could become sufficient, and still it may not show a total failure of the charity; others may contribute, other means and funds may be obtained, and the end accomplished. Very few donations of this kind are alone sufficient to accomplish fully the designs and objects of the benevolent. Should all donations be tested by a rule of sufficiency in themselves, there would be but few that might not be diverted from the original purpose, to some other as near like it as could be readily found, and especially would this be true, of the foundation or first donation beginnings. We have few educational institutions, however well endowed, at this day, whose earliest donations might not have been diverted for the same reasons."

If deemed advisable by the trustees, immediate steps need not be taken for the establishment of the Institute. The expenses of trusteeship should be slight and the fund might be allowed to accumulate for a time in order to place the institution upon a firm financial basis. *Tainter* v. *Clark*, 5 Allen, 66. Other benefactors may be found to assist in the maintenance of a type of school which has no competitor in this state and which may find a ready field of operation and usefulness.

The second prerequisite to the invocation of the cy pres rule may also be lacking, as the court might find it difficult to discover a general charitable purpose in this will but a particular purpose only. If so, and that purpose should fail, the fund could not be applied by the court cy pres the original purpose but would lapse and fall into the estate of the testator. *Merrill* v. *Hayden*, 86 Maine, 133; *Brooks* v. *Belfast*, 90 Maine, 318; *Teele* v. *Bishop of Derry*, 168 Mass. 341. That question, however, is not decided in this case. Were its decision necessary, the heirs of the testator should be given an opportunity to be heard.

For the reasons stated, the questions propounded by the trustees must be answered categorically as follows:

1. Are the said trustees authorized, after the sale of the real estate mentioned in paragraph 17, as therein directed, to expend the money, or a part thereof, received therefrom, in erecting a building which shall be known as the Nasson Institute? Answer, yes.

2. And if so authorized, whether said trustees are authorized to expend less than one-half of said money in the erection of said building or institute? Answer, yes.

3. Whether said institute when so erected may be authorized to receive pupils of both sexes? Answer, no.

4. Whether the trustees may authorize the said Institute to charge tuition to male pupils received into said institute for instruction? Answer, no.

5. Whether the said trustees are authorized to contract with the town of Sanford for the reception into said institute of pupils of both sexes, upon payment by the town of such tuition as the trustees may deem proper? Answer, no.

6. Whether the trustees are authorized to contract with the town to run a school for the pupils of both sexes in the Town of Sanford by the institute paying a female teacher or teachers the unexpended income or balance of income in the hands of the trustees? Answer, no.

7. If the income derived from the investment of the funds named in paragraph 17 is not sufficient to maintain and support an institute wholly for the education of female pupils, whether the trustees

are not authorized to contract with the town in some manner, so that such income may be sufficient to maintain and support an institute or school for the education of male and female pupils? Answer, no.

Decree accordingly. Taxable costs and counsel fees to the amount of fifty dollars to the plaintiff's and fifty dollars to the defendants to be allowed out of the fund.

JOHN V. THURLOW *vs.* F. L. PERRY, and Trustee.

Oxford. Opinion September 28, 1910.

Statute of Frauds. Contract to Purchase Land. Sufficiency of Writing. Revised Statutes, chapter 113, section 1, paragraph IV.

A letter admitting an oral agreement to buy land is insufficient under Revised Statutes, chapter 113, section 1, paragraph IV, requiring such contracts to be evidenced in writing, where it fails to set up the terms previously agreed upon, and particularly omits any reference to the purchase price.

Under Revised Statutes, chapter 113, section 1, paragraph IV, requiring a contract for a sale of lands to be evidence in writing signed by the party to be charged, or his duly authorized agent, all essential terms of the contract must appear, including the amount of the purchase price where the contract contains a stipulation as to price, so that no part of the agreement need be proved by parol evidence.

On agreed statement. Judgment for defendant.

Action of assumpsit, brought in the Rumford Falls Municipal Court, Oxford County, to recover damages for breach of a contract to purchase a farm. 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 pleaded, the defendant further says: That neither the alleged promise contract of agreement on which said action is brought nor any memorandum or note thereof

is or ever was in writing signed by him nor by any person by him thereto lawfully authorized." On motion therefor by the defendant, the action was removed to the Supreme Judicial Court in the same county. When the action came on for trial, an agreed statement of facts was filed and the case then reported to the Law Court for determination.

The case is stated in the opinion.

Fred R. Dyer, for plaintiff.

Williamson & Burleigh, for defendant.

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

PEABODY, J. This is an action of assumpsit for breach of contract to purchase a farm situated in Hartford, Oxford County, Maine. It was brought in the Municipal Court of Rumford Falls in said County, and on motion of the defendant was removed to the Supreme Judicial Court.

It comes before the Law Court on an agreed statement of facts.

On or about the fifteenth of September, 1908, the defendant made a verbal agreement with the plaintiff to purchase his farm and certain personal property of the value of more than $50 the price to be paid for the whole property being $2400. Subsequently several letters passed between the parties in which the plaintiff requested that a binding memorandum of the contract be made, and the statements and admissions contained in the letters of the defendant in response to these requests are relied upon as constituting a sufficient memorandum to comply with the requirements of the statute of frauds.

The principal admission so relied upon is contained in the following letter:

"Lichfield, Me., Oct. 27, '08.

Friend Thurlow;—

I arrived home this morning and received your letter. In reply will say you need not be one bit afraid. I told you I would buy your place and I shall do as I agreed. I have got a few things to do which will take me a day or two to do, and will telephone you the

night before I will meet you and Mrs. Thurlow in Lewiston. I have been quite sick since I was away and should have been here before, but I was not able. Hoping everything will be all right, I remain,

Yours truly,

(Signed) F. L. Perry.
Care of J. F. Gilman."

The other letters contained no additional terms and add nothing to the effect of the foregoing letter so far as it constitutes a memorandum under the statute.

About November 1st, 1908, the plaintiff and defendant met in Auburn where the plaintiff tendered a warranty deed of the farm to the defendant, who objected to receiving the deed at the time on the ground that the premises were incumbered by mortgages of which he was not informed at the time of the verbal agreement, and that he wished to see the lines himself. It was arranged that the mortgages should be discharged and that the lines should be pointed out to the defendant. This was done but the defendant has refused to purchase the farm.

The two defenses are, first, that there was no meeting of the minds of the parties in agreement, second, that there was no sufficient memorandum of contract under the statute of frauds.

It is unnecessary to consider the first defense as the written statements of the defendant do not contain all the necessary terms required by the statute to prove a contract for the sale of lands. R. S., chapter 113, section 1, paragraph IV. The letter of October 27th, taken in connection with the other correspondence, is sufficiently definite in its designation of the property, which is the subject of the contract, and contains a clear statement of an intention to purchase in accordance with the terms which had been previously agreed upon, but it fails to set out these terms and particularly omits any reference to the purchase price. It therefore amounts to nothing more than an admission that a verbal agreement previously made for the purchase of the plaintiff's farm existed. To comply with the statute both in letter and in spirit, as must be done to maintain the action, it is necessary that all essential elements and terms of the contract

be made to appear in writing signed by the party to be charged therewith or by some person thereunto lawfully authorized, in order that no part of the agreement needs to be proved by parol evidence. *O'Donnell* v. *Leeman*, 43 Maine, 158; *Williams* v. *Robinson*, 73 Maine, 186; *Kingsley* v. *Siebreckt*, 92 Maine, 25.

Among such essential terms the amount of the purchase price is to be included where the contract contains a stipulation as to price. Browne on Statute of Frauds, secs. 376-381.

Judgment for defendant.

FRANK VUMBACA *vs.* IDA B. WEST.

Cumberland. Opinion September 28, 1910.

Contracts. Variance. Evidence.

The defendant, who is sued under the name of Ida B. West, made and signed a written contract with the plaintiff "for laying blocks of a cement house" on her land, for a breach of which on her part this suit was brought. In the declaration the plaintiff set out in full a written memorandum of contract, in which the defendant was named as Ida B. West, and as having signed the memorandum by the same name. At the trial the plaintiff offered in evidence a written memorandum in all respects like the one declared on, except that the defendant's name there appeared as Ida A. West. *Held*, that the variance was not fatal, and that the memorandum was properly admitted in evidence.

By the contract the defendant was to furnish the blocks. The contract provided that the walls were to be twenty-nine feet high, but it was silent as to the thickness of the walls or the blocks. *Held*, that oral evidence that it was agreed that the blocks should be twelve inches thick is admissible. It does not contradict the written memorandum. It merely supplies the omission of an essential particular.

On exceptions by defendant. Overruled.

Special action of assumpsit brought by the plaintiff in the Superior Court, Cumberland County, to recover for breach of a special contract to build a house for the defendant, according to the terms of

the contract as set out in the plaintiff's writ. Plea, the general issue. Verdict for plaintiff for $40. The defendant excepted to certain rulings during the trial.

The case is stated in the opinion.

McGauflin & Briggs, for plaintiff.

Wilford G. Chapman, for defendant.

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

SAVAGE, J. Action for breach of contract. The plaintiff in his declaration sets out in full a written memorandum of agreement "for laying blocks of cement house to be located at No. 52 Myrtle Street, Portland, Maine." As declared upon, the memorandum, so far as it is necessary to state it here, recites that Frank Vumbaca agrees to lay the cement blocks, provide the cement, . . . and supply his own stagings . . . on basement completed: height, twenty-nine feet; with two bay windows out, and back end on Stone Street out.

Ida B. West is to furnish all blocks for the work to be done under this contract. . . . Said Ida B. West is to pay for all extra work not mentioned in this contract. . . .

Ida B. West is to pay for the above work the sum of one hundred and ninety dollars, when the work is completed in a manner to meet with the approval of the Building Inspector of Portland. . .

(Signed) Frank Vumbaca.
(Signed) Ida B. West."

The plaintiff averred further that the defendant failed to furnish the blocks, and to complete the basement on which the blocks were to be laid, as she had agreed to do, and thereby prevented the plaintiff from performing his part of the contract. For this alleged breach, the plaintiff sued the defendant as Ida B. West, and under that name she appeared and pleaded the general issue. The result of the trial was a verdict for the plaintiff.

During the trial the plaintiff offered in evidence an original memorandum, similar in all respects to the one set out in the decla-

ration, except that the name of the party contracting with the plaintiff was there given as "Ida A. West," instead of "Ida B. West," and the memorandum was signed by "Ida A. West." The plaintiff testified that the defendant was the person with whom he contracted, and who signed the contract. The defendant objected to the admission of the memorandum on the ground that there was a variance between the contract declared on and the one offered. It was admitted by the court, and the correctness of this ruling is the subject of the defendant's first exception.

We think the defendant's position is untenable. Here is no question about identity of parties. The defendant is the one who signed the contract as Ida A. West. Which of the two names is the correct one we are not told. It matters not. The variance, if the misdescription may be so called, in the middle initial letter of the defendant's name is immaterial, since there is no question of the identity of the person. It affords no defense. The defendant was impleaded. The contract offered was her contract. It was properly admitted. *Dodge* v. *Barnes*, 31 Maine, 290; *Medway Cotton Manufactory* v. *Adams*, 10 Mass. 360; *Orne* v. *Shephard*, 7 Mo. 606; *McDonough* v. *Heyman*, 38 Mich. 334. It has many times been held that the entire omission of a middle initial, or the insertion of an incorrect middle name or initial will not create a misnomer, nor as a general rule result in a fatal variance if contradicted by the evidence. See 14 Ency. of Pleading and Practice, 276, and cases cited.

Nor is there more merit in the defendant's second exception. The court below, against the defendant's objection, permitted the plaintiff to introduce testimony tending to show that the cement blocks as agreed upon were to be twelve inches thick. It is contended that this was a violation of the parol evidence rule, in that it permitted the written agreement to be modified or added to by oral evidence. We do not think so. The written contract was silent as to the thickness of the blocks or the thickness of the wall. But it is evident that thickness in such a case is an important, an essential, particular. We gather from the defendant's argument that she does not deny that a twelve inch wall was contemplated, but she claims that inas-

much as there are both twelve inch and eight inch blocks used in constructing the walls of buildings, she had the right to elect, the contract being silent, whether the plaintiff should lay twelve inch blocks, or to lay eight inch blocks and line them with four inch bricks. As to this, it is hardly necessary to observe that the written contract which the defendant wishes to be kept intact, makes no mention of brick lining.

But as touching the right of election, suppose, for illustration, that the contract had been silent as to height of the wall, or the number of stories of the house to be erected. Houses are erected of one, two, three, four or more stories. Could it reasonably be said that the defendant could have the election whether walls were to be built for a one story, or for a four story house? The question answers itself.

In this case the written agreement was on its face apparently incomplete. An essential stipulation was omitted. The evidence offered did not contradict the writing. It merely supplied the omission. The case falls within the exception to the parol evidence rule, and within the doctrine stated in *Neal* v. *Flint*, 88 Maine, 83, and *Gould* v. *Boston Excelsior Co.*, 91 Maine, 214. That doctrine is that where the writing does not of itself import that all the stipulations between the parties with reference to the subject matter were intended to be expressed in them, and where the particular stipulation offered to be shown by parol is of such a nature that the omission to express it in the writing does not indicate that it was not agreed upon, and it in no way contradicts or conflicts with any written stipulation, parol evidence of such a stipulation is admissible. *Gould* v. *Boston Excelsior Co.*, supra. No other exceptions have been pressed in argument. And, upon examination of the record, we find no error.

Exceptions overruled.

GEORGE MONROE *vs.* CLARENCE N. CLARK AND CHARLES R. SAWYER.

GUY EMMONS *vs.* SAME.

HERBERT CLARK *vs.* SAME.

ALBERT WEBSTER *vs.* SAME.

ALVIN CLARK *vs.* SAME.

Somerset. Opinion September 28, 1910.

Liens. Mechanics' Liens. Building Liens. Revised Statutes, chapter 93, sections 27, 29.

1. In order to bring a case within Revised Statutes, chapter 93, section 29, which provides that "whoever labors . . . in erecting . . . any building thereon, by virtue of a contract with or by the consent of the owner, has a lien thereon, and on the land on which it stands . . . to secure payment thereof," it must appear that the laborer performed the labor in "erecting the building."
2. When one contracts to furnish completed articles, like cut and fitted stones, for a building to be erected, and is to have no part in the erection of a building, his employees have no lien on the building for their labor in preparing and completing the articles.

On report. Defendants defaulted. Judgment that plaintiffs have no lien.

Five actions at law brought by the several plaintiffs against the same defendants, on accounts annexed, to enforce alleged liens against the building and land of one J. Palmer Merrill, under the provisions of Revised Statutes, chapter 93, section 29. The several cases were reported to the Law Court for determination, on admissions and evidence taken out at the hearing in the first two above entitled actions.

The cases are stated in the opinion.

Butler & Butler, for plaintiffs.

Merrill & Merrill, for defendants.

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

SAVAGE, J. These five suits are brought to enforce liens against the building and land of J. Palmer Merrill, under R. S., c. 93, sect. 29, which provides that "whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a wharf, pier, or any building thereon, by virtue of a contract with or by the consent of the owner, has a lien thereon, and on the land on which it stands . . . . . to secure payment thereof." The case comes up on report.

The defendants contracted with Mr. Merrill to furnish all the cut stone required for a building which he proposed to erect, and which he afterwards did erect, for the sum of $900. The plaintiffs labored for the defendants in the various processes in preparing and fitting the stone for the building, according to specifications furnished. Part of the labor sued for was quarrying in a quarry used by the defendants, part was cutting stone in their stone yard, and part was sharpening drills. The liability of the defendants is admitted in all the cases. The only question presented for our determination is whether the plaintiffs, or any of them, have mechanics liens on the building and land of Mr. Merrill, to secure the payment for their labor.

We think the plaintiffs have no liens. To bring the cause within the statute, it must appear that the laborer performed labor *in erecting the building*. The defendants were contractors. They contracted not to erect the building, or to do the granite work upon the building, but to furnish cut and fitted stone for the building. They were not to set it. Their contract was completed when they delivered the cut stone to the owner. They had nothing to do with the building itself. They did not even engage to cut the stone themselves, though doubtless that was contemplated. They engaged to furnish the cut stone. They would have satisfied their contract had they purchased the stone, all fitted, and then delivered it to the owner of the building.

The distinction is clear. Where one engages to erect a building, or do certain things in the erection of the building, as for example, the carpenter work, or the painting, or the plumbing, or the granite work, his employees have liens for their labor in doing these things. And if, in connection with doing these things, he agrees to furnish, and does furnish, the materials, the result is the same. It is not necessary that all of the labor should actually be done on the structure itself. To illustrate. The doors and windows may be made at the shop, the boards may be sawed and planed at the mill, or the iron work done at the blacksmith shop. These processes are all a part of the erection of the building. The work so done, in the contemplation of the statute, is done "in the erection of a building." *Webster* v. *Real Estate Improvement Co.*, 140 Mass. 526.

But where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employees have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed "in the erection of the building."

It would seem that these plaintiffs, or some of them, had a lien, which they might have enforced, under R. S., c. 93, sect. 27, which gives a lien for quarrying or cutting and dressing granite in a quarry. But that is immaterial in this discussion.

The plaintiffs are entitled to judgments against the defendants, but not to judgments for liens.

The entry in each case will be,

Defendants defaulted. Judgment that plaintiff has no lien. Judgment for J. Palmer Merrill against the plaintiff for his costs.

In Equity.

ALLEN P. TRASK AND OTIS SKINNER *vs.* GEORGE E. CHASE et als.

Penobscot. Opinion September 29, 1910.

Equity. Pleading. Demurrer. Hearing. Discretion of Court. Jurisdiction. Fraud. Corporations. Directors. Fraud of Directors. Equitable Remedy. Injunction. Actions. Appeal. Exceptions. Evidence. Revised Statutes, chapter 79, sections 22, 27.

1. In equity practice, merely technical and formal defects in a bill are not open to attack under a general demurrer.
2. If a demurrer be filed to the whole bill, and there is any part of the bill which on its face entitles the plaintiff to relief, the demurrer, being entire, must be overruled.
3. The allegations in a bill in equity for an injunction and other relief, to the effect that the defendants, constituting a majority of the directors of a corporation, but owning less than a majority of its stock, collusively and fraudulently issued stock to one of their number, for the purpose of securing control of the corporation by the ownership of a majority of the stock, and thereby preventing the plaintiffs, who had been the owners of a majority of the stock, but were a minority of the directors, from retaining control, state a case cognizable in equity.
4. The acts thus charged constitute a breach of trust, and are a fraud upon the minority directors, who are the majority stockholders.
5. In such case, equity has jurisdiction irrespective of whether the injured parties have a remedy at law, or whether such a remedy will be effective, or whether the loss from the want of an equitable remedy will be irreparable. Whether the defendants are insolvent or pecuniarily irresponsible, or not, is immaterial, and need not be alleged.
6. In such case it is not necessary to allege or prove that the stock thus fraudulently sold was sold at less than its real value. Such a fact, if true, is evidence merely of fraud. It is at least sufficient if it is alleged in effect that the corporation is alive, a going concern, with valuable assets.
7. The allegations in a bill in equity for injunction and other relief to the effect that the defendants, who are a majority of the directors, but owning less than a majority of the stock, intend to issue to themselves the balance of capital stock unissued, in violation of a by-law which prescribes that the directors shall issue the unissued stock to stockholders "in proportion to their respective interests," and that they will do so unless restrained, state

a case cognizable in equity. To issue all the unissued stock to themselves, without permitting other stockholders to take their respective shares would be unlawful, a breach of trust, and fraudulent as to the other stockholders.

8. An allegation that the plaintiffs protested against a vote of the directors, and caused their protest to be recorded is equivalent to an averment that they did not vote for the proposition in question.

9. In a bill in equity brought by stockholders to compel a director to surrender stock which has been fraudulently issued to him, it is not necessary to allege a tender or an offer to pay back the money paid by the director for the stock, or an offer to vote for its repayment.

10. In such a bill, to which all the stockholders are parties, it is not necessary to allege that the bill is brought on behalf of other stockholders, nor a willingness to let in other stockholders, nor that the bill is brought on behalf of the corporation, when the purpose of the bill is not to redress or prevent corporate wrongs.

11. In such a bill, when it is apparent on the face of it that an application to the directors or the corporation for relief would be fruitless, a demurrer will not lie for want of an allegation of such application. Whether it would be necessary to so allege in any case of this character is not considered.

12. An exception to the refusal of the sitting Justice, at the time of settling the final decree, to modify a preliminary injunction is not considered, because the preliminary injunction will no longer be of any importance when the final decision of the case is handed down.

13. Whether counsel, in his opening, in an equity hearing may read a piece of documentary evidence, in advance of its being offered as such, is a matter solely within the discretion of the Justice hearing the case. To his ruling thereon exceptions do not lie.

14. When an equity case is heard by the Law Court on appeal, the statute makes it the duty of the court to "affirm, reverse or modify the decree of the court below, or remand the cause for further proceedings as it may think proper."

15. Exceptions taken to the admission of testimony during the hearing of a case in equity are ineffectual, when the case goes to the Law Court on appeal, because, even if the rulings admitting testimony were erroneous, the court does not sustain the exceptions and send the case back for a new hearing, but, disregarding the inadmissible evidence, it decides the case finally, as the statute requires, and upon such evidence as it deems admissible. The same rule applies when evidence is erroneously excluded, if the record sufficiently shows what that evidence was.

16. The court is of opinion that the finding of the sitting Justice that the vote of the defendant directors to issue the stock mentioned in the bill to one of their own number and the issue of it accordingly were solely to enable the defendants to acquire control of the corporation and to oust the plaintiffs from their control, is amply supported by the evidence. It would be sufficient if that was the primary purpose.

17. The plaintiffs introduced a statement of the affairs of the corporation given by the director to whom the stock in controversy was issued to another director. The statement had a tendency to show that the stock was sold to him for less than it was worth. This was evidence of fraud, and was properly admitted, as against that director, the only one pecuniarily concerned in that branch of the case.

18. Breach of trust and fraud are among the fundamental grounds of equitable jurisdiction.

19. The directors of a corporation are trustees standing in fiduciary relations to the corporation and its stockholders, and are held to the exercise of the utmost good faith.

20. Holders of the majority of the stock in a corporation have a right to control the corporation, and it is a fraud for the directors or a majority of them to take advantage of a temporary ascendency in the board of directors to so manipulate the sale and issue of stocks as to oust the control from the majority of the stockholders, and secure it to themselves.

21. In equity matters the findings of the sitting Justice are to stand unless clearly shown to be erroneous.

In equity. On exceptions by defendants. Overruled. Decree below affirmed.

Bill in equity brought by the plaintiffs against George E. Chase, Robert C. Williston, George W. Smith and the Bangor Jewelry and Optical Company, a corporation, in which said company the plaintiffs and the said Chase, Williston and Smith are stockholders, praying for injunctions both temporary and permanent, restraining the said Williston from voting certain shares of the stock of the corporation held by him, or otherwise exercising the rights of ownership over the same, and from transferring the same and also that he be ordered to surrender and deliver to the treasurer the certificate thereof to be cancelled. The bill also contained other prayers all of which are stated in the opinion.

The defendants filed an answer with a general demurrer therein inserted. The cause was first heard in the demurrer which was overruled, and the defendants excepted. It was then heard on bill, answer and proof, and a decree was made in favor of the plaintiffs. The defendants then appealed and also excepted to certain rulings during the hearing.

The case is stated in the opinion.

E. C. Ryder, for plaintiffs.

Hugo Clark, and Charles H. Bartlett, for defendants.

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

SAVAGE, J. This is a bill in equity brought by two stockholders in the Bangor Jewelry and Optical Company against all the other stockholders and the corporation itself. It is alleged in the bill, among other things, that the capital stock of the corporation is $10,000, divided into 10,000 shares of the par value of one dollar each; that the plaintiffs, Trask and Skinner, and the defendants, Chase, Williston and Smith, are the owners of all the capital stock; that on February 1, 1909, which was the date of the last annual meeting prior to the filing of the bill, 8,025 shares had been issued, which were then owned as follows: 3,300 shares by Trask, 950 shares by Skinner, 2,000 shares by Smith, 1,150 shares by Chase, and 625 shares by Williston; that at the annual meeting it was voted by a majority vote of the stockholders not to sell or issue any more shares of the capital stock of the company; that at said meeting all the stockholders, Trask, Skinner, Smith, Chase and Williston were elected directors, and have since remained such; that Smith was elected president, and Chase treasurer; that it is provided in the by-laws of the corporation that the directors shall cause to be issued to the stockholders in proportion to their respective interests certificates of stock, not to exceed in the aggregate the capital stock of the corporation; that on March 22, 1909, Smith and Chase, president and treasurer respectively, and both of them directors, in breach of their trust and duty as officers and directors of the corporation, issued to Williston ten shares of the capital stock; that this was contrary to the vote passed at the annual meeting, before recited, and to the by-laws; that it was done without the authority of any vote passed at any meeting of the stockholders or directors, and without opportunity for other stockholders to purchase the same or any part thereof; that on July 22, 1909, a meeting of the directors, called at the request of Chase and Williston, according to the by-laws, was held, at which the following vote was passed: "Whereas it is desirable to reduce the indebtedness of this company to the Kenduskeag Trust Company, and whereas it is also desirable at this time to recognize the faithful and valuable services

of R. C. Williston, [one of the directors] who came to the company's employ on an understanding, perhaps not binding in law, to the effect that if he remained in the company's employ giving satisfaction for a reasonable time he should have the privilege to invest in and become the owner of the company's stock at par to an amount equal to the present holdings of George E. Chase; and whereas said Williston has remained and still remains in the employ of this company as one of its servants, and has given and still gives satisfaction in all respects to the present time, now therefore be it and it is hereby voted: That this company sell five hundred and twenty five shares of its capital stock to R. C. Williston at par, and that the president and treasurer of this company be and they are hereby authorized and directed to forthwith issue a proper stock certificate of this company in the usual form to him for said five hundred and twenty-five shares on his payment for the same to the treasurer of this company in cash at par; and that the treasurer of this company be and he is hereby authorized to make payment of the sum of five hundred and twenty-five dollars, being the amount to be realized from such sale of stock, on account of this company's indebtedness to the Kenduskeag Trust Company of Bangor, and to give a new note of the company, with such indorsements as may be arranged, for the balance;" that the plaintiffs seasonably protested against the passage of the foregoing vote, but that the protest was disregarded by Chase, Williston and Smith, the defendants; that the protest was recorded; that a certificate for five hundred and twenty-five shares of stock was immediately issued to Williston; that he now holds the same; that no opportunity was given to the plaintiffs to purchase any part of the unissued capital stock, though they were ready and willing and offered to take and pay for, at par, shares of stock in proportion to their respective interests at that time; that the action of the defendants, Chase, Williston and Smith, was a violation of their trust and duty as directors of the company; that they were in collusion with one another to prevent the plaintiffs from securing their proportional part of the capital stock, and from retaining control, as the holders of a majority of the capital stock, of the affairs of the company; that their acts were in violation of the vote of the stock-

holders, before referred to, and contrary to the by-laws of the company and the laws of the state; that the assets of the company, exclusive of unissued treasury stock, then amounted to more than $15,000; that there were no debts due at that time, and no reasons for the sale and issuance of the stock to Williston; that the vote to issue the stock to Williston was passed for the express purpose of securing control of the affairs of the company, and preventing the plaintiffs from holding a majority of the capital stock, and was a fraud upon the plaintiffs; that if Williston is allowed to retain the stock the plaintiffs will be prevented to their injury from securing their proportion of the capital stock; that Chase, Williston and Smith will own a majority of the capital stock, and as such can manage the affairs of the company according to their own pleasure, and for their own benefit, and the plaintiffs will be unable to obtain redress through any action of the corporation itself, and will be deprived of their rights as stockholders, and from acquiring valuable property to which they are entitled; that Chase, Williston and Smith intend to issue to themselves the balance of the capital stock now remaining unissued; that Williston intends to transfer the certificate of stock; that, if it be necessary to sell additional shares of the stock remaining in the treasury on said July 22nd, 1909, the plaintiffs are willing and ready and offer to take and pay for at par all of the shares to which they are entitled, in proportion to their respective interests; that the plaintiffs have no adequate remedy at law, and will suffer irreparable loss if Williston is permitted to retain or transfer the stock issued to him on said July 22, or if Chase, Williston and Smith, as directors, issue the remaining capital stock now in the treasury.

The bill prays for injunctions both temporary and permanent restraining Williston from voting, or otherwise exercising rights of ownership over the stock in question, and from transferring the same, and that he be ordered to surrender and deliver to the treasurer the certificate to be cancelled. There is also a prayer that Smith and Chase, as president and treasurer, respectively, be restrained from disposing and issuing certificates for any capital stock now in the treasury, or from issuing certificates transferring the

Williston stock. Further it is prayed that the directors be enjoined from offering for sale, or issuing, any unissued capital stock without first giving all stockholders an opportunity to subscribe for and purchase such stock in proportion to their respective interests. The bill was brought July 26, 1909.

To this bill the defendants answered, and in their answer they inserted a general demurrer, alleging for causes of demurrer, want of equity, and plain, complete and adequate remedy at law.

The case was first heard on the demurrer, which was overruled, and the defendants excepted. It was then heard on bill, answer and proof, and a decree was made in favor of the plaintiffs. The defendants appealed. They also took eight exceptions to rulings during the hearing.

We will first examine the demurrer. We have stated all of the essential averments in the bill substantially in full, because the argument upon the demurrer attacks it upon every side.

As already stated, the defendants under their general demurrer have assigned two causes, that the bill states no right of the plaintiffs, cognizable in equity, and that the plaintiffs have a plain, adequate and complete remedy at law. But in argument counsel state twenty-four specific reasons why the bill is demurrable. Many of these relate to formal and technical questions which should have been raised by special demurrer, and are not properly open under a general demurrer. Whitehouse Equity Practice, sections 338, 339. But this point has not been made by plaintiff's counsel. Hence we will consider them so far as it seems to be useful in determining the rights of the parties.

The gist of the complaint stated in the bill is (1) that the personal defendants, constituting a majority of the directors, but owning less than a majority of the stock, collusively and fraudulently issued stock to one of their number, for the purpose of securing control of the corporation by the ownership of a majority of the stock, and thereby preventing the plaintiffs, who had been the owners of a majority of the stock but were a minority of the directors, from retaining control, and (2) that the defendants intend to issue the balance of capital stock unissued to themselves in violation of a

by-law which prescribes that the directors shall issue the unissued stock to stockholders in proportion to their respective interests, and that they will do so unless restrained. And all these particulars are, we think, sufficiently stated so as to be held good against a general demurrer. Each of the causes states a case cognizable in equity.

Considering them in their order, we say that if the first set of allegations be true, as the demurrer admits, the act of the defendants constituted a breach of trust, and was a fraud upon the plaintiffs. And equity will prevent the collusive participants from enjoying the fruits of their fraud, and will restore to the plaintiffs if possible the rights of which they have been defrauded. Equity has jurisdiction irrespective of whether the injured parties have a remedy at law, or whether such a remedy will be effective, or whether the loss for want of such an equitable remedy is irreparable. Whether the defendants are insolvent or pecuniarily irresponsible, or not, is immaterial and need not be alleged. Breach of trust and fraud are among the fundamental grounds of equitable jurisdiction.

The directors of a corporation stand in fiduciary relations to it and to its stockholders. They are trustees. They are held to the exercise of the utmost good faith. It is commonly stated in the cases that they are the trustees and the corporation and stockholders are the cestûis que trustent. They manage the corporation for the benefit of the stockholders. Holders of the majority of the stock have a right to control the corporation. It is a fraud for the directors or a majority of them to take advantage of a temporary ascendency in the board of directors to so manipulate the sale and issue of stock as to oust the control from the majority of the stockholders, and secure it to themselves, and equity will afford relief, 2 Cook on Corporations, sect. 614; *Luther* v. *Luther Co.* 118 Wis. 112; *Essex* v. *Essex*, 141 Mich. 200; *Way* v. *American Grease Co.*, 60 N. J. Eq. 263; *Elliott* v. *Baker*, 194 Mass. 518; *Goodwin* v. *Cincinnati & W. C. Co.*, 18 Ohio St. 169; *Farmers L. & T. Co.* v. *N. Y. & N. R. Co.*, 150 N. Y. 410. Such is the law in England. *Punt* v. *Symonds Corp. Ltd.*, 2 Ch. (1903) 506.

In the Wisconsin case of *Luther* v. *Luther Co.*, the court states the reasons for the doctrine with such clearness and convincing force that we quote from the opinion. In that case it appears that the directors had authority to sell unissued stock to whom and at such prices as in the exercise of an honest discretion they might deem best for the corporation. The court said: "Even then, however, their duties with reference thereto are fiduciary; they are bound to act uberrima fides for all stockholders. To dispose of or manage the property of the corporation to the end and for the purpose of giving to one part of their cestui que trustent a benefit and advantage over, or at the expense of, another part, is a breach of such duty, especially when the directors themselves belong to the specially benefited class. It cannot matter how the result is accomplished, nor what the form of the undue benefits conferred or acquired. The benefit to the one class or the injury to the other need not be pecuniary. While the ultimate purpose of most stock corporations is money profit, the right of proportionate voice and influence in selection of policy and method of accomplishing that result is most important to each stockholder. It is as fundamental and vital as the right of suffrage under a representative government. While a governmental act may not take away from any class of citizens property or physical liberty, yet if, contrary to the fundamental law of organization, it abates their suffrage, it would be held void. Each holder of a share of stock has the right that, by convincing the holders of a certain number of other shares, his policy of business be followed. Any invasion of that right is an injury to him, which from his point of view may be greater than any considerable money loss to the corporation. While this right must yield to a power over it given by the terms of the association, still he has the right to insist that such power shall be exercised for the purposes of the whole association. It is not so when exercised for the direct purpose of depriving him of his proportional voice and influence. That is not a legitimate manner for those temporarily vested with power to perpetuate the policy which they favor."

In *Elliott* v. *Baker*, supra, the court in Massachusetts used this language:—"Corporate directors cannot manipulate the property of

which they have control in a trust relation, primarily with the intent to secure a majority of the stock of or directors in any particular interest. This is not a fair exercise in good faith of the power with which they are clothed. This is especially true when the issuance of the stock is for the express purpose of retaining in power the very persons who authorize the issue, and who are therefore distinctly benefited to the disadvantage of another and substantial part of their stockholders."

In some of the cases, in stating the elements of the doctrine, the courts include a selling of the stock at less than its real value. That fact existed in those cases, and doubtless strengthened the equity of the complainants' cause. But we do not think it necessary to allege or prove that the stock was sold at less than its actual value. If it was so sold, the injury would be primarily to the corporation, and only consequentially to the stockholders. In a case like the one at bar, the complainant asks and is entitled to a remedy for a direct injury to him, in which the corporation is not concerned, namely, the unlawful deprivation of the right of control. For a further elucidation of this point we refer to the discussion of the court in the Wisconsin case already quoted. While it may not be necessary, it is at least sufficient, if it is alleged, as in this case, that the corporation is alive, a going concern, with valuable assets. The fact that stock is sold at less than its value is evidential merely. It is important as bearing upon the good faith of the defendants, and tending to show that their primary purpose in issuing the stock was to oust the plaintiffs. *Elliot* v. *Baker*, supra; *Essex* v. *Essex*, supra. Since it will appear in the consideration of the appeal that the stock was sold to Williston at less than its actual value, it is proper to say here that an amendment setting out that fact would be allowed now, if necessary, but we think it is not.

We therefore conclude, so far as the question of issuing stock to Williston for the purpose of ousting the plaintiffs from control is concerned, the plaintiffs have stated a cause for equitable relief, not assailable under general demurrer. And here we might rest our discussion under the demurrer. It is a demurrer to the whole bill, and the rule in such case is that where there is any part of the bill

which on its face entitles the plaintiff to relief, the demurrer, being entire, must be overruled. Whitehouse Equity Practice, sect. 336.

But we will notice briefly the other ground on which relief is asked, that is, the alleged intention of the directors to issue all the remaining unissued stock to themselves. The by-laws of the corporation gave each stockholder a right to his proportion of the unissued stock when issued. It is alleged that the stockholders voted not to sell or issue any more stock. Much discussion has been had upon the questions whether this vote was legally passed, and if so, what was its effect. It appears in the evidence that a minority of the stockholders holding a majority of the stock voted for it. The defendants contend that in the absence of statute or by-law affecting the same, the common law rule of one stockholder, one vote, prevails. But this question does not arise under the demurrer. There are no facts stated upon which to raise it. And we think it is immaterial whether, as the plaintiffs claim, the vote was effective as an amendment of the by-law, and deprived the directors of any authority to issue stock, or as the defendants claim, that it was an irregular, and an unauthorized attempt to amend the by-law, and of no effect. If the plaintiffs are right in their contention, the defendants, as directors or officers, had no authority to issue unissued stock, and an attempt to do so would be unlawful. If the defendants are right, their authority to issue unissued stock was limited by the by-law. They could issue it only to stockholders, and in proportion to their holdings or interests, unless those who were entitled to proportionate shares waived their right. To issue it all to themselves, as it is alleged that they intend to do, and will do unless restrained, without permitting other stockholders to take their respective shares, would be unlawful, a breach of trust, and fraudulent as to the other stockholders. It would deprive the latter of the right to take their shares of the stock. To prevent such an illegal act equity will afford a remedy, preventive or otherwise, as it does for other breaches of trust and frauds.

Whether it was necessary, in connection with this ground of complaint, to allege specifically the value of the stock, as is claimed, is

a question not now open in a discussion of the demurrer, because, for reasons already stated, the demurrer must be overruled in any event.

The plaintiffs contend that the issue of stock to Williston was illegal because the vote to do so was passed only by means of his own vote as a director, and that being interested he could not vote. *Camden Land Co.* v. *Lewis*, 101 Maine, 78. We do not consider this question because it is evidently not within the theory of the bill as framed. We notice it only to say that the contention of the defendants that it does not appear by the bill but that the plaintiffs themselves, who were present at the meeting, voted for the issue of stock to Williston and so are to be barred from their remedy, is not tenable. We think the allegation that the plaintiffs protested against the passage of the vote and caused their protest to be recorded is by every fair intendment equivalent to an averment that they did not vote for it.

Many of the objections made in argument to the bill have already been sufficiently touched upon. Inasmuch as the claim founded on the alleged illegality of the directors' vote to issue the stock on account of Williston's interest is to be disregarded, some of the other objections become unimportant. Such of the others as are of importance we will now briefly consider.

It is objected that the bill contains no allegation of a tender, or of an offer to pay back, or to vote in favor of paying back to Williston the money he paid for the stock. It is not necessary. The plaintiffs hold none of Williston's money. He paid it to the corporation. Its repayment was a matter between him and the corporation. Whether Williston's connection with the fraud was such as to make it equitable or inequitable that the corporation should refund the money to him was a matter to be determined by the court in its discretion after a hearing of the case. The court in this case decided that the money should be paid back.

It is objected that there is no allegation that the bill is on behalf of other stockholders, nor of willingness to let in other stockholders, nor that the suit is in behalf of the corporation and other stockholders. There are two answers. One is that the bill is not brought

to redress or prevent corporate wrongs, another is that all the stockholders are already parties.

It is objected that there is no sufficient allegation of threats to dispose of the remaining unissued stock. But there is an allegation that they intend to do and will do so. Threats would be evidentiary of intent, but they would not make the intent any different or more dangerous.

It is objected that the bill does not show that the plaintiffs have applied to the defendants to right the wrong. If the rule which requires a stockholder who seeks to have a corporate wrong remedied first to apply to the directors or the corporation, is applicable to a case like this, about which we do not stop to inquire, it is apparent on the face of the bill that the rule should not be applied here, because it is obvious that such an application by the plaintiffs to the defendants, or to the corporation, under the stock control of the defendants, would have been useless; under such a condition it is not required. *Ulmer* v. *Maine Real Estate Co.*, 93 Maine, 324.

It follows from all that we have said that the defendants can take nothing under their demurrer, and their exception to the overruling of the demurrer must itself be overruled.

The defendants took seven exceptions during the progress of the hearing before the single justice, and one at the settling of the final decree to the refusal to modify the preliminary injunction. All that need be said of the last exception is that when this decision is handed down the preliminary injunction will no longer be of any importance.

The first exception related to the permission given to plaintiff's counsel in opening his case and as a part of his opening to read a piece of documentary evidence, in advance of its being offered as such. That was a matter solely within the discretion of the sitting Justice, and to this ruling exceptions do not lie.

The next six exceptions relate to the admissibility of evidence. Of these it may be said, as was said in *Redman* v. *Hurley*, 89 Maine, 428, they "need not be considered here." Since the case also comes up on appeal, "the vital question is whether there be sufficient legal evidence in the case to sustain the decree below." The statute, it is true, provides that an aggrieved party may take exceptions to any

ruling of law made by a single justice, "the same to be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby." R. S., chapter 79, section 27. In the Law Court such exceptions are "heard and determined like appeals." But they are not appeals. The decisions upon them are not necessarily decisive of the case. No question is open except the points raised by the exception.

But on appeals all questions which appear in the record are open. Upon the whole case the court is required to "affirm, reverse or modify the decree of the court below, or remand the cause for further proceedings, as it may think proper." R. S., chapter 79, section 22. The cause in the appellate court is heard anew upon the record. *Redman* v. *Hurley*, supra. The record of course shows the evidence admitted. "If it also shows any evidence excluded, or shows its nature, as it properly should, exceptions then serve no useful purpose in the law court and will not be considered on appeal, since if the evidence is improperly admitted, it will simply be disregarded by the court, and if the evidence excluded was material, the court may still give it the weight to which it is entitled." Thus the practical situation is stated in Whitehouse's Equity Practice, sect. 494. This case involves only the first part of the proposition, namely evidence admitted, and of this we repeat what was said in *Redman* v. *Hurley*, supra, that the admission of the evidence below "is of no consequence, except so far as it shall be considered competent for consideration on appeal." It is of no consequence when there is an appeal, because the party excepting on questions of the admissibility of evidence and of practice practically takes nothing by his exceptions. Even if the rulings were erroneous, the court does not sustain the exceptions, and then send the case back for a new hearing, for it is the duty of the court to determine the whole case on the appeal, on such evidence as it deems admissible. In this way we must now determine this case.

The sitting Justice found, among other things, that the directors' vote at the meeting of July 22, 1909 to issue the stock in question to Williston and the issue of it accordingly, were "solely to enable Smith, Chase and Williston to acquire control of the corporation."

He also found that the issue of the stock was without authority under the by-laws and vote of the stockholders. And he ruled that Williston was not equitably entitled to retain the stock, and decreed that he should return the stock for cancellation.

In determining the appeal it will be necessary to consider only the questions involved in the first of the above findings, namely, that the stock was issued for the purpose of enabling the minority stockholders to acquire the control of the corporation, and ousting the majority. We need not repeat the discussion already made concerning the law. If this finding is correct, the act was a fraud upon the rights of the majority stockholders. If done with a common understanding, it was collusively as well as fraudulently done. Nor do we think it is necessary that the acquisition of control should be the sole purpose of the vote, to make it fraudulent. It is sufficient if it be the primary purpose. *Elliott* v. *Baker*, supra.

By the rule in this State, the findings of the sitting Justice are to stand unless shown to be clearly erroneous. *Young* v. *Witham*, 75 Maine, 536; *Hartley* v. *Richardson*, 91 Maine, 424; *York* v. *Mathis*, 103 Maine, 67. This rule, however, is not the basis of our decision in this case. We think the evidence amply justified the finding. We shall not attempt to notice all the points of proof which the evidence affords. The following are some of the more patent ones.

The stockholders were divided into two factions. There is evidence that Williston from one faction, and Skinner from the other, had both sought to have additional stock. Smith, Chase and Williston were unwilling that Skinner should have any more. Trask and Skinner were unwilling that Williston should have more. The by-law provided that the directors should issue the unissued stock to stockholders in proportion to their respective interests. This by-law had not been observed. Apparently the rights of the stockholders under it had from time to time been waived. But that matters not now. At the annual meeting of the stockholders, February 1, 1909, the plaintiffs undertook in a measure to stand upon their rights. Having a majority of the stock, they voted by a stock vote not to issue any more stock. The defendants opposed

the vote. Whether that vote was legal and effectual, in view of the by-law provisions, we do not need to say. We allude to it merely as a fact, showing the contentions of the parties at that time. In the early part of 1909, defendant Smith took a transfer of all of plaintiff Trask's stock as collateral security for his endorsement of Trask's six months note to become due July 13. That note was in a bank. On March 22, 1909, he surrendered Trask's stock certificate and took out a new one in his own name. On July 2, defendant Chase, as clerk of the corporation, issued a call for a stockholders' meeting on July 9. The purpose of the call was not stated. On July 3, Chase issued another call for a stockholders' meeting on July 13, at 8 o'clock A. M. The purpose was not stated. The defendants were all cognizant of these calls, but none attended at the place for meeting, and no meetings were held. The defendants have undertaken to state the reasons why the meetings were called. But the reasons given are unsatisfactory. We cannot discover that they are at all relevant to a stockholders' meeting. It is to be noticed that at the time these notices for meetings were issued, Trask's 3,300 shares were standing in Smith's name. July 13, the date fixed for the meeting under the last call was the day that Trask's note came due at the bank, and that the hour, "8 o'clock A. M." was before banking hours. No notice of the meeting was given to Trask, although Smith, when he took the stock as collateral, gave back a receipt in which it was recited that "all rights in said stock to remain with said Trask." Smith testified that the reason no notice was given to Trask was because he, Smith, supposed that Trask would give Skinner a proxy to vote his stock.

But Trask learned of the calls for the meetings, and paid his note at the bank before the hour fixed for the first meeting, and demanded his stock, which was returned to him. Then, either as a sequence, or as a consequence, no meetings were held. These facts do not seem to be in dispute. And while they may be strongly significant of a purpose on the part of Smith to vote the Trask stock, and thus control the stockholders' meetings, — a purpose abandoned when he had to return the stock, — we do not say that they afford sufficient proof of it.

But on July 14, 1909, the next day after the one fixed for the last stockholders' meeting, the defendants began what seems to have been a more deliberate and carefully studied campaign to secure control of the corporation. Chase and Williston, directors, in writing, in accordance with the by-laws, asked Chase, clerk, to call a meeting of the board of directors, "to take action on the affairs of said company and to provide ways and means for the payment of its debts and the conduct of said company's business." At the meeting no time was wasted, and the defendants carried things with a strong hand. Smith presided. Williston had with him a series of typewritten resolutions, evidently agreed upon by the defendants in advance, whose passage, one after another, he moved, and Chase seconded. Among them was the one recited in the bill, for the issuing of the stock in question to Williston. The records state that this resolution was carried by the votes of "Smith, Chase and Williston," against the protest of Trask and Skinner. The plaintiffs testify that even debate was denied, until after the resolution was adopted. A previously prepared resolution was adopted dismissing Skinner, the plaintiff, who was a clerk and bookkeeper for the company, the dismissal to take effect "immediately." A formal written discharge was handed to him on the spot, and his key was demanded. It was ordered that the store and personal property be put into the direct custody of the treasurer, Chase, and the general manager, Williston.

The defendants claim that in April, 1906, Williston was induced to enter into the employment of the company on the strength of an understanding that he should have the right to take and pay for unissued stock of the company until he should have at least as much as Chase had, and that the resolution of the directors passed on July 22, 1909, was not for the purpose of securing control of the corporation, but of discharging its duty to Williston in reference to the stock understanding, as well as for providing means to pay corporate indebtedness. The defendants testify that the arrangement was that Williston was to have stock as fast as he could pay for it. Williston himself says, "I was to have the privilege of investing my money in

the company just as fast as I was able to get it together until I should have equal holdings with Mr. Chase." The plaintiffs deny that there was any such arrangement. If there was such an arrangement, we think, as did the sitting Justice, that it had nothing to do with the directors' vote, July 22. It does not appear that Williston, during the three years he had been connected with the company, had ever made any claim under the alleged understanding. In fact, the money that he paid for this stock was not money that he "had got together," but was money loaned to him without security by Smith for the purpose of paying for the stock.

There is another feature, also indicative of fraud, which we notice separately, since it was the subject of one of the defendant's exceptions. The stock in question was issued to Williston at par. The sitting Justice found that it was worth thirty per cent premium, and was so understood by the defendants. The evidence from which this finding is to be deduced, if at all, is a statement of the affairs of the corporation furnished by the defendant Williston to the plaintiff Skinner. But it is urged that this statement was inadmissible. We think otherwise. A sufficient reason is that Williston is a party to the suit. The statement was his declaration. It was admissible as such against him, at least, and he was the only defendant pecuniarily concerned in this branch of the case.

We have examined the evidence to which the other objections were made at the hearing, and we do not think that any of the objections are well founded.

Under all these circumstances, we think it would be farcical to say that a fraudulent and collusive purpose to deprive the plaintiffs of their rights as majority stockholders is not shown.

Besides a decree for the return of the Williston stock, we think under all the circumstances that the plaintiffs are entitled to hold that part of the decree which enjoined the sale, or offering for sale, of any of the stock ordered returned or any of the other unissued stock "except upon such terms and conditions as will ensure to each then stockholder the right to purchase and receive of such stock so offered for sale an amount proportionate to his then legal holdings

of stock of the corporation." This merely forbids the issuing of stock except as provided in the by-law, as we construe the by-law, and of this the defendants cannot complain.

Exceptions overruled.
Decree below affirmed with one bill of additional costs.

PORTEOUS, MITCHELL & BRAUN COMPANY

vs.

WILLIAM L. MILLER and Trustees.

Cumberland. Opinion September 29, 1910.

Costs. Statutory Provisions. Travel and Attendance. Taxation of Costs. Statute, 1858, chapter 42. Revised Statutes, chapter 84, section 152; chapter 117, section 14.

1. The right of a prevailing party in an action to recover costs is wholly statutory. He is entitled only to such allowances as costs as the statute has made provision for, and subject to the limitations it has imposed.
2. Under section 14, chapter 117, Revised Statutes, the court has authority to direct as to the number of terms for which travel and attendance are to be taxed, and such authority may be exercised by the court when application is made to it, under the provisions of section 152, chapter 85, Revised Statutes, to have the costs taxed and passed upon by the court.
3. Judgment for defendant was entered in this action after it had been pending in the Superior Court for Cumberland County, Maine, for 17 terms. Upon application, that court disallowed travel and attendance for all terms after the case had been in court one year, and allowed travel and attendance for 9 terms only. *Held*, that the court below exercised the authority conferred upon it by statute within legal bounds, and that its decision was entirely reasonable and proper as a matter of fact.

On exceptions by defendant to taxation of costs. Overruled.

Action of assumpsit brought in the Superior Court, Cumberland County. At the seventeenth term after the entry of the action, judgment was entered for the defendant by agreement. Upon application by the plaintiff, the defendant's costs were taxed by the

clerk at $73.22, and upon hearing the presiding Justice disallowed travel and attendance for all terms after the action had been in court one year, allowing travel and attendance for nine terms only, and directed the costs to be taxed at $39.94 only. To that decision the defendant excepted.

The case is stated in the opinion.

Libby, Robinson & Ives, for plaintiff.

Fred V. Matthews, and Wilford G. Chapman, for defendant.

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

KING, J. Section 152, chapter 84, Revised Statutes provides: "When a nonsuit or default is entered, or verdict rendered, or a report of referees is accepted, in an action, either party on application to the court, may have the costs recoverable taxed by the clerk, and passed upon by the court during the term; and any party aggrieved by the decision, may file exceptions thereto;"

At the February term of the Superior Court for Cumberland County, Maine, judgment for the defendant by agreement was entered in this case. Upon application of the plaintiff the defendant's costs were taxed by the clerk at $73.22, made up of an attorney fee of $2.50 and travel and attendance for 17 terms, being the full number of terms the case had been pending in court. Upon hearing the court disallowed travel and attendance for all terms after the case had been in court one year, allowing travel and attendance for nine terms only, and directed the costs to be taxed accordingly, at $39.94. The case is before this court on exceptions to that decision.

1. The defendant contends that by the entry of judgment in his favor his rights as to the costs recoverable became fixed, and that he was then entitled as a matter of law to have travel and attendance taxed in his favor for each term the case had been in court. But that contention is not legally sustainable. The right of a prevailing party in an action to recover costs is wholly statutory. He is entitled only to such allowances as costs as the statute has made provision for, and subject to the limitations which it has imposed.

In sec. 14, c. 117, R. S., it is provided:

"Costs allowed to parties and attorneys in civil actions shall be as follows: . . . to parties recovering costs in the supreme judicial or superior courts, thirty three cents for every ten miles travel, and three dollars and fifty cents for attendance at each term until the action is disposed of, *unless the court otherwise directs.*"

Under this statute the plaintiff was not entitled as a matter of law to have travel and attendance taxed for each and every term the case had been in court, for the court had authority to direct otherwise. This authority in the court to direct as to the number of terms for which travel and attendance are to be taxed is to be exercised by the court when application is made to it, under the provisions of sec. 152, c. 84, to have the costs taxed and passed upon by the court, as was done in this case. An examination of the several statutes, in which provision was made for the allowance of travel and attendance as costs, shows clearly that it was the legislative purpose and intent that the court should have authority to direct at the time the costs are taxed as to the number of terms for which travel and attendance should be allowed. The language of the statute in which this authority was first given (Chap. 42, Laws 1858) reads: "In taxing costs of suit . . . attendance shall be allowed until the action is disposed of, *unless the court shall otherwise direct*," etc. This language clearly refers to a direction by the court at the time the costs are taxed, and not, as suggested by the defendant, to a direction made during the proceedings in the case prior to the taxing of the costs.

2. It is unnecessary here to discuss the question raised that, even under the express provisions of sec. 152, c. 84, R. S., the reasonableness and propriety of the decision of the court below cannot be raised by exceptions, being the result of the exercise of judgment and judicial discretion, for this court is fully satisfied, from the facts reported in the bill of exceptions, not only that the court below exercised the authority, conferred upon it by statute, within legal bounds, but also that its decision was entirely reasonable and proper as a matter of fact.

Exceptions overruled.

CHARLES K. MILLER, Judge of Probate

vs.

CHARLES E. MESERVEY AND THE AMERICAN BONDING COMPANY.

Knox. Opinion September 29, 1910.

Executors and Administrators. Sales of Real Estate. License Bond. Revised Statutes, chapter 73, sections 3, 17.

1. A license bond given under the provisions of section 3, chapter 73, Revised Statutes, ceases to be operative at the expiration of one year from the date of the license, if no sale has been made within the year.
2. May 19, 1903, the defendant Meservey, administrator de bonis non with the will annexed of Charles A. Sylvester, was licensed under the provisions of chapter 73, Revised Statutes, to sell and convey certain real estate. The bond in suit was given as required by section 3 of said chapter. No sale was made under the license within one year from its date. *Held:* that at the expiration of the year from the date of the license no sale having been made, the bond was at an end, and no subsequent act of the licensee would create any liability under the bond.

On agreed statement of facts. Judgment for defendants.

Action of debt upon a probate bond, brought in the name of the Judge of Probate, and reported to the Law Court on an agreed statement of facts.

The case is stated in the opinion.

Frank B. Miller, and Rodney I. Thompson, for plaintiff.

Arthur S. Littlefield, for defendants.

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

KING, J. This action, upon a probate bond, is reported to the Law Court on an agreed statement from which the following facts appear:

Charles E. Meservey, administrator de bonis non with the will annexed of the estate of Charles A. Sylvester, on the 19th day of

May, 1903, was licensed, under the provisions of R. S., chap. 73, by the judge of probate having jurisdiction over said estate, to sell and convey certain real estate; thereafter, March 15th, 1904, the bond in suit was given, in compliance with the requirements of sec. 3, of said chapter, containing the following statutory conditions:

"Now if the said Charles E. Meservey shall, First: Well and truly observe all the provisions of law for the sale, leasing or exchanging of such real estate, or interests therein, and use due diligence in executing the trust. Second: Truly apply and account for the proceeds of said sale or lease according to law. Then this obligation to be void, otherwise to remain in full force."

May 23, 1904, Meservey sold the real estate and has not accounted for the proceeds thereof, and the question presented is whether the plaintiff is entitled to recover upon these facts. We think he is not.

Section 17, chapter 73, provides: "No license granted under this chapter, except when otherwise provided, remains in force for more than one year from its date; but when that time has expired, a new license may be granted, with or without new notice, at the discretion of the judge, for the sale of all or part of the same real estate upon filing a new bond."

Under the express provision of the statute, the license granted to Meservey expired in one year from its date, or on May 19, 1904. After that date he had no authority to act under it, and any attempted sale thereafter made by him was inoperative. *Marr* v. *Boothby*, 19 Maine, 150; *Marr* v. *Hobson*, 22 Maine, 321.

The obligations of the bond guaranteed and secured that Meservey would lawfully exercise the authority and faithfully discharge the trust conferred upon him by the license. The sale referred to in the conditions of the bond is the sale which the licensee was authorized to make within the period prescribed by the license, and not a sale he might attempt to make after that period had elapsed. At the expiration of the year from the date of the license, no sale having been made, the bond was at an end, and no subsequent act of the licensee would create any liability under it. That the obligations of such a bond, where no sale has been made within the year, do

not cover any sale made after the expiration of the year, is unmistakably shown by the express provisions of the statute, whereby a new license may be granted "upon filing a new bond."

It is suggested by the plaintiff that since this bond was not dated and approved at the time the license was granted the obligations of the bond should be held to apply to a sale made within one year from the date of the bond, or its approval. The answer to that suggestion is that the statute does not require that the bond should be given when the license is granted. The giving of the bond is not a condition precedent to the issuing of the license, but it is a condition of the statute to be complied with before the authority of the license can be lawfully exercised. The bond may be given at any time while the license is in force, provided only that it must be given "before proceeding to make such sale." Section 3, chapter 73, R. S.

No sale of the property was made while this license was in force, and accordingly the obligation of the bond ceased by limitation when the license expired. The sale, the proceeds of which Meservey has not accounted for, was not made till May 24, 1904, four days after the license had expired. The bond was not then in force, and the failure of Meservey to account for any money received by him as the proceeds of that sale is not a breach of the conditions of the bond.

Neither can the fact, that the administrator did not sell the property within the period of the license, be held to be a breach of the condition of the bond. The statute provides that a new license may issue, thus recognizing that the property may not be sold within the year, and it is not shown that the administrator was at fault in not selling it during the period of the license.

The entry, therefore, must be,

Judgment for defendants.

H. GRANGER FULLER *vs.* HARRY L. SMITH.

Cumberland. Opinion September 29, 1910.

Accord and Satisfaction. What Constitutes. Form. Requisites. Trial. Province of Court and Jury. Contracts of Employment. Breach. Jury Questions. Revised Statutes, chapter 84, section 59.

An accord and satisfaction under Revised Statutes, chapter 84, section 59, providing that "no action shall be maintained on a demand settled by a creditor . . . in full discharge thereof by the receipt of money or other valuable consideration, however small," is an executed agreement whereby one gives and another receives, in satisfaction of a demand, liquidated or unliquidated, money or other valuable consideration, however small.

An agreement constituting an accord and satisfaction under Revised Statutes, chapter 84, section 59 need not be express, but may be implied from the circumstances and the conduct of the parties.

To constitute an accord and satisfaction it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that acceptance shall satisfy the particular claim, and that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition.

When one tenders his creditor an exact amount of an undisputed debt intending that its acceptance shall satisfy another demand, such intention must be made known to the creditor in some unmistakable manner, and, if he undertakes to state in writing the condition on which the tender is made, his statement should be explicit, and all uncertainty and doubt resolved against him.

It is a trial court's province to construe written instruments, but where the effect of an instrument depends, not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the instrument must be left to the jury.

To make a question for the jury, there need be no conflict of evidence, and if facts are undisputed, but reasonable men might differ in the inferences to be drawn from them, the question is for the jury.

In an action by an employee for breach of a contract of employment, *held*, that under the evidence, it was a jury question whether the employer tendered a check on condition that its acceptance should satisfy any claim for damages for discharge as well as payment of a balance due the employee, and whether the employee knew or should have known that the check was so tendered.

Though the amount of a check tendered a discharged employee was admittedly due him, if the employer was unwilling to pay it unless the employee accepted it in satisfaction of his claim for damages for discharge, and it was tendered and accepted on that condition, there was a settlement of the claim for damages on a valid consideration within the meaning of Revised Statutes, chapter 84, section 59.

On exceptions by plaintiff. Sustained.

Action brought in the Superior Court, Cumberland County, to recover damages for an alleged breach of the following contract:

"We, the undersigned, hereby, contract and agree with one another, as follows: That Mr. H. G. Fuller is to devote his full business time and energy to the interests of Harry L. Smith, as they are connected with the Aetna Life Insurance Co., and as may be required of him, for the term of one year. For the service, said Harry L. Smith agrees to pay $20.00 per week, for fifty weeks during the year.

"Witness our hand and seal.

(Signed) Harry L. Smith
H. G. Fuller.
"To take effect Jany. 1st, 1909."

Plea, the general issue with brief statement as follows: "That from January 1, 1909 to June 26, 1909 said plaintiff was employed by him, but finding the plaintiff remiss, heedless and failing to devote his business time and energy to the defendant's business as required by the said contract, the defendant reproved him for being so remiss, heedless, neglectful and so failing to devote his business time and energy to the defendant's business, and on or about June 26, 1909 discharged him for good cause, whereupon subsequently to wit on or about July 3 a new contract was entered into by mutual consent between said parties and continued in force the remainder of the year."

Verdict for defendant. The plaintiff excepted to several rulings made during the trial.

The case is stated in the opinion.

Frank H. Haskell, for plaintiff.

Harry C. Wilbur, and Carroll W. Morrill, for defendant.

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

KING, J. This is an action for breach of a contract of employment, and comes before this court on plaintiff's exceptions.

January 1, 1909, the plaintiff entered into the employ of the defendant for one year under a written contract, and so continued until Saturday, June 26, 1909, when he was wrongfully discharged, as he claimed. At the time of the discharge the defendant called the plaintiff into his office, figured the balance due him for wages and expenses as $21.06, about which there was no dispute, and passed him a receipt filled out for that sum saying, "You sign this and I will give you a check." The plaintiff refused to sign the receipt because it contained the words, "in full of all contracts written and verbal," whereupon the defendant asked, "You aren't going to do anything are you?" and the plaintiff replied, "That remains to be seen." The conversation was then interrupted and nothing more was said as to the check or receipt. On Monday following the plaintiff received through the mail from the defendant a check for the $21.06. He cashed the check and retained the proceeds.

The defendant claimed, and the jury specially found, that a letter from him to the plaintiff was sent to and received by the plaintiff together with the check.

The letter was as follows:

"June 26th. 1909.

Mr. H. G. Fuller.

Dear Sir:

I enclose herewith the Company's check for $21.06, being a settlement in full of all my indebtedness to you and all of yours to me, and ending all existing personal contracts between us. The following is a statement of the account as it stands:

Due from me to you,	
1 week's salary to Saturday night June 26th,	
being the last week of your notice,	$20.00
claimed by you as travelling expenses,	10.35
	$30.35

Due from you to me,	
Overpayment on Bartlett Premium	.64
Slips in drawer which I found, which you owed the Company	8.65
Check	21.06
	$30.35

My decision as last expressed to you and the instructions are in no way altered.

Yours truly,

P. S. Kindly return desk key and office key Monday."

At the trial the defendant contended that the plaintiff's acceptance of the check for $21.06 after the receipt of the letter was an accord and satisfaction of his claim for damages as sued for. And as to that contention the presiding judge evidently took the same view, for, after stating fully and correctly the essential elements of a valid accord and satisfaction, he expressly instructed the jury as a matter of law that if the plaintiff did receive the letter with a check his acceptance of the check constituted an accord and satisfaction that would prevent his recovery in this action. To that instruction the plaintiff excepted.

It is objected by the defendant in argument that the plaintiff's bill of exceptions is insufficient in that it contains an extended extract from the judge's charge and does not show with sufficient explicitness what specific instructions were excepted to.

But we think this objection is not maintainable. It is manifestly clear that the exceptions were taken to the one central idea of the instructions upon this point which was unmistakably expressed by the presiding judge in these words: "If you find that such a letter did reach the plaintiff together with the check you need not spend any more time on the case; you may fill out your verdict for the defendant and bring it into court."

The jury found specially that the plaintiff did receive the original letter with the check, and accordingly returned a general verdict for the defendant.

The question presented by this exception then is, whether the plaintiff's acceptance of the check, after the interview in the office and the receipt of the letter which accompanied the check, so conclusively establishes an accord and satisfaction, or settlement, of his claim for damages against the defendant for wrongfully discharging him, as to leave no question of fact for the jury to determine.

The statute of this State, chapter 84, section 59, provides: "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 considerations however small."

Under this statute an accord and satisfaction is an executed agreement, whereby one party gives and the other receives, in satisfaction of a demand, liquidated or unliquidated, some money or other valuable consideration, however small. No invariable rule can be laid down as to what constitutes such an agreement, and each case must be determined largely on its own peculiar facts. The agreement need not be express, but may be implied from the circumstances and the conduct of the parties. It must be shown, however, that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such. These principles are elementary. But we quote with approval the following language of Pierpont, J., in the leading case of *Preston* v. *Grant*, 34 Vt. 203, as concisely expressing the rule applicable to this case. "To constitute an accord and satisfaction it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered, is bound to understand therefrom, that if he takes it, he takes it subject to such condition."

To justify the instruction of the presiding judge that if the letter was received with the check the verdict must be for the defendant as a matter of law, it must appear that the only permissible inference, to be drawn from the letter, and from all the other facts and circumstances as to the tender and acceptance of the check, is, that it was tendered by the defendant to the plaintiff upon the condition, that if he accepted it, his acceptance of it would be a full satisfaction of

his claim for damages for breach of the contract of employment, as well as payment of the balance due him for wages and expenses, and that it was tendered under such circumstances, or accompanied with such declarations, that the plaintiff knew, or was bound to know therefrom, that it was tendered on such condition.

In considering the question thus presented it is important to keep in mind the fact that the amount of the check was precisely the undisputed amount of the balance due from the defendant to the plaintiff, independent of any damages arising from the breach of the contract, and, therefore, that no part or portion of such damages—the demand which is the subject of the alleged accord and satisfaction—was tendered or accepted. The question here involved, therefore, is not the usual one, whether the tender and acceptance of a part of a claim was a satisfaction of the whole, but rather the unusual one, whether the tender and acceptance of payment of the whole of an undisputed claim constitutes an accord and satisfaction of another distinct and independent claim. It is urged that the tender and receipt of the check in this case, it being only for the amount of the undisputed balance due the plaintiff, was not a sufficient consideration for the alleged accord and satisfaction. But it may have been. Notwithstanding the fact that the amount of the check was admittedly due, yet if the defendant was unwilling to pay it except on the condition that the plaintiff would accept it in full satisfaction of his claim for damages, and tendered it on that condition, and the plaintiff accepted it on that condition, such tender and acceptance would we think constitute a settlement of the plaintiff's claim for damages upon a valid consideration within the meaning of our statute. But the question recurs: Was the check unmistakably tendered and accepted upon that condition? In other words, is that the only reasonable inference to be drawn from all the evidence? We are constrained to answer in the negative. When a person tenders his creditor the exact amount of his undisputed debt, but intends that if it is accepted it shall also be in satisfaction of another demand, fairness and justice require that he should make his intention known to the creditor in some unmistakable manner. The proof should be clear and convincing that the creditor did

understand the condition on which the tender was made, or that the circumstances under which it was made were such that he was bound to understand it. If the debtor undertakes to state the condition on which he makes the tender his statement should be explicit, and all uncertainty and doubt should be resolved against him.

In his letter to the plaintiff the defendant said: "I enclose herewith the company's check for $21.06, being a settlement in full of all my indebtedness to you and all of yours to me, and ending all existing personal contracts between us."

If nothing further had been added the plaintiff might have been bound to understand that the "indebtedness" referred to embraced his claim for breach of the contract. But the defendant added an explicit explanation of what the "indebtedness" was. He stated in the letter specific items of debt and credit, showing precisely what was covered by the check.

No mention was made therein of the possible claim of the plaintiff for damages for breach of the contract, which had at least been hinted at in the previous interview of Saturday. In that interview the defendant was informed that the plaintiff would not sign a receipt that might discharge his claim for damages, and, although the defendant asked for such receipt, it does not appear with certainty that he had then decided not to pay the balance actually due unless the receipt was signed, for the conversation was then interrupted and nothing more was said or done about the matter. If the defendant intended, when he sent the check and made up the statement contained in the letter, to permit the plaintiff to accept the check only on condition that it should also settle in full his possible claim for damages, is it unreasonable to infer that he would have expressly so stated? Not having so stated, but, on the other hand, having shown in the letter that the check was the exact balance of a detailed account therein specified, we think it cannot be held as a matter of law that the plaintiff could not have reasonably understood from the letter and circumstances under which the check was sent that it was payment only of that specific balance of the account admittedly due him, and that the expression "and ending all existing

personal contracts between us," was used to emphasize the fact that the plaintiff was discharged.

The specific instruction complained of took from the jury entirely the question of the effect to be given to the letter as bearing upon the intent with which the check was tendered and accepted.

In *West* v. *Smith*, 101 U. S. 270, it is said: "Doubtless the general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the paper must be left to the jury, or, in other words, where the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation."

The effect of a written instrument construed as an independent piece of evidence, apart from any other fact or circumstance, may be quite different from the effect of the same instrument when interpreted in the light of the circumstances and conduct of the parties from which the instrument arose. The letter which accompanied this check does not stand alone to be construed, as to its effect upon the plaintiff, apart from other facts and circumstances. Its effect upon the plaintiff, in contemplation of law, is the effect which it would have had upon a reasonable, fair minded person in his then situation, and in ascertaining that situation consideration must be given to the previous circumstances and conduct of the parties in relation to the subject matter of the letter as well as to the language of the letter.

In 1 Ency. of Ev., page 127, it is said: "If the evidence is not conflicting and only one inference can reasonably be drawn from it, the question is of law and not for the jury. Otherwise the inference of fact is to be drawn by the jury." In the note there referred to it is said: "It is not necessary, in order to make a question for the jury, that there be a conflict of evidence; if the facts are undisputed, but yet reasonable men might differ in the inferences to be drawn

from them, the question is for the jury." Among the cases there cited in support of the note is *Mortlock* v. *Williams et als.*, 76 Mich. 568, 43 N. W. 592, a case strikingly similar in facts to the one at bar. There the court below ruled as a matter of law that there was an accord and satisfaction, but that ruling was reversed, the court saying:

"We do not think the circumstances warrant this conclusion as a matter of law, but that the whole case should have gone to the jury under proper instructions."

See also *Laroe et al.* v. *Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61, where, reversing a ruling directing a verdict for the defendant on the ground that the receipt of checks constituted a valid accord and satisfaction, the court said: "at the most it was a question for the jury to pass upon, whether, under the circumstances and the previous transactions between the parties, the plaintiff knew, or should have known, that the check was sent to them on the sole condition that by its acceptance they should discharge the defendant."

It is the opinion of the court in the case at bar that the presiding judge erred in instructing the jury as a matter of law that if the plaintiff received the letter together with the check their verdict should be for the defendant, but that the ultimate question, whether from all the evidence the defendant tendered the check upon the condition that if the plaintiff accepted it, his acceptance of it was to be a satisfaction of his claim for damages as well as payment of the balance admittedly due him, and whether he did know or should have known that the check was tendered on that condition, should have been submitted to the jury with proper instructions.

Exceptions sustained.

RUEL W. GOODWIN *vs.* LEMUEL B. HODGKINS.

Franklin. Opinion September 29, 1910.

Fences. Partition Fence. Refusal to Repair. Fence Viewers. Notice. Revised Statutes, chapter 26, sections 3, 4, 5.

Under Revised Statutes, chapter 26, section 3, requiring fence viewers to "signify in writing" to one refusing to repair or rebuild a partition fence their determination that the fence is insufficient, a notice of such determination sent a delinquent by registered mail is insufficient, when it is not received by him until after the time fixed for repair or rebuilding, and when no evasion or wrongful act on his part is shown to prevent receipt of it; actual notice being required.

Revised Statutes, chapter 26, section 4, authorizing recovery of double compensation for building partition fences in certain cases, being penal in its nature, one suing thereunder must show compliance with all the requirements of the statute.

On exceptions by defendant. Sustained.

Action on the case under Revised Statutes, chapter 26, section 4, to recover double the amount certified by fence viewers as the value of a partition fence built by the plaintiff, and of their fees. Plea, the general issue with brief statement alleging ten special matters of defense. At the conclusion of the evidence, the presiding Justice, by a pro forma ruling, directed a verdict for the plaintiff for the amount claimed in the writ, to wit, $127 and a verdict for that sum was returned. The defendant excepted to the aforesaid ruling.

MEM. In directing a verdict for the plaintiff, the presiding Justice said: "There is nothing here for the jury evidently. It is a question of law; and I am free to say that in all my practice I never had a division fence case, and this is the first case that has come before me since I have been on the Bench. I am not at all clear what the law is; but for the purposes of this trial I instruct the jury to return a verdict for the plaintiff for the full amount named in the writ."

The case is stated in the opinion.

A. L. Fenderson, for plaintiff.

Frank W. Butler, for defendant.

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

KING, J. Action on the case to recover double the amount certified by fence viewers as the value of a portion of a partition fence built by the plaintiff, and of their fees. At the conclusion of the evidence the presiding Justice pro forma directed a verdict for the plaintiff for the amount claimed in the writ. The case is before this court on exceptions to that ruling.

Several grounds of objection are urged against the validity of the doings of the fence viewers under which the plaintiff claims that the liability of the defendant was established, but we find it necessary to consider only one, which we think is fatal to the plaintiff's case.

On reference to the facts proved at the trial, especially the notice to defendant dated July 23, 1909, it is clearly apparent that the proceedings were had under the provisions of sec. 3, chap. 26, R. S., which reads:

"If any party neglects or refuses to repair or rebuild any such fence, which he is legally required to maintain, the aggrieved party may complain to two or more fence viewers of the town where the land is situated, who, after due notice to such delinquent, shall proceed to survey it, and if they determine that it is insufficient, they shall signify it in writing to the delinquent occupant, and direct him to repair or rebuild it within such time as they judge reasonable, not exceeding thirty days. If the fence is not repaired or rebuilt accordingly, the complainant may make or repair it."

It appears that the fence viewers met on the 24th of July, 1909, according to their notice, and adjourned to the 26th of July. At neither of these meetings was the defendant present. On the latter date the fence viewers sent to him by registered mail a written notice that they found his part of the partition fence insufficient, "and that such fence must be made a legal fence, within four days from the twenty-sixth (26th.) day of July A. D. 1909."

It appears from the testimony of the defendant and his wife, which was uncontradicted, that he did not receive, or have knowledge of, this notice until long after the time limited therein had

expired. His wife received the registered letter in his absence from home, and did not forward it to him, and he did not receive it till his return home the last days of September.

Was the mailing of this notice, which was not in fact received by the defendant until long after the time fixed in it for building the fence had passed, a sufficient compliance with the statute requirement as to notice? We think not. The necessity for actual notice to a delinquent that the fence viewers have directed him to rebuild his portion of a partition fence, within a specified time, is so inherent in the very purpose and spirit of this statute that its requirement would be implied if it was not expressed, for, without such requirement, that which was intended to do justice, becomes the very means of doing injustice. But we think this statute does express such a requirement in the words, "They shall signify it in writing to the delinquent occupant." To "signify" is "to make known." Such, we think, is the import of the word as used in the statute.

Section 5 of the same chapter, under which section the fence viewers are authorized to divide a partition fence, provides that they "may in writing under their hands assign to each his share thereof, and limit the time in which each shall build or repair his part of the fence, not exceeding thirty days." This court has held, under this section, that "it must appear that they delivered to such party their assignment in writing at the time it was made, so that he may know the part he is required to build, and have the whole time limited by them in which to build it." *Briggs* v. *Haynes*, 68 Maine, page 536. The necessity of notice of the adjudication of the fence viewers that the delinquent must repair within a given time is as imperative in the one case as in the other. If under the provisions of sec. 5, no recovery can be had unless actual notice of the adjudication to repair was given to the defendant at the time it was made, a fortiori there can be no recovery under sec. 3, where the statute expressly requires that the fence viewers, "shall signify it in writing to the delinquent" and when it only appears that it was sent by mail within the time, but not in fact received until after the time had expired.

The reasons given for the decision in *Chase* v. *Surry*, 88 Maine, 468, are equally applicable, we think, to the question here presented. It was there held, under the statute which requires one who claims to have sustained injuries by reason of a defect in a highway to "notify" the municipal officers of the defendant town "by letter or otherwise" setting forth his claim for damages, etc., within fourteen days after the alleged injuries were received, that it was not a compliance with the terms of the statute to mail the required notice to the municipal officers within the fourteen days, the same not having been actually received by them within that time.

If the adjudication of fence viewers is sent to the delinquent by mail, within such time that in the ordinary course of the mail it would reach him in time for him to comply with their directions, the fact that he did so receive it, nothing being shown to the contrary, might be presumed therefrom. But that is not this case. It here appears that he did not receive it, and no evasion or wrongful act on his part is shown to prevent the receipt of it.

The plaintiff's action is under a penal statute, and it was incumbent upon him to prove that all the requirements of that statute had been complied with. In this we think he failed in one important particular, that he did not prove that the defendant had sufficient and timely notice of the adjudication of the fence viewers that he must build the fence within the time they had fixed.

Exceptions sustained.

INHABITANTS OF ALBANY *vs.* INHABITANTS OF NORWAY.

Oxford. Opinion September 29, 1910.

Paupers. Settlement. Minors. Change of Settlement. Statute, 1821, chapter 122. Revised Statutes, chapter 27, section 1, clause II; same chapter, section 3.

Under the provisions of Revised Statutes, chapter 27, section 1, clause II, a legitimate unemancipated minor child, whose father has no pauper settlement in the State, takes the settlement which its mother has within it. If the mother's settlement changes during such child's minority then the settlement of the child will change likewise and be the same as that of the mother.

In the case at bar, the parents of the minor pauper were divorced. At the time of the divorce neither parent had a pauper settlement in the State. The father did not subsequently acquire one. After the divorce the mother acquired a pauper settlement in the defendant town by a second marriage. Still later the mother acquired a settlement in the plaintiff town by reason of a third marriage. *Held:* That the settlement of the minor pauper was in the plaintiff town, the same as that of her mother.

On agreed statement of facts. Judgment for defendants.

Action of assumpsit to recover for pauper supplies furnished by the plaintiff town to one Flossie Miller, a minor, whose pauper settlement was alleged to be in the defendant town. Plea, the general issue. An agreed statement of facts was filed and the case reported to the Law Court for determination with the stipulation that if the Law Court should determine the pauper settlement of the said minor to be in the defendant town, then judgment should be for the plaintiff town; otherwise for the defendant town.

The case is stated in the opinion.

James S. Wright, for plaintiffs.

Albert J. Stearns, for defendants.

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

KING, J. This is an action to recover for pauper supplies furnished Flossie Miller, a minor. The only question in controversy is the settlement of the pauper. She was born in the plaintiff

town June 5, 1894. In 1902 her father and mother were divorced, and her custody was decreed to the mother. At the time of the divorce neither her father nor mother had a pauper settlement in this State, and her father did not subsequently acquire one. After the divorce, May 22, 1902, her mother married Walter C. Merrill, who then had, and still has, his pauper settlement in the defendant town. Thereafter, on May 11, 1907, the mother, of the pauper, having been divorced from her second husband, married Eugene O. McKeen, who then had, and still has, a pauper settlement in the plaintiff town. The plaintiff was living at her mother's home in Albany when she fell into distress and received the assistance sued for.

R. S., c. 27, sec. 1, cl. II, provides: "Legitimate children have the settlement of their father, if he has any in the State, if he has not, they have the settlement of their mother within it; but they do not have the settlement of either acquired after they are of age and have capacity to acquire one."

As the pauper's father had no settlement in the State, she took the settlement which her mother acquired in Norway upon her marriage to Merrill in 1902. *St. George* v. *Rockland*, 89 Maine, 43. Did the pauper's settlement change and follow that of her mother acquired in the plaintiff town by her subsequent marriage to McKeen in 1907? We think it did.

In the Act of 1821, c. 122, the language was: "legitimate children shall follow and have the settlement of their father if he has any in this State; but if he shall have none, they shall in like manner follow and have the settlement of their mother." As the result of the revision of the general statutes the words, "follow and have," used in the original statute, have been condensed to "have." But in *St. George* v. *Rockland*, supra, this court held that the meaning of the statute was not thereby changed. It was there said: "In this case there was no occasion for a change in the law. It kept poor minor children with their mother. It had remained unamended for a generation. The condensation of the clause into more terse language does not indicate an intent to make such a radical change in the law itself as the defendant contends for."

It is unquestioned that under this statute the pauper settlement of a legitimate unemancipated minor is the same as that of its father, and changes as often as its father's changes. Such is the plain meaning of the statute, and it has been uniformly so held. If, then, when the father has no settlement in the State, the minor "shall in like manner follow and have the settlement" of its mother, it must be held that its settlement, so derived from her, changes as often as hers changes during its minority.

It is suggested in behalf of the plaintiff that to hold Flossie's settlement changed from Norway to Albany violates the provision of sec. 3, of c. 27, that settlements "acquired under existing laws, remain until new ones are acquired." But the answer to that is, that if the settlement Flossie had in Norway, because her mother took one there by marriage, was "acquired" by her within the meaning of the provision of sec. 3, then she likewise "acquired" a new one in the plaintiff town, because her mother took one there by her third marriage.

At the time the minor pauper fell into distress, her father having no pauper settlement in this State, she had the settlement which her mother then had, and that was admittedly in the plaintiff town by reason of her mother's marriage to McKeen.

Accordingly the entry must be,

Judgment for defendants.

STATE OF MAINE *vs.* MAURICE R. FOGG.

Oxford. Opinion October 5, 1910.

Indictment. Liquor Nuisance. Intoxicating Liquors. Persons Liable. Resort. Criminal Law. Instructions. Revised Statutes, chapter 22, sections 1, 2, 4.

Objection that an indictment for maintaining a liquor nuisance should have been found and drawn under Revised Statutes, chapter 22, section 4, instead of section 2, can be taken, if at all, only by demurrer or motion in arrest of judgment.

An indictment charging that the accused at specified times maintained a specified place used for illegal sale and illegal keeping of liquors, where liquors were sold for tippling purposes, and that the place was a resort where liquors were sold, given away, drank, and dispensed and a common nuisance, etc., is sufficient under Revised Statutes, chapter 22, sections 1, 2, defining common nuisances, and prescribing punishment for keeping them.

In a trial for maintaining a liquor nuisance, it was not error to instruct that, if one having control of a place knowingly permits it to be used as a place of resort, if he has authority over it to prevent or permit that use and he permits it, then in the eye of the law he maintains it, because, the offense charged being a misdemeanor, all connected with the prohibited acts and conditions are principals.

An allegation that one "did keep and maintain" a liquor nuisance applies either to one who occupies or controls the occupation and procures or permits illegal use of the place.

The offense of maintaining a liquor nuisance under Revised Statutes, chapter 22, section 2, and section 4, are distinct offenses, and a conviction of one would not bar indictment for the other.

In a trial for maintaining a liquor nuisance, testimony as to what was found on the place, indicating the presence of intoxicating liquors, sounds of disturbance at night on the Fourth of July, and acts of an intoxicated man who was neither a boarder nor visitor at the place, was properly received to connect the accused with control of the place and the acts done and conditions found there, as was evidence of shipments from a particular city of liquors to him up to the time when whiskey bottles, with labels bearing the name of that city, were found at the place.

In a trial for keeping a liquor resort, the words "commonly" and "habitually" used in a requested instruction, applied to the resort, were properly omitted as mere tautology, since "resort" means a place of "frequent assembly."

In a trial for maintaining a liquor nuisance, an instruction defining, negatively and affirmatively a common nuisance, was properly refused as being substantially covered by the Justice's statement of the transactions relied on by the State, accompanied by the interrogatory to the jury, "Has that evidence satisfied you beyond a reasonable doubt—that is, given you a clear and abiding conviction—that for that time at least and on the day following that was a place of resort to which men went without invitation, and, having gone there, liquors were drank and dispensed?"

On exceptions by defendant. Overruled.

The defendant was indicted at the October term, 1909, of the Supreme Judicial Court, Oxford County, for maintaining a liquor nuisance. Verdict, guilty. The defendant excepted to several rulings during the trial.

The case is stated in the opinion.

The indictment, omitting formal parts, is as follows:

"The grand jurors for said State upon their oath present, that Maurice R. Fogg of Sumner, in said county of Oxford, on the fifteenth day of August, in the year of our Lord one thousand nine hundred and eight and on divers other days and times between that day and the day of the finding of this indictment, at Hartford, in the county of Oxford aforesaid, did keep and maintain a certain place, to wit: A boarding house known as the Corn Shop Boarding House situated in said Hartford, and near the depot of the Maine Central Railroad, known as East Sumner depot, a tenement there situate, then and on said divers other days and times there used for the illegal sale and for the illegal keeping of intoxicating liquors, and where on that day and on said divers other days and times intoxicating liquors were sold for tippling purposes, and which said place was then and on said divers other days and times there a place of resort where intoxicating liquors then and on said divers other days and times were there unlawfully kept, sold, given away, drank and dispensed, and which said place, being so used as aforesaid, was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said State, against the peace of said State, and contrary to the form of the Statute in such case made and provided."

Ralph T. Parker, County Attorney, for the State.

William H. Gulliver, and Matthew McCarthy, for defendant.

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

PEABODY, J. This was an indictment against the respondent for maintaining a statutory common nuisance, defined by section 1, chapter 22, R. S.

The case is before the Law Court on exceptions to the rulings of the presiding Justice, refusing to quash the indictment, to give instructions requested, and admitting certain testimony offered by the State, also to parts of the charge to the jury.

The ground upon which the respondent's counsel requested that the indictment be quashed and based the exception to the court's refusal, is that it should have been technically found and drawn under section 4 instead of section 2 of chap. 22, R. S. Such objection to the indictment could only be available to the respondent, if at all, by demurrer or a motion in arrest of judgment. *State* v. *Hurley*, 54 Maine, 562; *State* v. *Burke*, 38 Maine, 574. But the indictment is clearly sufficient in charging the offense defined in secs. 1 and 2 of chap. 22, R. S. *State* v. *Arsenault*, 106 Maine, 192; *State* v. *Lang*, 63 Maine, 215; *State* v. *Kapicsky*, 105 Maine, 127.

The same reason is urged in support of the exception to that part of the charge which defined what is meant by maintaining a place of resort; but it was not error to instruct the jury that a person having control of a place knowingly allows it, permits it to be used as a place of resort, if he has authority over it to prevent that use or to permit that use and he permits it, then in the eye of the law he maintains it; because the offense charged, being a misdemeanor, all connected with the prohibited acts and conditions are principals. *State* v. *Sullivan*, 83 Maine, 417; *State* v. *Murdock*, 71 Maine, 454; *State* v. *Ruby*, 68 Maine, 543; *Commonwealth* v *Wallace*, 108 Mass. 12; and because the words "did keep and maintain," used in the indictment in reference to the respondent, apply either to one who occupies or to one who controls the occupation and procures or permits the illegal use of the place. *State* v. *Arsenault*, 106 Maine, 192; *State* v. *Ryan*, 81 Maine, 107; *Commonwealth* v. *Kimball*, 105 Mass. 465.

It is the further contention of the argument in support of these exceptions, that under the instructions, the respondent might be convicted of aiding in the maintenance of a nuisance, the offense described in sec. 4, and that a judgment rendered against him under the indictment in this case could not be pleaded in bar of a subsequent prosecution for the former offense, and that upon the doctrine of *State* v. *Burgess*, 40 Maine, 592, such instructions were erroneous and prejudicial to the respondent. The offenses are undoubtedly distinct, *State* v. *Frazier*, 79 Maine, 95; *State* v. *Stafford*, 67 Maine, 125; *State* v. *Ruby*, 68 Maine, 543; and a conviction of one of these would not bar an indictment for the other, *State* v. *Coombs*, 32 Maine, 529.

They are statutory offenses and by legislative intent a person by the same act or group of acts may violate both and be punished for both or, as the court by EMERY, C. J., say, "Nevertheless some acts may sometimes constitute both offenses and when they do, the offenses are still different, though the acts are the same, and the perpetrator of the acts may be punished twice, once for each offense."

The case presents only the questions whether the place described in the indictment was a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drank and dispensed on the third day of July, 1908, and whether the respondent then and there kept and maintained the place.

The respondent admits that on that night intoxicating liquors were there drank or given away, and so the exceptions are in their application confined to the relevancy of evidence as proof of the character of the place, and of the connection of the respondent with it at that time.

The first exception claims that it was error to receive the testimony of witnesses as to what was found in the boarding house and corn shop indicating the presence of intoxicating liquors, the sounds of disturbance on the night of the fourth of July, and the acts of an intoxicated man, who was neither a boarder nor a visitor in the boarding house, as it had not been made to appear that the respondent was in control of the place; but as circumstances con-

sistent with the charge against the respondent relied upon by the State to connect him both with the control of the place and with the acts done and conditions found there on the day in question, we think the evidence was admissible.

By the same rule of evidence the testimony of the expressman, the subject of the second exception, is admissible, as to shipments to the respondent of numerous packages from Dayton, Ohio, up to the night of July third, when whiskey bottles labelled Dayton, Ohio, were found in the boarding house.

As to the fourth exception the court could decline to give the requested instructions "except so far as given in the charge to the jury," if the substance of those which were correct legal propositions was covered by the charge.

The first was given in substance properly omitting the adverbs "commonly" and "habitually" as mere tautology. According to Webster's Dictionary the natural meaning of the word "resort" is "a place of frequent assembly."

The second, requesting a specific negative and affirmative definition of a common nuisance, was substantially given by the Justice by a statement of the transactions of the night of the fourth of July and the day following, upon which the State relies, "that some half dozen more or less of men went there and went there to drink, and that they went there without invitation," with the concurrent interrogatory to the jury, "Has that evidence satisfied you beyond a reasonable doubt, that is, given you a clear and abiding conviction that for that time at least, and on the day following that was a place of resort to which men went without invitation, and having gone there, liquors were drank and dispensed?"

The remaining requested instructions were properly refused, the fourth because it could not be given without material modification, and the fifth, sixth, seventh, eighth and tenth because they are not strictly accurate statements of the law of the case.

Exceptions overruled.

MARCIA A. HATCH et al. *vs.* FREDERICK M. ROSE.

York. Opinion October 6, 1910.

Trespass. Lawful Entry. Evidence.

1. To sustain an action of trespass quare clausum the plaintiff must prove that the entry was unlawful when made, or became unlawful by unlawful acts injuring the close after entry.
2. For any acts after entry to render the original entry unlawful (being otherwise lawful), the entry must have been in invitum, by authority of law, and not by license from the owner.
3. If one enters upon real estate under an agreement with the owner to make specified improvements or changes in the real estate, the fact that he does not make all the changes agreed upon, or does not make them in the manner specified, does not render the original entry unlawful.

On report. Judgment for defendant.

Action of trespass quare clausum to recover damages for an alleged breaking and entering the plaintiffs' close on Elm Street in Biddeford. Plea, the general issue with brief statement as follows:

"And for a brief statement of special defense to be used under and in addition to the general issue above pleaded the defendant further says that at the time of the alleged trespasses declared upon in plaintiffs' writ defendant was duly elected, qualified and acting street commissioner of the district of said city of Biddeford where said land and way described in plaintiffs' writ was located and that the acts charged against defendant in plaintiffs' writ, if any were done by him were done by defendant in said capacity and in the lawful widening, leveling and grading of said way and not otherwise.

"Also that such acts, if any were done, were done by virtue of a license and agreement made by said plaintiffs and Cornelius Horigan in his capacity as mayor of said city of Biddeford prior to the time of said alleged trespasses whereby said defendant was given permission to do any and all of the acts complained of in said writ and which license was unrevoked at the time of said alleged trespasses."

At the conclusion of the evidence the case was reported to the Law Court, "to be decided upon so much of the evidence as is legally admissible."

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiffs.

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

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

EMERY, C. J. After study of the somewhat indefinite and conflicting evidence we find ourselves believing the following to be the facts in the case:—The plaintiffs were the owners of dwelling houses and lot on the southeasterly side of Elm St. in Biddeford, Mr. Hatch being their agent by whose contracts and stipulations concerning the property they were bound. The houses were situated a little back from the location line of the street and upon a ledge several feet above the level of the travelled part of the street. The ledge projected into the street beyond the location line. Access to the houses was by steps leading from the street at the foot of the ledge up over the ledge to a landing connected with the houses. There was no sidewalk on that side of the street.

Such being the situation, the city undertook through its officers and agents to make improvements in the street by constructing a concrete sidewalk on that side out to the location line and at the level of the travelled part of the street. To do this required cutting down to the street level the ledge in front of the plaintiffs' houses, and this would make necessary the building on the plaintiffs' land a retaining wall to take place of the removed ledge as support to the land and houses. In a conference over the matter between the Mayor of the city and Mr. Hatch the agent of the plaintiffs, substantially the following was agreed to by them:—The city was to construct a concrete sidewalk with curbing at the street level and out to the location line of the street; do the necessary blasting and excavating in the ledge on the plaintiffs' land for a retaining wall; build such wall next the street line and after completion fill in behind

the wall to its top, and leave the property in better shape than before. On the other hand the plaintiffs were to pay to the city one-half the expense of the sidewalk and curbing. There were no other specifications agreed on as to the wall or any other part of the work.

Under this stipulation the city entered upon the work. The ledge within the location line of the street was cut down to the street level, the concrete side walk and curbing constructed, the blasting and excavating done, and a retaining wall built on the plaintiffs' land next the street line. The plaintiffs were satisfied with sidewalk and curbing, and it does not appear that the retaining wall is insufficient. The plaintiffs however do complain, and did complain, that the city did not do all it should have done and did some things contrary to their wishes, and they consequently brought this action of trespass quare clausum against the defendant Rose, the street commissioner, for his entry and acts upon their land as above described. They contend, (1) that by reason of the existence for forty years of the houses and steps, the line of the street had become fixed at the outer end of the steps; (2) that the city not having complied with the conditions of the permission given to enter upon their land, forfeited that permission and its street commissioner became a trespasser ab initio.

We have no occasion to consider the first contention since our conclusion as to the second contention disposes of this case. Whatever conditions were imposed by the plaintiffs upon the permission given the city and the defendant to enter upon the land for the purposes named, they were all conditions subsequent. They could not be fulfilled till after the entry. If some of them were not fully performed it does not follow that the defendant's original entry was unlawful. The doctrine of trespass ab initio applies only to entries in invitum, under authority of law. It does not apply to entries by license from the owner. *Hunnewell* v. *Hobart*, 42 Maine, 565; *Dingley* v. *Buffum*, 57 Maine, 379; *Perry* v. *Bailey*, 94 Maine, 50. If the plaintiffs have suffered any legal injury from the acts or omissions of the defendant under the license given him to enter upon their land they have mistaken their remedy. To maintain

this action of trespass quare clausum they were bound to show that the entry and acts of the defendant were without right at and from the time of the entry. This they have failed to do, since the evidence clearly shows a license from them to the city and the defendant to enter in the first instance, and does not show any acts excluded by the license.

Judgment for the defendant.

In Equity.

W. F. BISBEE

vs.

MT. BATTIE MANUFACTURING COMPANY.

Knox. Opinion October 8, 1910.

Corporations. Liens. Dissolution. Distribution of Proceeds. Payment of Claims. Priority of Claims. Enforcement of Claims. Attachment of Real Estate. Receivers. Taxes. Revised Statutes, chapter 47, sections 80, 81; chapter 68, section 1; chapter 72, section 42; chapter 79, section 49; chapter 83, section 60; chapter 86, section 22.

A bill in equity was filed against the Mt. Battie Manufacturing Company, a corporation, under Revised Statutes, chapter 47, sections 80 and 81, praying for a dissolution of the corporation, and the distribution of its assets. Receivers were appointed, who subsequently sold the real estate of the corporation. Prior to the filing of the bill attachments of the real estate had been made in suits by several creditors. One of these cases, that of Brown & Adams, went to judgment as of a date prior to the filing of the bill, and on the execution, issued after the filing, the real estate was sold to one of the other attaching creditors, the Camden Savings Bank. The sale was prior to the appointment of the receivers. An injunction to restrain the sale was refused by a Justice of the Court. All the other suits remained on the docket until two days after the sale, when special judgments were ordered in three of them, and executions issued. Another suit went to

judgment at the end of the term then pending. The other suits still remain on the docket. One of the suits in which special judgment was taken was that of the Camden Savings Bank. Out of the proceeds of the execution sale the officer satisfied the Brown & Adams execution, and the three executions issued on the special judgments. In a suit by the receivers against the Camden Savings Bank it was held that the sale on the Brown & Adams execution was void, the property at the time being in the custody of the law. When the receivers were appointed, the court ordered that all creditors should present their claims to the receivers before a certain date fixed, and that all claims not so presented should be forever barred. None of the claims satisfied out of the execution sale were presented to the receivers. Questions having arisen concerning the rights of the several attaching creditors, including the judgment creditors, to priority in distribution, and concerning other questions of preference or priority, it is held by the court as follows: —

1. Valid attachments existing at the time a bill is filed for the dissolution of the corporation and the sequestration of its assets are not thereby destroyed.
2. Distribution is to be made according to the status of the attachment liens at the time the bill was filed. From that time the liens are equitably impressed upon the property and the fund produced by its sale, and the rights of priority are not lost by mere failure to pursue useless statutory methods of enforcement. They may be waived, or be barred by the conduct of the party having the right. They do not lapse.
3. In case of insufficiency of assets to pay all claims, distribution is to be made as of the filing of the bill. The amounts of claims, including taxable costs, are to be computed to that time, and no further.
4. An attachment of real estate, in a suit upon an account "for balance due," without items, is invalid and creates no lien. Such an attachment is not validated by an amendment of the writ, after entry, by filing an itemized account.
5. An attachment of real estate, in a suit upon an account annexed, with a proper itemized bill, and also upon an omnibus count, including the money counts, for a like amount, is invalid, and creates no lien, when there is no specification under the money counts, and the itemized bill attached to the first count is not referred to in the second count.
6. While a creditor by his conduct may become in contempt of the court, and may bar himself of the right to pursue his priority in equity, the court is of opinion that under the circumstances of this case the claims of the judgment creditors should not be regarded as barred by their conduct concerning the execution sale, or the matters connected with it.
7. The Camden Savings Bank is entitled to subrogation to the claims of Rawitzer and of Brown & Adams for priority, the same having been paid out of the proceeds of the void execution sale, in which the bank was the purchaser, as well as to priority in payment of its own claim, in its order.

8. The court in its discretion may extend the time for proving claims, and may admit claims to proof after the time previously limited for proving claims has expired.

9. The Camden Savings Bank cannot be allowed for attorneys' fees paid by it in the defense of the suit of the receivers against itself to recover the possession of the real estate sold to it at the void execution sale; nor can it be reimbursed for the costs of court which it was obliged to pay on the ending of that suit; nor for sums advanced by it for the care, protection and insurance of the property while it was in its possession.

10. In the distribution of the assets of a corporation, under a bill in equity for its dissolution and the winding up of its affairs, unpaid taxes for which there is no lien, are not entitled to preference or priority.

In equity. On report. Distribution according to opinion.

Bill in equity brought against the defendant corporation by its treasurer, under Revised Statutes, chapter 47, sections 80 and 81, praying for a dissolution of the corporation, and the appointment of trustees and receivers. Receivers were duly appointed and the real estate of the corporation was duly sold by them, and questions having arisen concerning the distribution of the proceeds, various creditors of the defendant corporation made application to the Supreme Judicial Court in equity to determine such questions, and by agreement the whole matter of the disposition of the money in the hands of the receivers was reported to the Law Court for determination.

See *Cobb* v. *Camden Savings Bank*, 106 Maine, 178.

The material facts are stated in the opinion.

J. H. Montgomery, for plaintiff.

Joseph E. Moore, and Arthur S. Littlefield, for receivers.

Reuel Robinson, J. H. Montgomery, Phillip Howard, M. T. Crawford, Manson & Coolidge, and Arthur S. Littlefield, for various claimants.

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

SAVAGE, J. This bill in equity was brought against the defendant corporation 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 and receivers. The date of filing does not appear. But the bill was served November 16, 1908. Receivers were appointed January 11, 1909. The real estate of the corporation has been sold by the receivers, and questions have now arisen concerning the distribution of the proceeds. The case is reported to the Law Court for the determination of the rights of the various creditors to payment.

Prior to the filing of the bill, attachments of the real estate had been made in suits by creditors in the following order; S. Rawitzer, Brown & Adams, Holyoke Warp Co., Camden Savings Bank, Frank Kenney, H. A. Metz & Co., Bacon & Co., I. L. Snow & Co., Howard Bros. Mfg. Co. and Albert Smith & Co. The Brown & Adams case went to the Law Court and was there argued. The certificate of decision was received November 28, 1908, and the case then went to judgment for the plaintiffs as of the preceding September term, as provided in R. S., ch. 79, sect. 49. Execution issued December 3, 1908. All the other suits remained on the docket until the January term, 1909, during which term, on January 6, special judgments were ordered for the plaintiffs in the suits of Rawitzer, Holyoke Warp Co. and the Camden Savings Bank, and executions issued. At the same January term the Kenney suit went to judgment for the plaintiff. All the other suits still remain on the docket.

On January 4, 1909, the real estate was sold on the Brown & Adams execution to the Camden Savings Bank, and out of the proceeds the officer satisfied that execution, and also the executions of Rawitzer, Holyoke Warp Co. and the Camden Savings Bank, issued on the special judgments referred to above. R. S., ch. 86, sect. 22. The equity in the real estate was subsequently sold, during the life of the attachment, on the execution issued on the Kenney judgment.

In *Cobb* v. *Camden Savings Bank*, 106 Maine, 178, the question of the validity of the execution sale on the Brown & Adams execution was before this court. And it was there held that the sale was invalid and that no title passed to the Camden Savings Bank, for the reason that in contemplation of law the property was in custodia legis, at least from the time of the service of the bill, under

which the receivers were appointed. This being so, the property was not subject to seizure and sale on execution afterwards, and such a sale without leave of court first obtained, was wholly void.

But the court in *Cobb* v. *Savings Bank*, also held that the rights of priority of creditors, existing at the time a bill is filed, are not destroyed by statutory proceedings for winding up a corporation and sequestrating its assets. The statutory lien by previous attachment is preserved. The enforcement of it, however, in the usual way is suspended. Lien creditors must apply to the court, which will give effect to liens which existed when the property passed into the custody of the law.

In *Cobb* v. *Savings Bank*, the court also strongly intimated that in equitable proceedings under the statute, distribution should be made according to the status of the liens at the time the bill was filed, without regard to what is done or not done afterwards. That intimation we now confirm. When the law took the property into its own possession, and prevented the lienors from pursuing statutory methods of enforcement, at least without leave of court, we think equity requires us to hold that the liens are from that time impressed upon the fund, and that rights of priority are not lost by mere inaction, by mere failure to pursue useless methods of enforcement. It is true that such lienors might at any time apply to the court to intervene. The application might be made within the statutory life of the attachment. But we do not deem that to be essential. The property is in the hands of the court for equitable distribution. And in case of insufficiency of assets to pay all claims, distribution is to be made as of the date of filing the bill. All equities existing then are protected, unless subsequently they are waived or barred. They do not lapse. If lienors make proof within such time as the court orders it is sufficient.

Under these rules it is conceded that Metz & Co., Snow & Co., Howard Bros. Mfg. Co. and Smith & Co. are entitled to priority of payment out of the fund, in the order of their respective attachments.

Before considering the disputed claims, it should be noticed that by the decree appointing the receivers it was ordered "that all creditors be and are required to present their claims against said corpora-

tion to said receivers supported by affidavit and evidence, and the first day of September, 1909, is the time limited within which all claims against said corporation shall be presented. That all claims not so presented within the time limited hereinbefore are and shall be forever barred." Of the disputed claims only those of Bacon & Co. and the Holyoke Warp Company were so presented.

It is contended by the receivers that in two of the cases where attachments were made, the attachments were invalid, and no lien or right to priority existed when the bill was filed. This contention must be sustained. The suit of Bacon & Co. was upon an account "for balance due," without items. After entry plaintiffs amended their writ by filing an itemized account. By R. S., ch. 83, sect. 60, it is provided that "No attachment of real estate on mesne process creates any lien thereon, unless the nature and amount of the plaintiff's demand is set forth in proper counts, or a specification thereof is annexed to the writ." Under this statute the attachment was clearly invalid. *Saco* v. *Hopkinton*, 29 Maine, 268. An invalid attachment cannot be made valid by an amendment of the writ. *Drew* v. *Alfred Bank*, 55 Maine, 451. This claim can be allowed only as a common claim without priority. The same is true of the claim of the Holyoke Warp Company, and for substantially the same reasons. This was a suit upon an account annexed, with a proper itemized bill. There was also an omnibus count, including the money counts, for a like amount, but with no specification. And the itemized bill attached to the first count is not referred to in the second count. In view of the statute provision above quoted, this attachment must be held invalid on the authority of *Osgood* v. *Holyoke*, 48 Maine, 410; *Hanson* v. *Dow*, 51 Maine, 165; *Drew* v. *Alfred Bank*, 55 Maine, 450; *Phillips* v. *Pearson*, 55 Maine, 570; *Shaw* v. *Nickerson*, 60 Maine, 249, and *Briggs* v. *Hodgdon*, 78 Maine, 514. This claim likewise can be allowed only as a common claim, without priority, whether it be regarded as an independent claim, or considered under the claim of the Camden Savings Bank for subrogation, which is to be noticed later.

As already stated, the Camden Savings Bank was the purchaser at the sale on the execution of Brown & Adams, and paid the purchase

price. The money received from the sale was applied by the officer in satisfaction of the Brown & Adams execution and the executions of Rawitzer, and the Holyoke Warp Company, and the bank's own execution. The sale was void. Therefore the Camden Savings Bank, now claims the right to prove its own judgment as a claim having priority by reason of its attachment existing at the time the bill was filed, and the right to be subrogated to the similar rights of Rawitzer, Brown & Adams, and the Holyoke Warp Company. Since we have found that the Holyoke Warp Company had no attachment lien, that part of the bank's claim may be disregarded in this discussion.

The claim of the Camden Savings Bank is sharply resisted. The chief objection is that these creditors,—and they may all be considered as a class together,—by their inequitable conduct while the property was in custodia legis, by seizing and selling it, and participating in the proceeds of the sale, some of them hastening to take out judgments in order that they might so participate, and by holding the receivers out of possession, have been barred in equity of their right to priority. It is contended that all these acts were done in contempt of the law and the court.

It is undoubtedly true that a creditor by his conduct may so bar himself. But we think that this principle ought not to be applied in this case. Though it has turned out that these creditors were legally in the wrong, the circumstances were not such as to show that they were not in good faith seeking to enforce what they had reason to believe were their legal rights. They were necessarily in the dark. They were also in a dilemma. If they failed to pursue their attachments, it was possible that they might lose the benefits of them. If they pursued them by sale, the sale might be held invalid. They would then have to rely upon the equitable discretion of the court. The statute on which the proceedings in equity were based had never been construed by the court. The proper interpretation of it may very fairly be said to have been uncertain and doubtful. Besides, as appears in *Cobb* v. *Savings Bank*, a Justice of the court had been applied to to enjoin the sale, and had refused to do so. It is true that every person is presumed to know the law, and to act in

the light of such a knowledge, but we hesitate to say that failure to anticipate what will be the decision of the court in construing for the first time a doubtful and untried statute shows such a degree of contempt for the law or the court as to require punishment by forfeiture. We do not say so. We think the motive is more important than the act, when the rights of others have not intervened. We think the acts of these creditors were at least excusable, under all the circumstances. We hold therefore that these claims are not barred by the execution sale, or by the matters that were connected with it.

And it seems to us also that the Camden Savings Bank, on the principles of natural equity on which the right of subrogation is founded, is entitled to subrogation to the claims of Rawitzer and Brown & Adams for priority, as well as to the priority in payment of its own claim, after those claims are paid.

Nor does it matter now that these claims were not proved before the receivers within the time limited in the decree of the court. When that time expired, the case of *Cobb* v. *Savings Bank*, had not been decided. Their legal rights were then undetermined. If their defense was sustained, they would have no claims to prove. It is clearly within the power of a court in equity, in its discretion, to extend the time for proving claims. It may receive proofs, even after the time fixed for barring claims not proved, so long as the fund remains undisturbed and no new rights have accrued to others.

All the foregoing remarks apply to the Kenney claim. It is to be allowed as having priority in its order.

It should be said further that the amounts to be allowed on these claims are not the amounts for which judgments were taken. The estate of the corporation is to be settled as of the date of filing the bill. If there should be an insufficiency of assets to pay all claims in full, the amounts, including taxable costs, are to be computed to that time, and no further. This will work out a ratable distribution.

The Camden Savings Bank also claims to be allowed for attorneys' fees paid by it in the defense of the case of the receivers against itself to recover the possession of the real estate, and the costs of court which it was obliged to pay on the unsuccessful ending of that suit; it also claims to be reimbursed for sums advanced for the care,

protection and insurance of the property while it was in its possession. We think none of these claims can be allowed. The case of *Cobb* v. *Savings Bank*, was an adversary proceeding. The parties on both sides stood on their rights. The bank was in the wrong and was defeated, and it must pay its own bills. It would be a strange conclusion to say that the receivers must pay out of the fund the expense of an unsuccessful attempt to prevent them from coming into their own and having any fund.

Doubtless there may be cases where one in possession of property without legal right, or even against legal right, may be equitably entitled to reimbursement for expenses incurred in caring for it. This may be true of expenses which otherwise the true owner would have been obliged to incur. We need not decide this question. In this case it does not appear that the insurance was for the benefit of the estate. It must be assumed that it was for the benefit of the bank. If so, the bank should pay for it. But as to the claim for insurance and for care and protection as well, this is to be said. The bank was in the wrongful possession of the property and was wrongfully holding the receivers out. Non constat that if it had surrendered the property to the receivers as it was its legal duty to do, there would have been any need of insurance or care. It would have been the duty of the receivers to sell. They were prevented from selling by the bank. So far as the administration of the estate is concerned, the expense was not necessary, or at least is not shown to have been necessary. If the receivers had sold promptly after appointment, as they might have done if not prevented, the expense need not have been incurred. Presumably the expenses were incurred by the bank for its own benefit. It is not entitled to reimbursement.

The last claim to be considered is that of the town of Camden for unpaid taxes in the years 1905, 1906, 1907 and 1908. The report shows that these taxes were assessed with sufficient regularity to constitute a valid tax against the corporation, but not sufficient to create any lien on the real estate. The town claims that these taxes are a preferred claim entitled to priority in payment. We do not think so. In the absence of any statute, taxes do not constitute

a preferred claim. In this State by statute, R. S., ch. 68, sect. 1, in the settlement of insolvent estates of deceased persons, taxes are preferred, and so in the settlement of estates under the general insolvency statutes, now in abeyance. R. S., ch. 72, sect. 42. But the statute under which these proceedings are had is not an insolvent statute, although it may turn out that the corporation to be dissolved is insolvent. It does not in terms make unpaid taxes a preferred claim. It expressly provides for a ratable distribution. We therefore conclude that the claim of the town of Camden for unpaid taxes is not entitled to priority.

The case will be remanded for an order of distribution. The claims of Rawitzer, Brown & Adams, Camden Savings Bank, Kenney, Metz & Co., Snow & Co., Howard Bros. Mfg. Co., and Smith & Co., as they stood when the bill was filed, will be awarded priority of payment in the order of their respective attachments. The Camden Savings Bank will be subrogated to the rights of Rawitzer and Brown & Adams. The claim of the Camden Savings Bank for counsel fees, for money paid for costs and for insurance and care of the property will be disallowed. In whatever may be left after payment of these claims, all other creditors who have proved claims will share ratably.

So ordered.

JOHN P. ELLIOTT *vs.* WILLIAM N. SAWYER.

Penobscot. Opinion October 10, 1910.

Master and Servant. Damages. Safe Appliances. Fellow Servants. Inspection. Injury to Servant. Evidence. Harmless Error. Assumption of Risk.

The plaintiff, a brick mason, was employed by the defendant, a contractor, in the erection of the walls of a brick building. A staging upon which the plaintiff was at work collapsed and he was precipitated to the ground, and injured. The stagings were in fact built by the carpenters employed upon the building, although occasionally a mason would assist to expedite the work. The staging in question, at the time of the plaintiff's injury, was admittedly incomplete and insecure, and collapsed because it had not been sufficiently stayed. The defendant contended that he had fully discharged his duty in the premises to his servants by furnishing them suitable and sufficient materials, with which they undertook to build the stagings for themselves, and that any negligence of the builders of the staging was the negligence of the plaintiffs' fellow servants, for which he is not responsible. The defendant also contended that the plaintiff went upon the staging to work, without direction or invitation from him, before it was ready for use, and when it was obviously unsafe, and that the plaintiff assumed the risk, and also was guilty of contributory negligence.

Held: 1. If a master undertakes to furnish completed stagings and other like aids to construction, for his servants to use during the erection of a building, and fails to use reasonable care to make them reasonably safe, he is responsible to a servant, who, while properly engaged in his work, is injured in consequence thereof, unless the servant has assumed the risk, or is at fault himself. The servants who build the stagings are not fellow servants of those who afterwards use them.

2. But a master may fully discharge his duty as to stagings by furnishing suitable and sufficient materials to his servants for them to use in building the stagings, if they undertake to build them for themselves. In such case, each servant in the general undertaking is a fellow servant of each of the others. The stage-builders are fellow servants of those who afterwards use the stagings, and for their negligence the master is not responsible.

3. When a master has assumed the duty of furnishing his servant with a completed staging to work upon, and has impliedly directed or invited him to go upon it, and it appears to the eye, without particular examination, to be ready for use, and in the same condition that the stagings, before that time, had customarily been in when ready for use, the servant may assume that the master has done his duty. The failure to make a particular inspection is not contributory negligence.

4. When, in a suit by a servant against his master for injuries caused by a defective and unsafe staging, it is claimed, that the servant was improperly and prematurely upon the staging before it was completed, it is permissible to show that the servant was impliedly directed or invited to go upon it, and for that purpose, evidence of the customary manner in which the work on the building had previously been carried on is admissible.

5. The evidence warranted the jury in finding that the defendant had assumed the duty of furnishing the staging as a completed structure for the plaintiff to use, that the plaintiff was impliedly directed or invited to go upon the staging, and was properly upon it, that he did not assume the risk, and that he was not guilty of contributory negligence.

6. When the jury have properly found that the plaintiff was directed or invited to go upon a staging to work, and that the defendant had assumed the duty of furnishing it as a completed structure, and when at the same time the defendant admits that the staging was incomplete, insecure and unsafe, by reason of not being sufficiently stayed, and it appears that that was the cause of the plaintiff's injury, it necessarily follows that the defendant was negligent. In such case, the character of the staging in other respects becomes unimportant and immaterial. And the defendant cannot be said to be aggrieved by the erroneous admission of testimony, respecting the safety of the staging, since he could not have been prejudiced by it.

7. Exceptions to the erroneous admission of testimony will not be sustained, if the excepting party was not aggrieved by it.

8. That the testimony excepted to was erroneously admitted is not decided.

9. The verdict of the jury was manifestly too large.

10. A servant assumes all risks incidental to his employment which are obvious, and all which he knows, or which in the exercise of due care he would or ought to have known, including the risk of negligence of fellow servants.

On exceptions and motion by defendant. Exceptions overruled. Motion overruled if remittitur be made.

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

$5000. The defendant excepted to several rulings during the trial and also filed a general motion for a new trial.

The case is stated in the opinion.

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

"In a plea of the case, for that the plaintiff on the thirteenth day of November, 1908, was a servant of the defendant and as such servant of the defendant he was employed as a mason or bricklayer in the laying bricks in and upon one of the walls of a new building under construction on the grounds of the Eastern Maine General Hospital; said wall where said plaintiff was working was at a height of 35 feet above the ground. While laying said bricks and doing his work the plaintiff was compelled to stand upon a stage or platform outside of said wall; now, the defendant owed to the plaintiff, his servant the duty and obligation by the law of the land, to furnish or to provide him a reasonably safe place in which to do his work, and with machinery and appliances reasonably safe with which to do the same, and to keep and maintain said place, machinery and appliances in a reasonably safe condition and proper state of repair; and the plaintiff further says it was the duty of the defendant especially to furnish for his use a reasonably safe stage or platform sufficiently strong to support him as well as the other weights and burdens necessarily placed upon it, in the conduct of his work; that the plaintiff could not do his work and discharge his duty to the defendant without such stage or platform; yet the plaintiff says that the defendant wholly disregarding his duty as aforesaid to him, on the said 13th day of November, carelessly, negligently and unlawfully caused and permitted to be erected and maintained against the aforesaid wall, a weak, defective and insufficient stage or platform for the plaintiff's use, and then and there ordered and directed the plaintiff to stand, abide and work upon said stage or platform in the discharge of his duty; and the plaintiff further says that said stage or platform, which was constructed of timbers and boards was dangerous and wholly unsafe, of which dangers and unsafe condition the plaintiff was then and there wholly ignorant. Now on said 13th day of November, aforesaid, about the twelfth hour, the plaintiff was standing upon the stage aforesaid, doing his accustomed

work in the service of the defendant, his master, in the exercise of due and ordinary care, fully relying upon the strength of said stage, as was his right, when the same without warning and with great suddenness gave way, fell and collapsed, so that and whereby the plaintiff was hurled and precipitated to the ground below, a distance of 35 feet, as aforesaid, then and there striking and falling upon bricks, stones, and sticks, with exceeding force and violence; and the plaintiff says that by and in consequence of said fall all the bones in and about the right elbow were crushed and broken; that his left arm was broken above the elbow; that both of his shoulders were bruised, hurt and injured; that his back, sides and legs were bruised and hurt; and that the muscles, sinews, nerves and tendons of both arms and legs were strained, hurt and torn and great injuries were wrought and done to other parts of the plaintiff's body; and the plaintiff says that in consequence of the injuries sustained by him, as aforesaid, he hath greatly suffered with bodily and mental pain from thence hitherto; that he hath been obliged to lay out and hath laid out great sums of money in the employment of surgeons and physicians and for medicines and nursing that he might be cured; and the plaintiff is not yet cured nor will he ever be well again; his right arm is rigid and useless; he still suffers great pain and misery; he is wholly unable to labor nor is it likely that he will ever be able to labor again, by reason of all which the plaintiff hath lost and will hereafter lose great gains that would have and should hereafter accrue to him as the wages of his hire as a mason.

"And the plaintiff says that, that the hurts and injuries aforedescribed were received by him wholly without his fault and solely because of the wrong and negligence of the defendant; which said wrong and negligence were the erecting and maintaining of the aforesaid unsafe stage and providing such unsafe stage for the plaintiff to do his work upon, of all which the defendant was well knowing or ought to have known in the exercise of due care, to the damage of said plaintiff (as he says) the sum of Ten Thousand Dollars."

Louis C. Stearns, and Louis C. Stearns, Jr., for plaintiff.

John E. Nelson, for defendant.

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

SAVAGE, J. Case for personal injuries. The defendant was a contractor, engaged in building a brick addition to the Eastern Maine General Hospital at Bangor. The plaintiff was a brick mason employed in that work by the defendant. A staging on which the plaintiff was at work collapsed, or "jackknifed" as the witnesses termed it, and the plaintiff was thrown to the ground, a distance of about thirty-five feet, receiving thereby serious injuries. The plaintiff claims, and all the evidence tends to show that the cause of the collapse was the fact that at that time the staging was not properly stayed. The verdict was for the plaintiff, and the case comes up on defendant's motion for a new trial, and on his exceptions.

There is not much dispute about the material facts. We think the evidence warrants the following statement. The general method of construction of the stage from the ground was as follows: Six or eight feet from the wall of the building tall poles were set up. Close to the wall pieces of lumber each four and one-half feet long were placed upright at suitable intervals. Short sticks called putlogs to support the flooring of the stage were placed, one end on the top of each upright and the other end on the ledger board which was fastened by clamps to the outside poles, extending from pole to pole. The putlogs were nailed to the ledger board. The poles were stayed through the windows to a staging within the walls. Inside stays or ledger boards running lengthways of the wall were nailed to the uprights. The flooring completed the stage so far. When the masons standing on this stage had laid up the wall as high as they could conveniently, the process of stage building was repeated. Other uprights were placed on the ends of the putlogs next to the wall, directly over the uprights below, and were "toe-nailed" to the putlogs. Other putlogs were placed on the top of the new uprights, and extended to a ledger board. The staging was stayed to the inside stage as before, and was then ready for use. This process was repeated as often as necessary. The stagings were in fact built

by the carpenters, although occasionally a mason would help a little to expedite the work, as by putting up planks. It appears that the general plan pursued was for the carpenters to build a stage on one side of a building, while the masons were at work on another stage at some other part of the building. In this way, as a general rule, when the masons had completed their work on one stage, they would find another already prepared for them, and thus would lose no time. Generally the ends of the stage at the corners of the building were made ready and stayed first, so that the two masons who were to build up the leads at the corners could build the leads while the carpenters were completing the rest of the stage. By thus starting the leads, the wall would be ready for the other masons to work on when the whole stage was done. All the work on the building was done under the charge and supervision of the defendant's general superintendent, Sturtevant.

On the morning of the day of the plaintiff's injury Mr. Sturtevant directed two masons to go upon the staging in question, which was on the west side of the building, and build up the leads at the corners. Meanwhile the masons' crew, including the plaintiff, were at work on a staging at the same level on the south side of the building. An hour later, having finished their work on the south side, they came around the corner of the building onto the staging which afterwards collapsed. They found the staging floored, the leads up, and brick and mortar on the stage, ready to be put into the wall. The brick and mortar had been placed there by the masons' tenders. The masons had no express directions from the defendant or his superintendent to go upon the staging, but they went there in the regular course of their work, because there the wall had been made ready for them. The plaintiff made no inquiry about, or examination of, the stage to see if it was completed and properly stayed. He assumed from the appearance of the stage and the existing conditions that he was expected to go to work then upon the stage. He knew however that sometimes men went up onto a staging to put up the leads before the staging was completed. He and his fellow laborers were upon the stage laying up the wall two hours or more before the stage collapsed.

During some part of the time the plaintiff was working upon the stage, and at the moment of the collapse, a single carpenter was at work underneath the staging, nailing on stays from the outside poles through the windows to the inside staging. The stays were nailed on close up to the ledger boards, a few inches below the planking of the upper stage. Just when this carpenter began this work does not clearly appear. But the jury were warranted in finding that he did not commence staying the stage until after the masons had gone upon it. In fact, this carpenter, who was a witness, so testified. And inasmuch as thirty-five to forty feet of the sixty foot stage still remained unstayed at the time of the accident, a strong inference arises that he had not then been at work a long time. He had not worked directly under the plaintiff, but when the stage fell he had reached a point about fifteen feet from him. The part of the stage which fell was about midway of the building.

Upon these facts, the defendant denies all responsibility. He claims, first, that he did not undertake to furnish a staging as a completed structure, on which the plaintiff was to do his work, but that he furnished the necessary materials for the stage, suitable in kind and sufficient in quantity, with which the workmen, either the masons or their fellow servants, the carpenters, or both, were to build the stagings as they liked, and upon their own responsibility; next, that even if he had undertaken to furnish the stagings as completed structures, in this case he did not in fact furnish this stage to the plaintiff, because it was obviously not completed, and it was not intended for the masons to go upon it, until more securely stayed, and the plaintiff went upon it without direction or invitation, prematurely, before it was ready to be furnished or had been furnished in fact; and, lastly, that the plaintiff, in going upon a stage so obviously incomplete and unsafe, both assumed the risk, and was guilty of contributory negligence.

As to the first point this is to be said. It is admittedly the duty of a master to use reasonable care to furnish for his servant a reasonably safe place for him to do his work. In the matter of stagings and scaffoldings, and other like aids to construction, built during the progress of the work, the master, if he undertakes to

furnish and does furnish a reasonably safe, completed structure, has fulfilled his duty. If he undertakes to furnish such a structure, and fails to use reasonable care, and it is not made reasonably safe, he is responsible to a servant who is injured in consequence thereof unless the latter has assumed the risk, or is at fault himself. He is responsible not only for his own personal negligence, but for the negligence of the servants whom he employs to build the structure. In doing the work, they are doing his work. They are not fellow servants of others who may be employed by him to do other work in the same general undertaking. *Pellerin* v. *International Paper Co.*, 96 Maine, 388; *McCarthy* v. *Claflin*, 99 Maine, 290.

On the other hand the master may fully discharge his duty as to stagings, if he furnishes suitable and sufficient materials, and his servants undertake to build the staging for themselves. In such a case each servant is a fellow servant of each of the others. The masons who lay the walls are the fellow servants of the carpenters, who, perchance, may build the staging. If a servant is injured in consequence of the negligence of any of his fellow servants, whether of his own class or another, he has no remedy against the master. If a mason is injured because a carpenter has been guilty of negligence in building the stage, he cannot look to the master for compensation. For it is well settled law that a servant assumes all the risk of the negligence of his fellow servants. *Amburg* v. *International Paper Company*, 97 Maine, 327; *McCarthy* v. *Claflin*, 99 Maine, 290.

Whether, in any particular case, the master has assumed the duty of furnishing the stage as a completed structure is a question of fact to be determined by the jury. In this case, the defendant testified that Sturtevant was his superintendent and had entire charge of all the work in his absence, and had full authority and discretion to manage the operation; that it was a part of the duty of the carpenters to build the stagings; that he directed Sturtevant to be sure and make everything strong; that Sturtevant had authority to construct the stages; that he employed Allen, the foreman of the carpenters; that Allen was under the direction of Sturtevant; that he himself was present when parts of the stage were built, and spoke

to the carpenter once or twice and told him to be sure and stay the stage, or something of that kind; that the stage was put in the charge of the carpenter, and that it was his duty to stay it; and finally, that he knew the stages would be built, and he had ordered them to be built under the direction of his general superintendent, Sturtevant. There is no question but that the materials furnished for the stage were suitable.

Upon the testimony of the defendant himself, we think the jury might properly find that he assumed the duty of furnishing the stage as a completed structure, and that he was responsible for it, if he furnished it to the plaintiff to work upon. *McCarthy* v. *Claflin*, supra.

There is no doubt but that the stage was unsafe. Indeed, it is the defendant's contention that it was obviously unfinished and unsafe, and that the plaintiff, had he been in the exercise of reasonable care, would have kept off from it.

Next, was the plaintiff properly upon the stage? In other words, had the defendant directed or invited him to go onto the stage to work in the condition it was in? It was not necessary that he should be expressly directed. It was sufficient if he was invited. The plaintiff says that he was invited, that the stage was held out to him as ready to be used; that it was so held out because according to the manner in which the work had been carried on, and was being carried on, while the masons were working on one stage the carpenters erected another; when the leads were up and the stock on the stage, the masons' crew, having finished on the first stage, went to the new stage, not because they were expressly directed to go, but because by the usual course of the work it was their duty to go, so understood by them and so understood by the master; and because on this occasion the leads had been put up by the express direction of the general superintendent, and the brick and mortar were on the stage. If under such circumstances the stage was held out to the plaintiff as ready for use, he was impliedly directed or invited to go upon it.

It may be that the bricks and mortar had been put upon the stage by the tenders prematurely, and without authority. But in view of the fact that only one carpenter was put to work staying

the stage, in connection with the fact that but for the use of this stage the masons would have had to be idle until the staging was done, it is not unlikely that the jury concluded that the defendant, or whoever represented him at the time, actually intended the stage to be used by the masons, when, and as it was. We should not disturb such a conclusion.

Did the plaintiff assume the risk of the want of staying? He assumed all risks that were incidental to his employment, all risks which were obvious, and all which he knew, or which in the exercise of due care he would have known, or ought to have known. *Caven* v. *Bodwell Granite Co.*, 99 Maine, 278; *Demers* v. *Deering*, 93 Maine, 272; *Babb* v. *Oxford Paper Co.*, 99 Maine, 298. But he did not assume the risk of the negligence of the master. *Jensen* v. *Kyer*, 101 Maine, 106. He had a right to rely upon the presumption that the master had not been negligent, *Caven* v. *Bodwell Granite Co.*, supra; not however being excused thereby from the reasonable use of his own faculties. The risk of stays, or the want of them, was not incidental to his employment. The neglect would have been obvious, and would have become known to the plaintiff, had he made an examination as to that feature, but he did not do so. He says he did not think of it. Was he bound to think of it? We think not. When a master has assumed to furnish his servant with a completed stage to work upon, and has invited him to go upon it, and it appears to the eye, without any particular examination to be ready for use, and in the same condition that the stages customarily have been when ready for use, we think it would be a severe and unnecessary rule to hold that a servant is bound at his peril to examine particularly as to the staying. It is a case where the servant may well presume that the master has done his duty. It is not shown that the plaintiff knew of the lack of stays. He says he did not. He went onto the stage from another at the same level, and not mounting from below, in which case he would have had a better opportunity to see. It appears that for some indeterminate length of time a carpenter on the stage below was nailing stays, fifteen or more feet away from the plaintiff. How long the time was we do not know. How many stays were nailed we do not

know. The sound of a carpenter's hammer upon the stage of a building in the process of construction might have attracted the plaintiff's attention to the work the carpenter was doing, but if it did not, we do not think the circumstances require him to be charged with knowledge. The claim that the plaintiff was negligent is practically disposed of by the foregoing considerations. Under the circumstances the jury might well find that there was no contributory negligence. And upon the whole we think that the defendant under his motion is not entitled to have the verdict set aside on the question of liability.

The defendant reserved several exceptions to the admission of testimony. We need not state them in detail. They may be grouped into two classes. The plaintiff, against objection, was permitted to show by several witnesses that upon this job, after a stage had been made and the stock was upon it, and the men had gone up with the leads, it was the customary rule for the masons to follow. It is true, as argued, that custom or usage does not excuse negligence. If the plaintiff was negligent in going upon the stage, he was not less so because he customarily had gone under the same conditions. But that was not the office of this evidence. It was properly admitted to show, by the general way in which the work was carried on, that on this occasion the plaintiff was impliedly invited to go upon the stage, because it was according to the accustomed course of business. And if it was a general custom on this job, as testified to, it must be assumed that the defendant knew it. The only doubt we have is whether it is not a universal custom, and necessarily known to the defendant. It is to be assumed that the jury were properly instructed in regard to the purpose and effect of this evidence. The defendant can take nothing by these exceptions.

The defendant also claims to be aggrieved because the plaintiff was permitted to show by the opinion evidence of experts the safety of the stage in question, compared with stages built according to other plans; also because experts were permitted to testify that in their opinion the defendant's stage was not a safe kind of stage. We do not find it necessary to consider the objections made to these

classes of testimony. Nor do we consider the point not raised, whether it is competent for an expert witness to give his opinion that a particular staging is safe or unsafe,—a question concerning which there is much contrariety of opinion expressed in the decided cases. The testimony, if admissible, tended only to show the defendant's negligence. It did not affect the other issues in the case. If, as the jury found, the defendant assumed the responsibility of building the stage, and if, as the jury also found, the defendant invited the plaintiff to use the stage, and the plaintiff did not assume the risk and was in the exercise of due care, then the defendant's negligence in not properly staying the stage is not denied. As we have said already, it is precisely the defense which is offered, that the stage was unfinished, unstayed and insecure, and obviously so. Hence upon the issue of the defendant's negligence, the testimony was immaterial. And since, upon the jury's findings, the defendant was necessarily negligent in not staying the stage, he could not have been prejudiced by testimony as to the character of the stage he undertook to build. For this reason, these exceptions must be overruled.

The defendant also contends that the verdict, which was for $5,000, is excessive. And we are impressed with the belief that such is the fact. Besides some minor injuries from which the plaintiff has recovered, his chief claim for damages rests in the fact that his right arm is permanently disabled, so that he never can pursue the business of a brick mason, or make any efficient use of the arm. He suffered a compound fracture of the bone at the right elbow joint. The olecranon process was broken off. The elbow and shoulder joints became stiffened. The elbow is stiff, and the shoulder largely so. He has but little use of his fingers. But at the time of his injury the plaintiff was sixty-two years old, with a life expectancy, as shown by mortality tables, of less than thirteen years. His earning capacity will naturally grow less as he grows older. He was afflicted with tuberculosis of the lungs, the natural effect of which will be not only to shorten his life, but to reduce his earning capacity while he lives. We think it is evident that the jury did not pay proper attention to these considerations. Upon the whole,

we think that the sum of three thousand dollars will afford all the compensation to which the plaintiff is entitled under the circumstances. The certificate of the court will be,

Exceptions overruled.

If the plaintiff, within thirty days after the certificate of decision is received by the clerk, shall remit all of the verdict in excess of $3,000, motion overruled; otherwise, motion sustained, on the question of damages only.

In Equity.

CHARLES C. WILSON & SON et al.

vs.

HARRY HARRISBURG AND NATHAN GOLDBERG.

Androscoggin. Opinion October 11, 1910.

Navigable Waters. Waters and Watercourses. Navigable Stream. Floatable Stream. Riparian Owners. Conveyances. Boundaries. Ice Ownership. Cutting Ice. Equity. Jurisdiction. Injunction. Nuisances. Damages.

The part of a river above falls and above the ebb and flow of the tide is not a "navigable river" at common law.

A river which in its natural condition, unaided by artificial means, is susceptible to public use to float vessels, rafts, or logs, is a navigable or floatable stream according to the law of Maine, though not a navigable river in the technical sense of the common law.

As to floatable and nontidal streams, a riparian owner owns the bed to the middle, and all but the public right of passage.

A grantor of riparian lands can exclude the bed of the stream and all of the bank beyond a definite line on the top of it by employing apt words.

A deed which describes a line along a nontidal river as running "with," "along," "by," "on," "up" or "down" the stream carries the title to the center thereof, unless the contrary appears.

The bank of a river extends to the margin of the stream, or to that point where the bank comes in contact with the stream, and it is a monument which may be a boundary of a grant.

A deed bounding the land as extending to the outermost line or margin of the bank or shore of a river, and granting water rights in front of the land, did not extend the grant beyond the water's edge, even if it conveyed beyond the brow of the river bank.

The test of a title to ice on a stream is the ownership of the soil over which it forms.

Owners whose lands do not extend beyond the edge of a stream are not riparian proprietors in the full sense of the term.

The basis of equity jurisdiction in cases such as one to enjoin cutting ice from a stream over lands owned by plaintiff is the inadequacy of the common-law remedy manifested chiefly in irreparable injury and continuing or repeated trespasses and nuisances involving a multiplicity of actions at law.

Irreparable injury such as gives equity jurisdiction does not mean that the injury complained of is incapable of being measured by a pecuniary standard.

An appropriation of another's land constituting a permanent injury to and depreciation of the property is an irreparable injury, owing to the uncertainty of the measure of damages.

Where the extent of a prospective injury is uncertain or doubtful, so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will lie to prevent it.

A continuing nuisance which prevents the comfortable use of one's property and the enjoyment of his property rights creates an irreparable injury, as does one also which may break up a business, destroy its good will, and inflict damages which are incapable of measurement because the elements of reasonable certainty for their computation are wanting.

Where the taking from a river of an ice company's ice and the construction of an ice slip as threatened by defendants would have involved a continuing trespass during that and each succeeding season and an interference with the company's established method of business, it was a threatened nuisance, depriving them of the enjoyment of their property rights, which is subject to injunction.

In equity. On report. Bill sustained.

Bill in equity asking that the defendants be enjoined by both temporary and permanent injunctions from cutting and removing ice from the Androscoggin River opposite the shore of their property situated on the east side of the river above the Maine Central Railroad bridge in Lewiston. A writ of temporary injunction was issued as prayed for. The defendants filed a joint and several

answer, and the plaintiffs filed the usual replication. The cause was then heard before the Justice of the first instance and at the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

White & Carter, and Newell & Skelton, for plaintiffs.

Ralph W. Crockett, and Foster & Foster, for defendants.

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

WHITEHOUSE, J. This is a bill in equity asking that the defendants be enjoined by both temporary and permanent injunctions from cutting and removing ice from the Androscoggin River opposite the shore of their property situated on the east side of the river above the Maine Central Railroad bridge in Lewiston. A temporary injunction was issued as prayed for, and the case comes to the Law Court on report for final determination.

December 24, 1867, the Franklin Company, a corporation organized under the laws of Maine and located at Lewiston, was the owner of land on both sides of the Androscoggin River in Lewiston and Auburn, including the land in question in this case owned by the defendants, and land on the opposite side of the river in Auburn. The plaintiffs claim title to the annual ice crop opposite the defendants' land by virtue of a lease from the Franklin Company for the term of twelve years from January 1, 1906.

The contention of the plaintiffs is that the Androscoggin River at the point in question is a floatable stream; that in 1867, the Franklin Company, from whom the defendants' predecessors derived their title by deed of December 24, 1867, was a riparian proprietor on both sides of the river at the point in question, and as such was the owner of the entire bed of the river between the two banks, and of all rights growing out of such ownership, including title to the ice forming over the bed of the stream.

It appears from the Franklin Company's deed to Bearce and Coe, the defendants' predecessors in title, that the land thereby conveyed,

is bounded from the point of beginning according to the following call in the deed: "Thence westerly by the Northerly line of Avon street extended about 491 feet to the outmost line or margin of the bank or shore of the Androscoggin river; thence up river by said line or margin to a point from which a line drawn parallel with the side line of High street extended would strike the point begun at." It is claimed that by this deed the Franklin Company obviously conveyed only to the top of the bank and retained in itself title to the bank of the river and the bed of the stream; and it is not contended that the defendants have any greater rights than their predecessors acquired by the above named deed.

On the other hand it is argued in behalf of the defendant that the Androscoggin River at the point in question is "navigable" in fact and should be held to be "navigable" and a public river in the technical sense as at common law, though above the ebb and flow of the tide; that the title to the ice forming on it is in the public and that whatever title the plaintiffs or the Franklin Company may have to the bank or the bed of the river, they have no greater right to the ice crop than the defendants or any other citizen of the State. But it is further argued that by the terms of this deed from the Franklin Company, the defendants' ownership includes not only the bank but the bed of the river and extends to the thread of the stream, and that even if their title does not go to the center of the stream, it is contended that in any event the defendants own the bank of the river and are riparian proprietors and as such they and not the plaintiffs have the exclusive right to the ice crop opposite their land. Finally it is contended in behalf of the defendants that even if the plaintiffs have a superior title to the ice forming opposite the defendants' premises, the anticipated injury would not be irreparable, and that an adequate remedy for the trespass when committed would be first an action at law for damages, and not a bill in equity for an injunction.

1. The defendants' premises were situated above the Lewiston Falls, and the Androscoggin River at that point being above the ebb and flow of the tide, was not a navigable river in the technical sense of the common law, but upon the undisputed evidence in this

case, it does appear to be navigable in a popular sense, or a floatable stream, according to the common law of this State. In its natural condition unaided by artificial means, it is susceptible of public use above the Falls for the purposes of commerce, for the floating of vessels, boats, rafts or logs. *Brown* v. *Chadbourne*, 31 Maine, 9; *Pearson* v. *Rolfe*, 76 Maine, 380, and cases cited. In Farnham on Waters, Vol. 1, page 117, (23 f) the author says: "The difficulty with respect to the question as to what streams are navigable arises from failure to distinguish between streams which are navigable and those in which the title is in the public. The mere fact that the title to the bed is in a private owner does not prevent the use of the stream for the purpose of navigation by the public. The King's title to the land under the water was limited by the flow of the tide. But as far as the tide flowed he had the title in the soil, and the use of the water was public because he held the entire title in trust for his subjects. The only purpose for which it becomes a matter of importance to determine whether or not the tide flows is in ascertaining who owns the soil. The distinction does not affect the public easement in the water."

In *Gerrish* v. *Brown*, 51 Maine, 256, it was held that the Androscoggin river at Bethel and Berlin Falls, the points there under consideration, and between them, "though not technically a navigable stream, is of sufficient capacity to float logs and rafts, or in other words is a floatable stream, and as such, by the laws of this State, is deemed a public highway." Such rivers above the influence of the tide are regarded as public, not with reference to the property in the soil, but only with reference to the public use of the streams as highways.

2. With respect to the rights of the riparian proprietor in floatable and non-tidal streams, it is the settled law of this State that he owns the bed of the river to the middle of the stream and all but the public right of passage. *Pearson* v. *Rolfe*, 76 Maine, 385, and cases cited. This is in accordance with the doctrine laid down by Lord Hale in De Jure Maris, ch. 1, in a statement quoted in Farnham on Waters, page 239, viz, "Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent;

so that the owners of the one side have of common right the propriety of the soil usque filum aquae, and the owners of the other side the right of soil or ownership unto the filum aquae on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length."

But it is important to have a correct understanding of the force and meaning of the term "riparian proprietor," for it is obviously competent for a grantor of land owning to the center of a stream to fix the boundary lines and limit the grant as he may choose. If he wishes and intends to exclude the entire bed of the stream and all of the bank beyond a definite line on the top of it, he may undoubtedly do so by employing apt words to express his intention. "In all cases where the language used clearly shows such to be the intention of the grantor, the bank, side, margin or shore become themselves monuments and are to be treated as such." *Bradford* v. *Cressey*, 45 Maine, 13; *Haight* v. *Humor*, 83 Maine, 457. In *Bardwell* v. *Ames*, 22 Pick. page 354, Shaw, C. J., said: "The owner of the shore or the proprietor of the land bounding on the river generally, is the owner of the soil to the central line of the stream, commonly called the filum aquae or thread of the stream. . . . Such an owner is conveniently enough designated by the significant appellation of riparian proprietor. . . . By this designation, I understand an owner of land bounded generally upon a stream of water, and as such having a qualified property in the soil to the thread of the stream with the privileges annexed thereto by law."

3. At the time of the conveyance from the Franklin Company to the defendants in 1867 of the land in question on the Lewiston side of the river, the Franklin Company had become a riparian proprietor with title to the center of the river on each side and had thus acquired the ownership of the entire bed of the river at that point. In the deeds by which it acquired its title on the Auburn side, its lands are bounded "by the river" and it appears that they extended up river beyond the defendants' lot. It also appears from the deeds that its land in Lewiston was "bounded westerly by the

Great Androscoggin river." And a deed which describes a line along a non-tidal river as running "with" or "along" the stream, or as running "by" or "on" the stream or "up" or "down" the stream, carries the title to the center of the stream unless the contrary appears. *Lowell* v. *Robinson*, 16 Maine, 360; *Lincoln* v. *Wilder*, 29 Maine, 179; *Pike* v. *Monroe*, 36 Maine, 309; *Mansur* v. *Blake*, 62 Maine, 38; Farnham on Waters, sects. 852-853.

It has been seen that there was no legal obstacle to prevent the Franklin Company from separating its estate at or near the water's edge so as to convey the upland and retain in itself the title to the bed of the stream. The plaintiffs contend that such was its intention, and that it employed apt language to express that intention in its deed of December 24, 1867 to Bearce and Coe, the defendants' predecessors in title. Attention has already been called to the two leading calls in the description of the grant in that deed which are:—"Westerly by the northerly line of Avon street extended about 491 feet to the outmost line or margin of the bank or shore of the Androscoggin river; thence up said river by said line or margin to a point," etc. The marked difference between "the outmost line or margin of the bank" as the westerly boundary of the lot and the description found in the original deed to the Franklin Company in which it was bounded "westerly by the Great Androscoggin river" is highly significant. If it had been the intention of the Franklin Company to convey to Bearce and Coe the title to the bed of the river which was acquired by the original deed to the Company, it would have been natural to employ the same language in the description of the lot and to bound it westerly by the Androscoggin river and not by "the outmost line or margin of the bank of the river." This studied departure from the terms of the original deed indicates a manifest intention to fix a different westerly bound for the grant in the deed to Bearce and Coe.

In *Nickerson* v. *Crawford*, 16 Maine, 245, the line of the land conveyed was described as extending "to the margin of the cove, then westerly along the margin of the cove," and the court said: "The general rule is that lands bounded upon rivers or streams of water extend to the thread of the stream unless the description be

such as clearly to show a different intention. . . . . In this case the land conveyed is not by any term used extended to the water, but is bounded by a line without the edge of the water, and the flats are not included." The bank of a river extends to the margin of the stream to that point where the bank comes in contact with the stream; and it is a monument which may be a boundary to a grant. *Morrison* v. *Bank*, 88 Maine, 160; *Proctor* v. *Railroad Co.*, 96 Maine, 473; Farnham on Waters, sect. 857. But a grant bounded by the bank of a stream would extend only to the water's edge and not to the center of the stream.

That it was not the intention of the Franklin Company to extend the grant in question to Bearce and Coe, beyond the water's edge in any event, is manifest from another provision in the deed giving to the grantees the "right to erect and maintain at all times all such booms, piers and other fixtures as they wish or find necessary in front of said land for the successful prosecution of their business upon said premises." Their business on the land conveyed at that time was that of operating a saw mill, and this express authority to erect and maintain booms was entirely superfluous if the grant of land extended to the center of the river. But if the Franklin Company retained their title to the bed of the river the grantees would have no right to erect and maintain booms over the bed of the streams without express provision therefor in the deed.

A very persuasive argument is presented by the plaintiffs' counsel in support of their contention that the "outmost line or margin of the bank" should be interpreted in the light of the evidence to signify the top or brow of the bank, and that the defendants' land does not extend beyond a line thus located.

But in the opinion of the court it is unnecessary to decide whether or not the defendants' grant stops at the brow of the river bank or extends to the water's edge. It is only material to determine in this case whether or not the defendants' land extends beyond the water's edge so as to include the bed of the stream, and the court is clearly of opinion that it does not, the Franklin Company having retained in itself the title to the bed of the river.

4. The question respecting the ownership of the ice in the river at this point is but a corollary from the foregoing proposition that the bed of the river is owned by those under whom the plaintiffs claim title to the ice. "The right to take ice . . . . results from and grows out of the title to the bed of the stream. . . . The plaintiff therefore has the sole right to take ice from the water resting upon his land." *Stevens* v. *Kelley*, 78 Maine, 445. This is the settled doctrine of this State. It is recognized in the more recent cases of *Barrett* v. *Ice Co.*, 84 Maine, 156; *McFadden* v. *Ice Company*, 86 Maine, 319, and *Wright* v. *Woodcock*, 86 Maine, 113. See also Farnham on Waters, sect. 140. It is only the riparian proprietor in the full sense of the term, whose land is bounded by the river generally, and is thus made to include the bed of the stream to the middle thread, who has the right to take the ice in front of his land. The test of the title to the ice is the ownership of the soil over which it is formed. The defendants are not riparian proprietors in the full sense of the term. Their land does not in any event extend beyond the edge of the water. They do not own the bed of the river over which the ice is formed, and hence have no title to the ice. The plaintiffs, Wilson and Son, took from the Franklin Company by lease for twelve years from January 1, 1906, and the Lake Auburn Crystal Co., the other party plaintiff, acquired certain rights and interests by virtue of a bond for a deed from Charles C. Wilson, a member of the plaintiff copartnership of Charles C. Wilson & Son. At the time this bill in equity was commenced the title to the property was in Charles C. Wilson and Charles H. Wilson.

5. Finally the plaintiffs confidently assert that the acts done and threatened by the defendants immediately prior to the commencement of this bill, were unmistakable evidence of an intention on their part to cut and remove the ice over the bed of the river owned by the plaintiffs, and that they constitute ground for relief in equity under the recognized principles of modern equity jurisdiction.

The Franklin Company and its successors in title, including these plaintiffs, have exercised acts of ownership over the bed of the river opposite the defendants' premises and used the river at that point

as a part of an ice field since 1875, at least, a period of more than thirty years, and there is no evidence that their right or title had ever been disputed until the question was raised by the defendants to this bill in 1908. Nearly opposite the middle of the defendants' premises the river is divided by the Franklin Company Island into two currents, one going westerly near the Auburn shore and the other easterly near the Lewiston shore. The ice field in 1908 extended on both sides of this island, and on the Lewiston side up to a point above the most northerly limit of the defendants' land. The plaintiffs have two ice houses on the river one on the Auburn shore below the island but above the railroad bridge and the other on the Lewiston shore some distance below the bridge; and it appears from the evidence that in filling the Lewiston house the owners have always taken ice from the ice field opposite and above the defendants' premises being the nearest available field, and floated it in the most direct course practicable utilizing the current of the river, to the ice house below; and for this purpose have kept open and used an ice way or channel near the Lewiston shore opposite the defendants' premises. It also appears that in operating these ice fields only a small part can be cut and that considerable areas must be left uncut near the banks of the river and elsewhere from which to carry on the operations and upon which the snow scraped from the ice to be cut can be dumped.

On the premises of the defendants were two buildings called "dry sheds" and in the fall and early winter of 1908 they converted these sheds into ice houses and commenced the construction of an ice slip into the river. They also set a line of stakes running from near the corner of the dry sheds across the channel to the island, for the apparent purpose of marking the limits of the ice field from which the defendants proposed to cut and remove the ice. The storage capacity of these two ice houses was estimated at 1500 tons and the defendants admitted in evidence that they intended to cut a sufficient quantity to fill them from the field in front of their premises. In their answer to the plaintiffs' bill the defendants also expressly admit the allegation of the plaintiffs that they "intend to enter upon the shores of the river adjacent to the premises owned by

them . . . . and to cut and harvest and remove from said river the ice crop forming in and upon the same at said points, said slips and other structures being intended to be used by them in cutting, harvesting and removing said ice." November 21, 1908 the plaintiffs gave the defendants notice in writing that they owned all the ice on the river between the northerly and southerly limits of the defendants' land; but the defendants persisted in their claim of right to cut the ice and continued the erection of the ice slip.

It satisfactorily appears from the evidence that if the defendants had been allowed to cut and remove the ice opposite their premises as they intended, they would not only have taken and converted to their own use 1500 tons of the plaintiffs' ice, but in so doing would have destroyed the plaintiffs' customary margin of ice left for travel, as well as the ice channel and dumping grounds heretofore maintained, and compelled the plaintiffs to resort to more distant fields and radically different methods of operating in order to obtain the 10,000 or 12,000 tons of ice required to fill their Lewiston ice house.

The plaintiffs had learned from long experience that their method of cutting the ice opposite the defendants' premises and of floating it to their Lewiston house, was the most effective and economical one. For this purpose they had a right to avail themselves of the advantages afforded by their own ice field and to employ their own method of operation and were not compelled to adopt the more expensive and circuitous method suggested by the defendants. It was shown by the evidence that if the defendants had cut and removed the ice from the field indicated by their stakes, there was a reasonable probability that the increased expense of filling the Lewiston ice house by the method of operating made necessary by the defendants' interference with the plaintiffs' rights, would have been essentially prohibitive.

The basis of all equity jurisdiction in this class of cases is the inadequacy of the remedies at common law. It manifests itself chiefly in cases of irreparable injury and continuing or repeated trespasses and nuisances involving a multiplicity of actions at law. 5 Pom. Eq., sects. 501-514.

But irreparable injury in the sense in which it is used in conferring jurisdiction on the courts of equity does not mean that the injury complained of is incapable of being measured by a pecuniary standard. Thus an appropriation of the land of another, constituting a permanent injury to and depreciation of the property, is an irreparable injury owing to the uncertainty of the measure of damages. *Wilmarth* v. *Woodcock*, 58 Mich. 482, (25 N. W. 475). Where the extent of a prospective injury is uncertain or doubtful, so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury. *Lyon* v. *McLaughlin*, 32 Vt. 423.

So a continuing nuisance which prevents the comfortable use of one's property and the enjoyment of his property rights creates an irreparable injury, as does one also which may break up a business, destroy its good will and inflict damages which are incapable of measurement, because the elements of reasonable certainty for their computation are wanting. 5 Pom. Eq., sect. 574; *Edwards* v. *Mining Co.*, 38 Mich. 46.

In *Props. Me. Wharf* v. *Props. Custom House Wharf*, 85 Maine, 176, a bill for an injunction against maintaining a narrow strip of wharf in front of another proprietor's wharf, the court said: "Equity will restrain the continuance of a nuisance by injunction whenever substantial damages might be recovered at law, or where the nuisance is permanent, however small the damages."

In *O'Brien* v. *Murphy*, 189 Mass. 357, the court said: "The inconvenience and annoyance from repeated trespasses, though relatively harmless, but which interfere with the free use and enjoyment of real property, justify the interference of a court of equity to prevent their continual repetition, even if a recovery of nominal damages at law would afford full compensation. . . . . "If the plaintiff's title is put in issue, it can be determined as well by a court clothed with full equity powers as at law. The jurisdiction at least is concurrent." See also *Fernald* v. *Knox Woolen Co.*, 82 Maine, 55, and *Lockwood Co.* v. *Lawrence*, 77 Maine, 297. If the defendant has threatened to do acts of the kind which equity

enjoins, that will also be sufficient ground for injunction. And threats may be purely verbal without any acts, or they may consist of acts from which the inference as to the defendants' intention may be drawn. 5 Pom. Eq., sect. 501.

The taking of the plaintiffs' ice in the winter of 1908-9, and the construction of the ice slip as threatened by the defendants, would have involved a continuing trespass during that and each succeeding season, and the interference of the plaintiffs' established methods of business by the same acts would have been a continuing nuisance to the plaintiffs in depriving them of the enjoyment of their property rights.

For the injury to the plaintiffs occasioned by such a continuing nuisance in the complex situation disclosed by the evidence, the damages in an action at law would have been incapable of measurement by any accurate standard owing to the fact that the elements of reasonable certainty would have been wanting. The remedy at law would not have been as practical and efficient as in equity but would have been incomplete and inadequate.

It is accordingly the opinion of the court that the plaintiffs' bill must be sustained, with one bill of costs and the temporary injunction be made permanent.

Decree accordingly.

ARTHUR J. COLLINS *vs.* CITY OF LEWISTON.

Androscoggin. Opinion October 18, 1910.

Schools. Superintendent. Power of School Committee. Contracts. Conflict with Statutes. Special Laws, 1868, chapter 465, section 2; 1907, chapter 129.

Under Private and Special Laws 1868, chapter 465, section 2, as amended by Private and Special Laws 1907, chapter 129, permitting the superintending school committee of Lewiston to appoint a superintendent of schools for such term as they may determine, but providing that he may be removed at the pleasure of the committee, the committee cannot deprive themselves of the right to remove at any time by making a contract of employment for a definite term and for the payment of the agreed salary for the whole term, though the superintendent be discharged.

When a contract conflicts with a statute, the former must yield; otherwise statutes could be modified or repealed without even the approving caress of the referendum.

On exceptions by plaintiff. Overruled.

Action of assumpsit by the plaintiff to recover the sum of $2000 for services as Superintendent of Schools in Lewiston. Plea, the general issue. At the conclusion of the evidence, the presiding Justice ordered a verdict for the plaintiff for $40 and a verdict for that sum was returned. The plaintiff excepted to the order.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

McGillicuddy & Morey, and W. H. Hines, for defendant.

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

SPEAR, J. This is an action of assumpsit brought by the plaintiff to recover the sum of two thousand dollars ($2,000) for services as superintendent of schools in the city of Lewiston. At the conclusion of the evidence the presiding Justice directed a verdict in favor of the plaintiff for the sum of forty dollars ($40). Upon exceptions to this order the case comes to the Law Court. The plaintiff was superintendent of schools in Lewiston in 1907 and

1908. In April, 1909, he was reelected to the position for the "next following natural school year" at a salary of $2000 and $100 for carriage hire. In August, 1909, the Lewiston school board and the plaintiff executed the following contract:

"THIS AGREEMENT, entered into by and between the Lewiston School Board, party of the first part, and Arthur J. Collins, party of the second part, is an agreement of contract to specify and set forth more fully the election, duties, privileges, tenure of office, and salary of the said party of the second part as superintendent of schools as previously voted by the said Lewiston School Board.

"The parties to this contract agree that the election of the party of the second part as superintendent of schools by the party of the first part at the regular meeting of the School Board, April 5, 1909, is for the natural school year August, 1909—July 1910, and that the duties, privileges and responsibilities shall be the same as during the past two years. The party of the first part agrees that a salary of two thousand dollars ($2,000) shall be paid to the party of the second part in ten (10) equal monthly payments; but in case the said party of the second part is discharged, dismissed, superseded by another, or in any other manner deprived of his office, or interfered with in the performance of his duties, all parts of the said salary of two thousand dollars then unpaid to the party of the second part shall immediately become due and payable. The party of the first part further agrees that actual carriage hire in any amounts not aggregating more than one hundred dollars ($100) for the year and all necessary traveling expenses while in the service of the said City of Lewiston shall be paid the same as during the past two years.

"In consideration of the payment of salary and expenses as above set forth, the party of the second part agrees to faithfully perform the duties and obligations as superintendent of the Lewiston Public Schools, all in accordance with the rules and regulations the same as during the past two years."

The plaintiff entered upon the performance of his duties under his appointment and in pursuance of his contract and continued his services until Sept. 6, 1909, when he was summarily dismissed by the superintending school committee, or school board as they term

themselves in the contract. The special law under which the committee acted is found in chapter 463 of the Private and Special Laws of 1868, as amended by chapter 129, Private and Special Laws of 1907, the amended section reading as follows:

"Section 2. The superintending school committee of said city of Lewiston, may exercise all the powers conferred, and shall discharge all the duties imposed, by law, on superintending school committees and district school agents; and they may also appoint a superintendent of schools and truant officers, for such term and with such compensation as the superintending school committee of said City of Lewiston may determine. Such superintendent may be removed at the pleasure of said committee, and any vacancy shall be filled by their appointment."

The plaintiff contends that, under his contract, having been ready at all times to perform his part of the agreement, and a fair construction of the law by which the committee was authorized to employ "for such term and with such compensation" as they might "determine," he is entitled to recover his salary for the full school year. Did the statute stop with the above quotation there might be much force in the argument. But it does not. It goes further and places a limitation, contingent upon the "pleasure" of the committee, upon the continuance of the employment of the superintendent whatever the term specified in the contract. After conferring power to contract the statute contains this express provision: "Such superintendent may be removed at the pleasure of said committee, and any vacancy shall be filled by their appointment." This clause confers upon the committee summary authority to dismiss a superintendent at any stage of his services. It does not require the preferment of any charge or proffer of any reasons, but permits action "at the pleasure of said committee." The plaintiff's employment was for the "natural school year" without any further agreement. The written contract, would, therefore, seem to have been executed for the sole purpose of defeating the express provision of the statute.

The contract, as construed by the plaintiff, is in direct conflict with the statute, and completely inhibits its intended operation.

The defendant contends that the contract was ultra vires and that the committee could not thus deprive themselves or their successors of the right to exercise an authority, which might at any moment assume the form of a duty, clearly imposed upon them by statute. This contention must prevail. When a contract conflicts with a statute the former must yield. Otherwise statutes could be modified or repealed without even the approving caress of the referendum.

Exceptions overruled.

ARTHUR P. ADAMS *vs.* WILLIAM H. BURTON.

Somerset. Opinion October 20, 1910.

Fraud. Misrepresentations by Vendor. Measure of Damages. Evidence.

In an action for deceit against a vendor, requested instructions that his statement that one season he cut 60 to 65 tons of hay was an estimate or opinion only, as the hay was then in the barn and could have been as readily calculated by the purchaser as by the vendor, and hence was not a material representation, and that a statement as to the length and width of a barn was not a material representation, as the purchaser could have easily measured it, were properly refused, as not being entirely correct legal propositions.

Statements by a vendor as to the quantity of hay cut on the land during a particular season were material representations, and not mere "dealer's talk."

Evidence *held* to sustain a finding that misrepresentations were made by a vendor with knowledge of their untruth, and that the purchaser was thereby deceived and induced to purchase.

That a vendor made misrepresentations, known by him to be untrue, which the purchaser relied on, thereby being deceived and induced to purchase, shows liability of the vendor.

A purchaser's measure of damage for the vendor's deceit is the difference between the actual value of the land and its value based on the vendor's representations.

On exceptions and motion by defendant. Overruled.

Action on the case to recover damages for deceit in the sale of a farm. Plea, the general issue. Verdict for plaintiff for $750. Defendant excepted to certain rulings and also filed a general motion for a new trial.

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

"This case is an action of deceit by vendee in the sale of a farm against vendor in which a verdict was rendered for the plaintiff. It is averred in the declaration that there were misrepresentations as to the boundaries of the farm and that the defendant represented that the barn on the farm was forty feet wide and seventy-two feet long, but that the barn was only thirty-six feet wide and sixty-four feet long and that the defendant represented that there was cut on the farm in 1907 from sixty to sixty-five tons of hay, but the defendant only cut in 1907 twenty tons. The plaintiff at the trial testified that these representations were made by the defendant and that they were false. It also appears from the plaintiff's evidence that he was in the barn at the time the representations as to the size of the barn and the number of tons of hay cut were made, and that the 1907 cut of hay was then in the barn and the plaintiff knew it and looked at it, and that he was at the barn on two other occasions before the sale.

"The presiding Justice charged the jury that as to whether these representations were material or not was a question for the jury. At the close of the charge the Judge was requested by the defendant to give three instructions to the jury. The first instruction, which was that "the statement alleged to have been made by Mr. Burton that he would soon have to build a new barn on account of the amount of hay cut, is not a material representation on which an action can be based," was given to the jury, but the last two instructions he refused to give the jury, as follows:

"2. The statement alleged to have been made by Mr. Burton that in the summer of 1907 he cut sixty to sixty-five tons of hay is only an estimate or expression of opinion, as the hay was then in the barn and the amount could have been as readily calculated by

the plaintiff as by Mr. Burton, and is therefore not a material representation.

"3 The statement made by Mr. Burton as to the length and width of the barn, inasmuch as it was before the plaintiff and could have been easily measured by him, is not a material representation."

George W. Gower, for plaintiff.

Manson & Coolidge, for defendant.

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

PEABODY, J. This is an action on the case brought to recover damages for deceit in the sale of a farm in Pittsfield, Somerset County, Maine. The verdict was in favor of the plaintiff for $750.

The case is before the Law Court on the defendant's general motion for a new trial and on exceptions to the rulings of the Justice in refusing to give two requested instructions, namely, "A statement alleged to have been made by Mr. Burton that in the summer of 1907 he cut 65 tons of hay is only an estimate or expression of opinion, as the hay was then in the barn and the amount could have been as readily calculated by the plaintiff as by Mr. Burton, and is therefore not a material representation;" and "The statement made by Mr. Burton as to the length and width of the barn inasmuch as it was before the plaintiff and could have been easily measured by him, is not a material representation."

Part of the farm was owned and conveyed by the defendant and the other part was owned and conveyed by his wife, Lucy Burton, to the plaintiff, but all the alleged representations having been made by the defendant, the two cases were by agreement to be tried as one and as though he conveyed the whole.

The land described in the writ consisted of four different pieces, namely, the Burton home farm, on which were the buildings, being lot No. 4 in the fifth range; east of this the Nathan Burton lumber lot, being the south half of lot No. 3 in the fifth range and the north half of lot No. 3 in the fourth range; further east a parcel of land consisting of all of lot No. 4 in the fifth range and part of lot No. 4 in the fourth range; and next easterly a parcel of seventy-seven acres in the fifth range.

The misrepresentations claimed are to the location of the northerly and southerly lines of the Nathan Burton lumber lot; the southerly line of the Lucy Burton lot No 4; also in regard to the size of the barn and the productiveness of the farm.

We consider first the exceptions. The refusal to give the requested instructions was proper, because the legal propositions involved in them were not correct in their entirety. *Franklin Bank* v. *Cooper*, 39 Maine, 542; *Hetland* v. *Bilstad*, 140 Iowa, 411.

Giving the plaintiff the benefit of the most favorable inference which may be drawn from the evidence the liability of the defendant must be limited to the representations made by him in regard to the productiveness of the farm, the others alleged being either not sufficiently proved or as proved not actionable representations. Here the testimony is in direct conflict. The plaintiff testifies that in answer to the inquiry as to the quantity of hay the farm cut Mr. Burton said he cut from 60 to 65 tons the year he, the plaintiff, bought the place, and he said that the year before that he wintered 13 head of cattle, 30 sheep, 2 horses, part of the time 3 horses, kept the horses up the year round, and sold 16 tons, 1700 pounds of hay, and had a part of a ton left, half or three quarters of a ton, part of a ton left, and he cut more hay that year than he ever cut before. The plaintiff further testifies that the year 1908 he cut on the farm about 12 tons.

The defendant in reply to the question of his counsel, "Did you ever make a statement that this farm would cut 60 or 65 tons of hay?" he answered, "No, Sir," and to the question, "Did you ever make a statement that it ever cut 60 or 65 tons?" he answered, "No, Sir, no mention of any tons at all. You mean to Mr. Adams?" On cross examination by the plaintiff's attorney in answer to the question, "How much hay do you claim you cut on that farm?" he answered, "Well now, I never had it pressed, Mr. Gower;" "What is your judgment?" "I should guess, take it an average one year with another, may be 40 or 45 tons."

The statements claimed by the plaintiff to have been made by the defendant relative to the quantity of hay cut on the farm were statements of fact, the substantial correctness of which the defend-

ant knew, or which he might properly be supposed to know. They were material representations, not mere "dealer's talk," and we think the jury were justified in finding from the evidence that they were made by the defendant, were known by him to be untrue, that the plaintiff relied upon them, was deceived, and by the deceit induced to purchase the farm, and that the defendant was therefore liable. *Hoxie* v. *Small*, 86 Maine, 23; *Braley* v. *Powers*, 92 Maine, 203; *Martin* v. *Jordan*, 60 Maine, 531; *Coon* v. *Atwell*, 46 N. H. 510.

The damages would be measured by the difference between the actual value of the farm and the value based on the representations of the defendant, and as found by the jury they are not excessive.

Exceptions overruled.
Motion overruled.

In Equity.

FREDERICK O. CONANT et als. *vs.* EDWARD D. JORDAN et als.

Cumberland. Opinion October 27, 1910.

Waters and Watercourses. Great Ponds. Title. Right to Fish and Fowl in Great Ponds. Common Law. Colonial Ordinance, 1641-47.

1. Under the common law of this State, based in part upon the Colonial Ordinance of 1641-7 of Massachusetts, and in part upon the usages and customs of the early inhabitants, the title to all great ponds containing more than ten acres is in the State for the use of the public.
2. The public have the right of free fishing and fowling upon Great Pond in Cape Elizabeth, which contains more than ten acres, although the territory in which the pond is situated was held in private ownership as early as 1631, and has so continued until the present time.
3. The common law of England has never been in force in this State except as far as it has been adopted in the usages and customs of the people.

4. The doctrine of the English common law respecting private ownership of ponds has never been recognized nor adopted in this State, so far as ponds of more than ten acres are concerned, and fishing and fowling upon them has been free from the beginning.

5. Any pond containing more than 10 acres is a "great pond" within the Colonial Ordinance of 1641-47, forbidding appropriation of great ponds to any particular person or persons.

Brastow v. *Rockport Ice Co.*, 77 Maine, 100, affirmed.

In equity. On report. Bill dismissed.

Bill in equity brought by Frederick O. Conant, Alpheus G. Rogers, and the Great Pond Club, a corporation organized and existing under the laws of Maine, against Edward D. Jordan and ten others, wherein in substance the plaintiffs claimed to be the owners of a certain tract of land situate in the town of Cape Elizabeth, "together with certain waters thereon, all containing two hundred and fifty acres more or less, known as the Great Pond property," and praying that the defendants be enjoined "from entering upon the complainants' said lands, or upon said pond; from fishing in said waters; from shooting from said waters or from complainants' lands; from trespassing upon complainants' said property in any manner whatever, and from asserting or maintaining any claim adverse to the estate of complainants in said property or to their exclusive right to the use of said pond for all purposes," and that a final decree be entered "adjudging that complainant Conant and the other persons herein named as part owners with him, are the absolute owners in fee simple of said lands, including the said pond and the land thereunder, and the exclusive use of said pond and the waters thereof for all purposes." The defendants filed an answer and the plaintiffs filed the usual replication.

The cause was then heard before the Justice of the first instance on bill, answer and evidence, and at the conclusion of the evidence the cause was reported to the Law Court under the following stipulation:

"The parties consent and request that the foregoing case be reported to the Law Court for determination upon the pleadings, the admissions and agreements of the parties and so much of the evidence as is admissible by law or under the agreements and admis-

sions of the parties. They further consent and request that the court shall exercise jury powers and determine in this proceeding all questions of law and fact necessary for the determination of the controversy between the parties, all question whether the procedure should be at law being expressly waived."

In relation to the size of the pond in the case at bar, the fourth paragraph of the plaintiffs' bill alleges that "situated upon said tract of land and lying entirely within it is a small body of water now called Great Pond, which is about 200 rods in length, about 125 rods in width and covers about 175 acres of said tract."

The case is stated in the opinion.

Payson & Virgin, and Jed F. Fanning, for plaintiffs.

Wilson & Bodge, for defendants.

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

SAVAGE, J. This is a bill in equity praying for an injunction. The plaintiffs claim to be the owners of Great Pond in the town of Cape Elizabeth, of the soil underneath it, and of lands adjoining it, and they seek to enjoin the defendants from entering upon the pond, and from fishing and shooting upon it. The defendants claim that Great Pond is a public pond, upon which the public has the right of free fishing and free fowling. This is the issue.

Great Pond contains more than ten acres, and comes within the terms of the Ordinance, or Body of Liberties, declared by the General Court of the Massachusetts Bay Colony in 1641, as amended by the ordinance of 1647. This ordinance is commonly called the Colonial Ordinance of 1641-7. The ordinance was not merely an enactment. It was a declaration of existing claimed rights and liberties. *Com.* v. *Alger*, 7 Cush. 53.

Among the rights so declared was the one that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds . . . . within the precincts of the town where they dwell, unless the freemen of the same town or the General Court have otherwise appropriated them, provided that this shall not be

extended to give leave to any man to come upon others' propriety without their leave." In 1647 the ordinance was amended so that towns were forbidden to appropriate "to any particular person or persons any great pond containing more than ten acres of land," and also providing that "for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow." And from that time to this, in the Massachusetts Bay Colony, and wherever else the ordinance has been in force, ponds containing more than ten acres are deemed to be "great ponds." They are public ponds. The State holds them, and the soil under them, in trust for the public. There can be no private ownership of them, even by prescription. The public, in the absence of statute regulation, have the unrestricted right to fish and fowl upon them, and to make other uses of them, like cutting ice, provided that they can reach the pond without trespassing "upon any man's corn or meadow." These are rights which were not enjoyed under the common law of England. The ordinance was an assertion of new rights, and was subversive of the common law.

At the time this ordinance was adopted, none of the territory now embraced within the State of Maine was a part of, or in any way connected with, the Massachusetts Bay Colony. Therefore the ordinance as a legislative or declaratory act did not then apply to this territory. Nor has this ordinance been extended to Maine by any legislative act. Rather it has been declared to be a part of the common law of this State. It has been judicially adopted, not in the sense that the court extended it to this State, but that the court found it extended by the public itself, as the expression of a public right, so acted upon and acquiesced in as to have become a settled, universal right. And it has been extended through all the parts of the State. *Barrows* v. *McDermott*, 73 Maine, 441, and many other cases cited therein.

Although these views are not controverted in this case, it is thought best to state them, in order that the precise point in controversy may be the better understood. The plaintiffs, not denying

that the Colonial Ordinance of 1641-7 is in force in Maine, and that Great Pond is within the terms of the ordinance as now interpreted, say that the ordinance does not apply, because prior to the adoption of the ordinance, Great Pond and the lands around it had passed into private ownership, and have ever since remained in private ownership. They say that in 1641 the English common law was in force in Maine; that by the English common law the pond and the soil under it then belonged to private individuals; that private titles to ponds were in terms exempted from the operation of the ordinance; and further that the General Court of the Colony by which the ordinance was adopted was prevented by "the fundamental limitations of legislative power" from taking, by means of the ordinance, privately owned ponds for public use without making just compensation therefor. It may be said again in passing that the adoption of the ordinance by the Massachusetts Bay Colony, of course, did not of itself affect any pond in Maine. It was extra-territorial as to them. But that is not important, since the same objections may be made to the extension later of the principles of the ordinance as a part of the common law of Maine, over those ponds in Maine which were private at the time of the extension. If the doctrine, "once private, forever private," is to prevail in the one case, it ought to in the other.

We think the plaintiff's contention should not prevail. In the first place it may well be doubted whether the plaintiffs have shown a title to the pond beginning prior to the Colonial Ordinance, and continuing unbroken to the present time. It is not denied that Great Pond is within the limits of the Great Patent of New England by which King James I in 1620 conveyed to the Council of Plymouth for New England all of the American continent between the fortieth degree and the forty-eighth degree of north latitude, nor that it was included in the grant from the Plymouth Council to Robert Trelawny and Moses Goodyear, December 1, 1631. This is the beginning of the plaintiff's title, as claimed. We do not stop to notice technical objections to this or any other ancient grant. We notice however that prior to the Trelawny grant the Council of Plymouth had already issued two patents, including the land which

the Trelawny patent covered, one to Sir Ferdinando Gorges and John Mason in 1622, and one to John Dy and others in 1631, for the Province of Lygonia. These conflicting grants led to prolonged contests between the proprietors, and threw much doubt and uncertainty upon the validity of the titles to private grants. There is evidence that Trelawny himself had doubts about the validity of his title, and after his death his heirs appear to have abandoned the claim. However, in 1648 Robert Jordan, executor of the will of John Winter, a creditor of Trelawny's, obtained a judgment of the Lygonia Assembly, by which he was authorized to retain possession of the Trelawny lands until redeemed by Trelawny's executors. And he and his successors have retained possession until now.

While the plaintiffs have undoubtedly a valid title to all the estate claimed by them, the pond and soil underneath excepted, we think that upon the evidence there is considerable doubt whether their present title originated in Trelawny before 1641, the year the ordinance was adopted, or in judgments, confirmations and prescription after that date. We do not decide this question. We prefer to rest our decision of the case upon another point.

We will assume that the title of Trelawny and Goodyear has come down to the plaintiffs, and that so far as the terms of the conveyances could make it so, it was a title in fee to the pond and the land under it. Still, in that event, we must hold that the title to Great Pond is in the State, and not in the plaintiffs. This precise question was before the court in *Brastow* v. *Rockport Ice Co.*, 77 Maine, 100, and was decided adversely to the plaintiff's present contention. The case is imperfectly reported in that it contains no statement of facts, and the contentions of the parties appear only inferentially. But the briefs of counsel are luminous on the question at issue. Besides we have taken the trouble to examine the record of the case as made up for the Law Court. We find that the plaintiffs alleged in their bill that they held the private ownership of Lily Pond in Camden, under the grant of the Council of Plymouth to Beauchamp and Leverett in 1629, of ten leagues square of land, afterwards known as the Waldo Patent, and

by a continuous chain of title from Beauchamp and Leverett to themselves. The defendant answering said that "the waters of Lily Pond were public property, in the use of which all the citizens of this state had an equal right to participate." The issue thus raised was elaborately argued by very able and eminent counsel. And it was necessarily the issue which the court decided when it used this language, speaking by Walton, J. "In this state, ponds containing more than ten acres are public. . . . . The claim of the plaintiffs to an exclusive right to cut ice on Lily Pond opposite to so much of the shore as they own or have leases of cannot be sustained. Lily Pond, it is admitted, contains more than ten acres. It is, therefore, a 'great pond' within the meaning of the ordinance of 1641-7 ; and by the principles of that ordinance (which have been too many times recognized, sanctioned and declared to be a part of the common law of this state, to be now disregarded) it is a public pond, and the use of it free to all who can reach it without trespassing upon the lands of others." Counsel seeks to distinguish the *Brastow case* from the case at bar, but we think it cannot be done successfully. If the decision in that case is law, it is decisive of this case. Counsel also suggests that the *Brastow case* should be re-examined in the light of *Watuppa Reservoir Co.* v. *Fall River*, 154 Mass. 305, which was decided after the *Brastow case*. But the *Watuppa case* decided no question which affects the present discussion, which had not been previously decided. The court in that case said,—"There is no doubt, of course, that if the pond and the rights claimed by the plaintiffs had been appropriated to private persons before the ordinance went into effect, those rights remained unaffected afterwards." The same doctrine had been previously asserted in *Berry* v. *Raddin*, 11 All. 577. After full consideration, we think the *Brastow case* should be affirmed.

We need not inquire whether the *Watuppa case* can be distinguished from this case, as, for instance, whether the colonial grant of the Watuppa Ponds did not, by fair construction, come within one of the exceptions in the ordinance, namely, an appropriation by the General Court, or rather by the Plymouth Colony which would amount to the same thing, for we think that case is not decisive here.

This court has never had occasion to decide at what time the principles of the colonial ordinance became a part of the common law of this State. It is certain that they have not existed here immemorially, which is a feature of the general common law. That is not meant when we speak of the ordinance as a part of the common law of the State. It is certain also that it did not become a part of the common law because of its adoption in Massachusetts in 1641. The ordinance, of course, as has already been said, did not then have any extra-territorial effect. Being a part of the general law of Massachusetts, it was extended to Maine when that province became a part of Massachusetts under the Province Charter in 1692, if it was not already a part of our law. Such was the effect of the well recognized principle of extension. *Barrows* v. *McDermott*, supra; *Watuppa Reservoir Co.* v. *Fall River*, supra.

But we think it does not admit of any reasonable doubt that the principles of the ordinance were recognized and practiced here prior to 1692. The same conditions which led the people of Massachusetts to declare "free fowling and fishing" as one of their "liberties" existed here. There was the same necessity for a resort to fishing and fowling for sustenance. In both cases, the colonists were in a comparatively uninhabited and not very fertile country. It was a wilderness. They gained only a scanty subsistence from the soil. Husbandry was attended with failure of crops and depredations from savage foes. The common law of England, which restricted the use of ponds and streams to private owners was not suited to their conditions and necessities. It is commonly said that the common law of England was brought over by the colonists, and, in a general sense became their law, but it is held that they adopted only so much of it as was suitable to their new conditions and needs, consistent with the new state of society, and conformable to the general course of policy which they intended to pursue. *Cottrill* v. *Myrick*, 12 Maine, 222; *Concord Co.* v. *Robertson*, 66 N. H. 1; *Storer* v. *Freeman*, 6 Mass. 435 (a Cape Elizabeth case); *Com.* v. *Alger*, supra. The picture of these struggling colonists, so familiar to every reader of history, clearly shows how very inapplicable to their conditions was that principle of the common

law which gave the exclusive right of fishery in a pond to the owners of the soil underneath. Such undoubtedly was the origin of the "liberty" which was declared in Massachusetts in 1641.

When it is said that the early colonists brought over with them the English common law, adopting so much of it as they chose, it is not meant that they brought it over as a body of law, and recognized it as law because it was the law of England. Such a statement would be historically inaccurate. It would even be contrary to the truth, so far at least as the Massachusetts Bay Colony was concerned. While the founders of that colony recognized their political dependence upon England, they came to these shores with a fixed purpose to found a commonwealth with laws of their own. They left England just after the troubles between Charles I and his early parliaments, and partly because of those troubles. Most of them sympathized with the parliaments rather than with the king. The royal charter authorized them to make laws and ordinances "not repugnant to the laws of England." And they did so. They did not consider the common law of England as binding upon them, but they felt at liberty to adopt just so much of it as suited their purpose. From time to time, as occasion arose, they enacted laws of their own. But for ten years they had no "body of laws," and were without the security of a system of statutes or any recognition of the authority of the common law. Palfrey, Hist. of New England, Vol. 1, at page 280. Rights of parties were settled by the magistrates, where there was no express ordinance, according to their conception of equity and justice, or according to their understanding of the law of God. The people grew dissatisfied with this somewhat uncertain and irregular administration of justice and wished for a "body of laws." Consequently in 1636 a committee was appointed "to make a draught of laws agreeable to the word of God." "In the meantime the magistrates and their associates" were "to determine all causes according to the laws" already established, and where there "was no law, then as near the law of God as they" were able. In 1641 a "Body of Liberties" was adopted. It was the first system of statutes in that colony. It had been drafted for the most part

by Rev. Nathaniel Ward, who while in England had both studied and practiced law. The Body of Liberties consisted of one hundred sections, and covered a wide range of subjects. The free fishing and fowling ordinance now under consideration was one of the "Liberties."

In the Body of Liberties, security in person, family and property was assured unless forfeited "by virtue or equity of some express laws of the country, warranting the same, established by the General Court, and sufficiently published, or, in case of the defect of the law in any particular case, by the word of God." This ordinance, says Mr. Palfrey "gave distinct utterance to the doctrine that English law had in Massachusetts no other than the restrictive force that the colony should not make laws repugnant to the laws of England, and that within the limit so prescribed, she was competent to build up such a system of jurisprudence as her condition might seem to herself to require." Hist. of New England, Vol. 1, at page 281.

In 1644 the General Court affirmed that "it was the chief civil power of the commonwealth."

In 1646 certain persons presented a petition to the General Court praying that they might be governed by the laws of England, and have the same privileges as were enjoyed in the mother country. This petition aroused great indignation, and the leading petitioners were called before the General Court to answer for their presumption.

In 1678 the General Court said:—"We humbly conceive according to the usual sayings of the learned in the law that the laws of England are bounded within the four seas, and do not reach America."

It is interesting, also, to note that the Plymouth colonists on board the Mayflower drew up an instrument in which they "solemnly and mutually, in the presence of God and of one another, covenanted and combined themselves into a civil body politic for their better ordering and preservation, and to enact such just and equal laws . . . from time to time as should be thought most meet and convenient for the general good of the colony." And when

they enacted their first code of statutes, sixteen years later, it was not "framed on any theory of conformity to the law of England, but consisted of such provisions as on general principles of jurisprudence, and with the experience which had been obtained, appeared suitable to secure the well being of the little community. It allowed authority to such laws only as were enacted by the body of freemen, or by their representatives legally assembled." Palfrey, Hist. of New England, Vol. 1, at page 278. See also, on the general subject, Hilkey's carefully prepared monograph, published by the Columbia University in 1910, on "Legal Development in Colonial Massachusetts."

But the early colonists were Englishmen. And necessarily they brought over with them conceptions of personal and property rights which were based upon the common law. In that sense they brought over the common law. Such of these rights as they found suitable to their situation they adopted by usage and custom. And those usages and customs were judicially recognized and enforced. And thus it came about that much of the common law of England became the common law of the colonists and those who have succeeded them. There is no historical evidence, we think, that the English law respecting the ownership and exclusive right of use of ponds was ever in force in Massachusetts, as applied to what are termed "great ponds."

But in Maine, it must be conceded, the general situation differed from that of the Massachusetts Bay Colony. The early inhabitants did not come over with such independent and lofty ideas of government as were possessed by their Massachusetts brethren. Gorges was a royalist. Many of the colonists were royalists. There is no doubt that Gorges contemplated founding a province of Englishmen with English laws so far as convenient and practicable. So did the charter granted to him by Charles I in 1639. But the charter also contemplated that English laws might not in all respects be adapted to the needs of the colonists in this wilderness for it empowered Gorges with the assent of the major part of the freemen to make laws from time to time, "not repugnant or contrary, but agreeable as near as conveniently may be, to the laws of England for the

public good of said province." Vol. VII, Collections of Maine Historical Society, pages 222-243. But for a long time after the grant to Trelawny in 1631, the colonists were more interested in wresting the means of subsistence from the ground and the sea and the forest and inland waters than in making laws. Many were adventurers. Their settlements were segregated. For years such organization as they had was local, and not general. The first General Court under the Gorges charter was held at Saco in 1640. Courts having both a legislative and a judicial character were held at Saco and at Agamenticus, which at a later date was incorporated under this name of Gorgeana. An assembly of a similar character was held in Lygonia after 1643. But the legislation of those bodies was almost purely local, and of a temporary character. It has left little or no impression upon the laws of the State. The early settlers, however, like those in Massachusetts, brought with them conceptions of law, of the rights of property. Those conceptions, so far as they found them convenient and useful, they put into practice, and to that extent they adopted the common law. To that extent it was their law, because they used it. And except so far as they so adopted and used the common law, it was not in force here. It is on this ground that the courts have many times declared that various laws of England have never been laws here.

In determining whether the common law principles respecting ponds was ever adopted in Maine, we may properly consider the situation and necessities of the early inhabitants, which were common to both colonies. These we have already noticed. There are other cogent reasons which lead to the conclusion that "fishing and fowling," at least on great ponds, were free here.

The people in the province of Maine were not so far removed from Massachusetts as not to know and to be influenced by the conception of public rights in vogue in the larger and more prosperous province, as well as of the claim of the people of Massachusetts that the common law was not in force there. "When Thomas Gorges, grandson of Sir Ferdinando, and deputy governor of the province, came over in 1640, he came with instructions to consult and counsel with the magistrates in Massachusetts as to the general course of

administration most expedient to be pursued" Vol. 1, Williamson's History of Maine, at page 283. And in the second volume of his History, at page 680, Mr. Williamson, speaking of the system of rules and regulations prescribed in the Gorges charter said, "They were in practice, modified and assimilated to the colonial usages and legal prescripts adopted by Massachusetts." Many settlers emigrated from Massachusetts to Maine. Many Massachusetts colonists were large property owners in Maine. Besides there was a political connection between the provinces. From 1651 to 1692, with the exception of two brief periods, the Massachusetts Bay Colony claimed and exercised some sort of jurisdiction over that part of Maine which included the Trelawny grant. The laws of Massachusetts were extended over the Province of Maine, 1652–1658. This grew out of a claim by Massachusetts that by her charter her territory extended northerly to a line three miles north of the source of the Merrimac river. The various settlements submitted to Massachusetts from time to time and finally the owners of the Trelawny grant submitted in 1658. The claimed jurisdiction of Gorges practically faded out for the last time in 1665, when the King's commissioners, disregarding both Massachusetts and Gorges, assumed a jurisdiction which they feebly exercised until 1668, after which time Massachusetts resumed jurisdiction. "The extension of the laws and jurisdiction of Massachusetts over this territory," says Mr. Willis, Vol. I, Collections of the Maine Historical Society, page 92, "had an important influence upon its settlement and prosperity. Hitherto we may presume that no permanent code of laws had been established; the records furnish no indication of the kind, but temporary ordinances were framed, as they were called for by the wants of the people and the emergency of the occasion, and the execution of these must have been inefficient and fluctuating. But when the laws of Massachusetts were introduced, sanctioned by her example and power and enforced with rigour, security was afforded for the enjoyment of property and civil privileges." In 1677 Massachusetts purchased the Gorges patent, and thereafter assumed to own and govern Maine, until her own charter was annulled by the court of chancery in 1685. So that all conditions favored the

adoption and exercise by the people here of those common rights which were claimed and exercised there. But we do not rest upon inference alone. There is historical proof.

Prior to 1654 the Council of Plymouth had granted lands on the Kennebec, afterwards known as the Kennebec Purchase "to the Plymouth adventurers." The Plymouth Colony conveyed these lands to William Bradford and associates. In 1654 Bradford and his associates at a meeting held at "Merry Meeting," where "the people generally assembled," ordered and agreed "*that fishing and fowling be free to all the inhabitants as formerly.*" Records of Plymouth Colony, Vol. 3 and 4, pages 58, 60. This evidence as to existing usages is of the strongest character.

It is to be noticed that the exceptions in the colonial ordinance, namely, of ponds "otherwise appropriated" by the freemen of a town, or by the General Court, have never applied here. They are not required here. We know of no grants by towns, nor by any general court. Here there were no apparent limitations. Here, we feel bound to say, the doctrine of the English common law of private ownership in great ponds was never recognized nor adopted, and fowling on, and fishing in them was free from the beginning.

An interesting discussion of how usage concerning "great ponds" may ripen into law is found in *Concord Co.* v. *Robertson*, 66 N. H. 1. New Hampshire was never a part of Massachusetts, as Maine became in 1692, and the Colonial Ordinance was never extended to her by legislative or judicial decision, although in the case cited the court said that the ordinance "could well be considered as common law by adoption, if it were in harmony with the interests and usages of the state." But the court, by Chief Justice Doe, holding that ponds in New Hampshire of more than ten acres are public, gave a resume of the reasons in these words:—"They (referring to the New Hampshire decisions) show that from the beginning the New Hampshire court has tended to hold free the fishing in all considerable lakes and ponds, basing its action partly upon the analogy of the Massachusetts ordinance, and partly upon the appreciation of local usage. . . . . In some respects there has been a marked difference between Massachusetts and New Hampshire. But

in both jurisdictions large ponds are withheld from private ownership for reasons that are distinctly American. The great purpose of the 16th article of the Body of Liberties was to declare a great principle of public right, to abolish the forest laws, the game laws and the laws designed to secure several and exclusive fisheries, and to make them all free. In this state free fishing and fowling in great ponds and tide waters have not needed the aid of a written statute for the abolition of written, or the declaration of unwritten, law. So far as the ordinance of 1641 introduced or confirmed those liberties, it was an enactment of New Hampshire common law. . . . The recognition of the validity of the appropriations of great ponds to private persons before 1641 is an exception not required here for any purpose of justice or convenience."

There is another view which may be taken. It is considered that even if there had been technically a private ownership in great ponds, at the outset, that ownership has ceased. It was not destroyed by the adoption or extension of the Colonial Ordinance, but by the acquiescence of the owners in the practice of fishing and fowling as the exercise of a public right, a practice which originated in public convenience and necessity, and which has continued unbroken for more than two centuries. The private right has yielded to the public need, and is now lost. While a long continued public practice may not of itself create a right, or make a law, yet such a practice, yielded to and acquiesced in by those adversely interested may be strong evidence of what the right, or the law, is. As the court, in *Barrows* v. *McDermott*, supra, said, of the adoption of the Colonial Ordinance in this State. "It is not adopted solely at the discretion of the court declaring its adoption, but because the court find that it has been so largely accepted and acted upon by the community as law that it would be fraught with mischief to set it aside." And this mischief would be all the more serious, because for more than twenty-five years, since the decision in *Brastow* v. *Rockport Ice Co.*, the doctrine that all great ponds are public has been a declared rule of property in this State.

Our conclusion is that under the common law of this State, based now in part upon the Colonial Ordinance, but beginning before the

ordinance was extended here, all great ponds without exception are public. It follows that the plaintiffs are not entitled to the relief prayed for.

Bill dismissed with one bill of costs.

AUGUSTA C. MATHER AND HELEN E. BERRY, Appellants,

vs.

EDWARD R. CUNNINGHAM AND ALBERT W. CUNNINGHAM.

Waldo. Opinion October 31, 1910.

Costs. Report to Law Court. "Case." Revised Statutes, chapter 79, section 46.

Where the opinion of the Law Court, on report from the Supreme Judicial Court sitting as a Supreme Court of Probate, is silent upon the question of costs, no costs are allowed to either party.

Revised Statutes, chapter 79, section 46, provides that questions of law arising on reports of cases may come before the Supreme Judicial Court as a court of law. *Held*, that the word "case" is used in its unrestricted sense, as a contested question before a court or Justice, a suit or action, a cause, and the phrase "reports of cases" contemplates a method of submitting questions involving both law and fact, in the most comprehensive manner, to the decision of the court, so that a report of a case under the statute must submit the whole controversy for final decision unless some question is reserved, and hence upon a report without restriction, the Law Court may pass upon the question of costs in a probate case.

On exceptions by plaintiffs. Overruled.

Appeal from decree of Judge of Probate, Waldo County, appointing an administrator on the estate of Henry H. Cunningham. See *Mather et al.* v. *Cunningham et al.*, 105 Maine, 326, and *Mather et al.* v. *Cunningham et al.*, 106 Maine, 115.

The case is stated in the opinion.

Littlefield & Littlefield (of the New York Bar) and Arthur S. Littlefield, for plaintiffs.

W. Henry White (of the Washington, D. C., Bar) and Dunton & Morse, for defendants.

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

SPEAR, J. This case comes up on exceptions by the appellants. The history of the case is this: Henry H. Cunningham died in Shanghai, June 10, 1905. Albert W. Cunningham was appointed administrator of his estate by the Probate Court in the County of Waldo. An appeal from this appointment was taken and heard at the April term, 1908, of the Supreme Judicial Court sitting as a Supreme Court of Probate. At the conclusion of the evidence the presiding Justice made this order: "This case having come on to be heard by me at the April term of the Supreme Judicial Court in Waldo County, I, the undersigned Justice, being of opinion that questions of law are involved of sufficient importance and doubt to justify the same and the parties agreeing thereto the same is reported . . . . and the Law Court is to determine the rights of the parties." It will be here observed that the appellate court made no decree respecting costs or any other matter presented to it, but reported every matter upon which it had a right to pass to the decision of the Law Court. The Law Court finally disposed of the case upon the following certificate:

"IT IS NOW ORDERED that the Clerk of said Law Court make upon the docket under said action, the following entry, and certify the same to the Clerk of said Court for the County of Waldo, to wit: Appeal sustained. Decree of the Court below reversed."

As the opinion was silent upon the question of costs, no costs were allowed to either party. *Alvord* v. *Stone*, 78 Maine, 296; *Peabody* v. *Mattocks*, 88 Maine, 167. The appellants, however, claim that the question of costs could not be passed upon by the Law Court in the case as reported, and filed a decree at the April term, 1909, in the Supreme Court of Probate in Waldo County in all respects in conformity with the opinion of court, with the exception that it provided for the allowance of one bill of cost for the appellants. The presiding Justice did not sign the decree. At the June term, 1909, of the Law Court at Bangor the appellants filed a petition praying for the recall of the certificate of decision and mandate in the case, and restoration of the case to the law docket and allowance

of costs. This petition was dismissed. At the January term, 1910, of the Supreme Judicial Court for Waldo County the appellants filed a petition praying the sitting Justice to "pass upon said decree in relation to said matters of cost." The presiding Justice denied the petition and ruled "as a matter of law" that he had "no jurisdiction in the matter at that time." The appellants excepted to this ruling and assert that under the statute, authorizing the report of cases, the Law Court had no authority in the original case to exercise any jurisdiction upon the question of costs. They contend that an examination of the powers of the Law Court confirms this conclusion. R. S., chap. 79, sec. 46, provides: "The following cases only come before the court as a court of law; cases in which there are motions for new trials upon evidence reported by the justice; questions of law arising on reports of cases; bills of exceptions; agreed statements of facts; cases civil or criminal, presenting questions of law and questions arising in equity," etc. Their contention is that the report of this case brings it under the second group and submitted to the Law Court only the question of law relating to the issue of domicil; that the authority of the Law Court was confined to determining only the questions of law; and that it "had nothing to do with the question of costs in probate cases." We think this interpretation too restricted. There was nothing in the report that qualified a full consideration of the case. The clause of the statute under which the original case was reported, in which the question of costs was determined, is expressed in the most comprehensive language. The word "case" is used in its unrestricted sense. When used in the statute it had a well established meaning and the legislature is presumed to have understood it. It is defined by reliable authorities as follows: Words and Phrases, Volume 1, page 985. "A case is a contested question before a court or Justice; a suit or action, a cause. It is defined by Webster to be a state of facts involving a question for discussion or decision, especially a cause or a suit in court. The primary meaning of the word according to the lexicographers is cause. When applied to legal proceedings it imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a

court of justice. In this, its generic sense, the word includes all cases, special or otherwise." Abbott's Law Dictionary, Vol. 1, page 187. "An action, suit or cause; a state of facts involving the decision of a question of law or fact." From these definitions it would seem that the phrase "reports of cases" was employed by the legislature as a method of submitting questions, involving both law and fact, in the most comprehensive manner to the decision of the court. The words are used in the statute in their generic or broadest sense and embrace every question of law and fact which the case reported involves. The language of the statute must therefore be held to require a submission of the whole controversy to the Law Court. It consequently becomes immaterial whether the case was a probate appeal, an equity appeal, an agreed statement of facts, or a civil or criminal case presenting a question of law, if reported without any restrictions as to the questions to be decided. The Law Court never assumes to pass upon abstract, or moot, questions of law. It is only when the "question of law" is calculated to settle some controversy that the court entertains it. The report of the case under the statute must submit the whole controversy for final decision unless some question is reserved. This has been repeatedly decided in this State. In *Laforest* v. *Blake Co.*, 100 Maine, 220, our court in commenting upon the method of reporting a case and the ground upon which the court would consider it hold that where the report contained a provision that only a part of the case should be decided it was irregular, saying: "Reports are intended to take up the whole case for the court to make final decisions. It should not come up by instalments . . . . It should have proceeded to a decree upon the merits before the sitting justice and then come here by appeal, or the whole case both law and fact should have been reported."

In *Casualty Company* v. *Granite Company*, 102 Maine, 148, the court declined to entertain a report involving only a question of law and in the opinion say: "Cases cannot thus be sent to the Law Court piece meal, the case to be returned again to the Law Court when and as often as another question may arise." It is further said interlocutory matters "should not be sent to the Law Court

even upon report at the request of the parties, except at such stage of the case, or upon such stipulation, that a decision of the question may, in one alternative at least, dispose of the case itself." Again it is said: "It is evident, that even by agreement of parties, a trial should not be interrupted or postponed in order to obtain the opinion of the Law Court upon such questions at least unless the parties stipulate that the opinion in some alternative shall practically end the case." This rule of practice requiring a final disposal of reported cases is too well established to require further citation.

Under this construction of the statute, authorizing the report of a case by agreement of the parties to the Law Court, the various statutes cited by the appellants do not apply. The purpose of the report is to eliminate the intervening statutory proceedings in probate appeals, and to pass up directly to the Law Court the whole controversy for final decision.

In the case at bar the parties by agreement reported the whole case without restrictions or qualifications. Every question of law and fact that could possibly arise, from the evidence and agreed statements reported, was fully before the court. It would therefore appear to have been the duty of the court to decide the whole case or dismiss the report without having decided any of it. The certificate of decision in the original case must be regarded as final and conclusive of all questions of law and fact including the question of costs.

Exceptions overruled.

EDNA PAGE SMITH, Appellant from decree of Judge of Probate, estate of EDWARD P. PAGE.

Somerset. Opinion November 2, 1910.

Descent and Distribution. Allowance to Widow. Mistake of Law. Effect of Such Mistake. Revised Statutes, chapter 65, section 33; chapter 67, section 14; chapter 77, section 18.

1. One must, himself, bear the consequences of his mistaken opinion upon a question of law, and even of his acceptance of the erroneous opinion of others who he had reason to believe knew the law.
2. Under Revised Statutes, chapter 77, section 18, the widow of a deceased intestate is entitled, upon distribution of the personal estate, to one-third of the net balance after payment of the debts, etc., and not to one-third of the gross estate.
3. The fact that upon the denial of her petition for an allowance under Revised Statutes, chapter 67, section 14, the widow was induced to acquiesce, and not appeal, by opinions, expressed to her by the judge of probate and by counsel for the heirs, that upon distribution she would be entitled to one-third of the gross estate, does not authorize the court to deprive the heirs of any part of their legal rights or shares in the estate under the statute of distribution.

On report. Decree reversed and case remitted to Probate Court.

Appeal from the decree of distribution of the personal estate of Edward P. Page, deceased intestate, made by the Judge of Probate, Somerset County, wherein he decreed that Lizzie M. Page, widow of said deceased, was entitled to "1-3 of personal property free from payment of debts of intestate, $21,308.67" while the balance was decreed in equal shares to Blin W. Page and Edna Page Smith, the two children of the deceased. The appeal was duly entered in the Supreme Court of Probate, the evidence taken out, and the case then reported to the Law Court for determination.

The case is stated in the opinion.

Walton & Walton, and Butler & Butler, for Edna Page Smith.

Forrest Goodwin, for Lizzie M. Page, widow and administratrix.

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

EMERY, C. J. After the estate of Edward P. Page, deceased intestate, had been settled and the balance left in the hands of the administratrix, after payment of debts and expenses, had been ascertained, the judge of probate upon due petition and notice made a decree for distribution of the balance to the widow and children of the deceased. In his decree he awarded the widow a share equivalent to one-third of the gross personal estate before deducting debts paid, etc., instead of one-third of the net balance in the hands of the administratrix. One of the children thereupon entered this appeal to the Supreme Court of Probate.

Clearly, as practically admitted by counsel, there was error in the decree. The widow was entitled upon distribution to only one-third of the net balance in the hands of the administratrix after paying the debts, etc., R. S., ch. 77, sec. 18. *Fogg, Appellant*, 105 Maine, 480.

Nevertheless, the widow contends that the decree should be affirmed because of the following circumstances: A year or more previous to the final settlement of the estate she petitioned for a widow's allowance out of the personal property under R. S., ch. 67, sec. 14. At the hearing upon that petition both the widow and the heirs were present with counsel. The judge of probate, being then of the opinion that the widow would be entitled to one-third of the gross estate upon distribution instead of one-third of the net balance only, granted her a much smaller allowance than he otherwise would, and he so stated to the parties at the time. This opinion seems to have been shared by counsel for both parties. At least no dissent was expressed. Believing, from the judge's uncontradicted statement of the law in the presence of both counsel, that upon final settlement and distribution she would be entitled to one-third of the gross estate as stated, the widow did not appeal as, but for that assurance and belief, she would have done.

It should need no argument, or citation of authorities, to demonstrate that the children cannot now be forced to yield to the widow

any of their legal rights or shares in the estate because of her mistaken views of the law, even though that mistake was owing to expressions of opinion as to the law by the judge of probate or by their counsel. She must, herself, bear the consequences of her mistake, and even of her acceptance of the erroneous opinion of others who she had reason to believe knew the law. The court is now sitting as the Supreme Court of Probate and, whatever the hardship to the widow and even the seeming inequity, the court must award the children their legal rights and shares in the estate as fixed by the statute. This is what "law and justice require." (R. S., ch. 65, sec. 33.)

Decree below reversed. New decree to be made in accordance with this opinion and for costs of appeal, and case then remitted to the probate court for further proceedings.

STATE OF MAINE *vs.* J. D. PHILLIPS.

Hancock. Opinion November 2, 1910.

Constitutional Law. Distribution of Governmental Powers. Use of Highways. Police Power of the State. Class Legislation. Automobiles. Constitution of United States, XIV Amendment. Constitution of Maine, Article I, section 1; Article III, section 2. Private and Special Laws, 1909, chapter 133.

Under the Constitution of Maine, Article III, section 2, declaring that no person belonging to one of the three co-ordinate departments of government shall exercise any of the powers belonging to either of the others, it is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons, and courts are not justified in preventing the enforcement of a statute by declaring it invalid unless satisfied beyond a reasonable doubt that it is in clear violation of the Constitution.

The right to use the public highways is not an absolute unqualified right, but is subject to limitation and control by the legislature whenever necessary to

promote the safety and general welfare of the people. Article I, section 1, of the Constitution of Maine, specifying certain natural and unalienable rights of man, is not violated by such an exercise of the State's police power.

The exercise of the State's police power to limit and control the use of highways as by excluding automobiles from some of them, is not a violation of the fourteenth amendment to the United States Constitution, forbidding any State to deny to any person the equal protection of the laws.

A statute is not class legislation simply because it affects one class and not another, where it affects all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis.

The legislature by passing an act prohibiting the use of automobiles in such of the four towns on the island of Mt. Desert as should accept the act, having determined that it was reasonable and expedient, its judgment must be deemed conclusive, and the court cannot say that the act had no tendency to promote the safety, health, and welfare of the people; and hence that it was not enacted in the exercise of the State's police power.

On agreed statement of facts. Judgment for the State.

The defendant was arrested on a warrant duly issued by the Bar Harbor Municipal Court for an alleged violation of a special act of the Legislature approved March 12, 1909, entitled "An Act to prohibit the use of automobiles in the towns of Eden, Mount Desert, Tremont and Southwest Harbor, on the island of Mount Desert." The defendant pleaded not guilty but on trial was found guilty and sentenced to pay a fine of $20 and costs and thereupon the defendant appealed to the Supreme Judicial Court. An agreed statement of facts was filed in the appellate court and the case reported to the Law Court for determination.

The case is stated in the opinion.

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

Herbert L. Graham, for defendant.

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

WHITEHOUSE, J. This is a criminal prosecution for an alleged violation of a special act of the Legislature approved March 12, 1909, entitled "An Act to prohibit the use of automobiles in the towns of Eden, Mount Desert, Tremont and Southwest Harbor on

the Island of Mount Desert." The respondent was found guilty by the Municipal Court of Bar Harbor and appealed to the Supreme Judicial Court for Hancock County. The case comes to the Law Court on an agreed statement of facts.

Section one of the special act in question, declares that "no automobile or motor vehicle shall be set up, used, driven or operated in or on any highway, townway or public street within any of the towns of Eden, Mount Desert, Tremont and Southwest Harbor, on the Island of Mount Desert, in the County of Hancock, State of Maine."

Section two prescribes the penalties for violation of the act and Section four is as follows: "In such of the said towns as shall accept this act at any legal meeting called by a warrant containing an article for that purpose, this act shall, subject to the provisions of the constitution thereto applicable, take effect ten days after it shall be so accepted."

This act was duly accepted by the towns of Eden, Mount Desert and Tremont at legal meetings called for that purpose, but was rejected by the town of Southwest Harbor, on the 16th day of July, 1909.

It appears from the agreed statement of facts that the respondent, a resident and taxpayer of the town of Southwest Harbor which had rejected the act of the Legislature, left his home on the first day of October, 1909, in his automobile, propelled by its own power, and travelling by the only road possible from his home in Southwest Harbor to the city of Ellsworth, was obliged to pass through certain portions of the towns of Mount Desert and Eden, two of the towns accepting the act.

It also appears from the agreed statement that "the town of Southwest Harbor is so situated that closing the roads of Mount Desert and Eden to the use of automobiles and motor vehicles, makes it impossible for the owners thereof, resident of Southwest Harbor, to leave that town, and the Island of Mount Desert by the town and county roads, without passing through some portions of the towns of Mount Desert and Eden. The agreed statement concludes with the following stipulation:

"If the court is of opinion (1) that the act of the Legislature granting authority to the towns of Eden, Mount Desert and Tremont totally to prohibit the use of automobiles and motor vehicles within the limits of said towns is not in violation of the State and United States constitutions, (2) and by so prohibiting them to deprive the residents of Southwest Harbor, the town rejecting said special act, of free ingress and egress to and from said town over the public highways, is not in violation of the State and United States constitutions, upon the above statement of facts and papers in the case, then judgment is to be rendered for the State, otherwise for the respondent."

It is not in controversy that in the exercise of that police power which pertains to every sovereign state, the Legislature may regulate the manner in which automobiles shall be operated on the highways, and may absolutely prohibit their use upon certain specified highways and streets. But it is contended that the special legislation in the case at bar is unconstitutional, first, because it totally prohibits the use of automobiles on any and all of the highways, townways and public streets within the limits of the towns of Eden, Mount Desert and Tremont, and second, because as a result of the acceptance of the act in the three towns named, and its rejection by the town of Southwest Harbor, the residents of that town are deprived of the right of ingress and egress over the county roads to and from their homes in vehicles recognized as legitimate means of conveyance on the public highway. It is argued that this statute makes a distinction between the towns here in question and other towns throughout the State, which is arbitrary and unreasonable and not necessary for the promotion or preservation of the public health, safety or welfare. It is accordingly contended that it cannot be justified or sustained as an exercise of the police power of the State and that the decision of the Legislature upon this question is not final and conclusive, but is a legitimate subject of inquiry by the court when the constitutionality of the act is assailed. The constitutional provisions invoked by the respondent, in contravention of which the statute is alleged to have been enacted, are section one of the "Declaration of Rights" in Article one of the Constitution of

this State, and section one of the Fourteenth Amendment of the Federal Constitution, declaring that "No state shall . . . . deny to any person within its jurisdiction the equal protection of its laws."

It is a fundamental rule respecting the distribution of the powers of government into three departments that "no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others." Const. of Maine, Art. III, sec. 2. But courts are not justified in preventing the enforcement of a legislative enactment by declaring it invalid unless satisfied beyond a reasonable doubt that it is in clear violation of some provision of the Constitution. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons. *State* v. *Rogers*, 95 Maine, 98; *State* v. *Lubec*, 93 Maine, 421; *Soper* v. *Lawrence*, 98 Maine, 280. "It is but a decent respect" said the court in *Ogden* v. *Saunders*, 12 Wheat. 270, "due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation is proved beyond all reasonable doubt.

In determining the constitutionality of the statute in the case at bar, it is important to enter upon the inquiry with a correct understanding of the relations between the State and the municipalities and the authority of the Legislature respecting the establishment and control of highways.

In Dillon's Mun. Corp. (2 ed.) sec. 653, the author says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large as distinguished from the municipality because they are situate within the limits of the latter, and because the Legislature may have given the supervision, control and regulation of them to the local authorities. The Legislature of the state represents the public at large, and has, in the absence of special constitutional restraint and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full para-

mount authority over all public ways and public places." This was cited with approval in *Scovel* v. *City of Detroit*, 146 Mich. 93, (109 N. W. Rep. 20), in which it was held competent for the Legislature to confer upon a Park Commissioner, authority to set aside a portion of a boulevard as a speedway. So in *The People Ex Rel. Bristol* v. *The Board of Supervisors of Ingham Co.*, 20 Mich. 95, the court said: "The Legislative power is everywhere recognized as the proper guardian of all such public rights, as the right of travel upon the highways, and as having as the proper representative of the public, full power over the whole subject of laying out, opening, altering and discontinuing highways. And this power they may, so far as they have not been restrained by the Constitution, exercise *directly* without delegating it to any other tribunal."

In accordance with this view, in the early case of *Wales* v. *Stetson*, 2 Mass. 143, the court observed: "We are not prepared to deny a right in the General Court to discontinue by statute, a public highway. It is an easement common to all the citizens who are represented in the Legislature. The authorization of the erection of bridges over navigable waters is in fact an exercise of a similar right." So in *Eudora* v. *Darling*, 54 Kan. 654, (39 Pac. 184), it was held that the Legislature, as the representative of the public, had full constitutional power to vacate certain streets and alleys laid out and established and opened for public travel. See also *State* v. *Yopp*, 97 N. C. 477 (2 S. E. 458), and *Twilley* v. *Perkins*, 77 Md. 252, (26 Atl. 286). In *Commonwealth* v. *Abrahams*, 156 Mass. 57, it was held that a statute authorizing park commissioners to "govern and regulate" any park laid out by them under the statute was constitutional and that whether any park can be temporarily set aside for the use of any portion of the public is for the park commissioners to decide, in the exercise of their discretion.

In our own State this court speaking of the appointment and equipment of highway surveyors by the town in *Goddard* v. *Harpswell*, 84 Maine, 499, said: "But the town does all this as a public duty, not for its own peculiar gain. It has no proprietorship in the roads and bridges built and maintained by taxes upon

its inhabitants. The roads and bridges belong to the public." And again in *State* v. *Boardman*, 93 Maine, 73, in which the validity of an ordinance excluding heavily loaded vehicles from certain streets was brought in question, the court observed that "Such ways cannot be considered in any sense the easement or property of the town; but the municipality in which a public way is located has been vested by the Legislature with supervision and control of such ways for public use."

In harmony with these fundamental principles, it is now a well settled rule that in the absence of any constitutional restriction or limitation, the legislature of a sovereign State, in the exercise of its police power which extends to the preservation of the "lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State" has the right to prohibit automobiles from passing over certain streets or public ways in any city or town. *Commonwealth* v. *Kingsbury*, 199 Mass. 542. In accordance with the doctrine of this case and with the uniform current of authority upon the subject, it was held by this court in the recent case of *State* v. *Mayo*, 106 Maine, 62, that a "private and special" act of the Legislature authorizing the town of Eden (one of the towns embraced in the act now before the court) at any legal meeting of the voters thereof to close to the use of automobiles certain streets in that town, was not repugnant to any constitutional provision and that the ordinance adopted by the vote of the town in pursuance of this enactment excluding automobiles from such streets was a legal and valid one. In that case as in this, it was contended in behalf of the defendant that the statute was in violation of the "natural, inherent and unalienable rights" of man specified in Sec. 1, of Art. 1, of the Constitution of Maine and Article XIV of the Amendments to the Constitution of the United States, declaring that no State shall deny to any person "the equal protection of the laws." But it was determined by this court in a carefully considered opinion, and in accordance with the firmly established principle above stated, that the right to use the public streets is not an absolute and unqualified right, but is subject to limitation and control by the Legislature "whenever necessary to

provide for and promote the safety, peace, health, morals and general welfare of the people," and that "no constitutional guaranty is violated by such an exercise of the police power of the state." The Fourteenth Amendment was not designed to impair the police powers of a State and has never been so construed. *Commonwealth* v. *Abrahams*, 156 Mass. 60.

But it is insisted in behalf of the defendant that the statute in question makes an arbitrary classification with respect to the subjects over which it operates, because it distinguishes between the methods of travel upon the public highways of the several towns where no necessity for such discrimination is shown by the evidence in the case. This objection is satisfactorily answered by the Supreme Court of the United States in *Barbier* v. *Connolly*, 113 U. S. 27, in which the court said speaking of the Fourteenth Amendment: "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having those objects in view, must often be had in certain districts. . . . Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. 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."

So in *Christy* v. *Elliott*, 216 Ill. 31, (74 N. E. 1035) the court said: "Such laws as the act in question have never been regarded as class legislation simply because they affect one class and not another inasmuch as they affect 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." See also Cooley's Const. Lim., 6 edition, pages 479-481, and *State* v. *Swayerty*, 203 Mo. 517; *Leavett* v. *Railway Co.*, 90 Maine, 153; *State* v. *Leavett*, 105 Maine, 76, and *Opinion of the Justices*, 103 Maine, 506.

In *State* v. *Mayo*, the defendant's further contention that the ordinance in that case, was unreasonable and unnecessary for the public safety and welfare and that the court had authority to review the decision of the Legislature upon that question, was carefully examined and fully considered upon reason and authority, and it was there determined that if the power granted to a municipality is a general one, the ordinance passed in pursuance of it must be found to be a reasonable exercise of the power, but that when the Legislature has constitutional authority to enact a law and thereupon does specifically and directly authorize and prescribe that which is done by the municipality, the Legislature thereby determines that the law is reasonable and will promote the public welfare. Its judgment was accordingly held conclusive. See also *Lunt's Case*, 6 Maine, 414; *Moore* v. *Veazie*, 32 Maine, 360; *Jones* v. *Sanford*, 66 Maine, 589; and *Jacobson* v. *Massachusetts*, 197 U. S., page 11. In the last named case the court said: "Upon what 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." *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207, 223.

With respect to the conditions actually existing in the town of Eden in which the streets in question in that case were located, the court said: "In certain sections in 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."

In enacting the law in question in the case at bar, the Legislature must be presumed to have had under consideration not only the facts above stated, but all the necessary and pertinent information respecting the four towns to be affected by the act, such as the character and extent of the population and the location and condition of all the highways and streets. It may be presumed to have taken note of the fact that these four towns comprise the entire area of the island of Mount Desert, which contains thirteen mountains and thirteen lakes, and that this "bright mosaic of island and bay" has ever been celebrated for the surpassing beauty and grandeur of its picturesque scenery. It could not forget that for more than a quarter of a century it has been famous as one of the most attractive and healthful summer resorts on the Atlantic coast, and that its numerous summer residents, fatigued and depressed by their activities and cares in the crowded cities, annually seek peaceful seclusion and rest at this island resort where the air is invigorating and their repose undisturbed. It is presumed to have considered that ponderous and rapidly moving automobiles not only endanger all who travel in the highways and streets with horses, teams and carriages, but increase the expense of maintaining in a

condition of safety and convenience the highways frequented by the permanent residents of these towns.

These and similar reasons appear to have been sufficient to induce the legal voters in three of the towns, containing about nine-tenths of the population of the island to vote for the acceptance of the act in question, Southwest Harbor alone with about one-tenth of the population voting to reject it. These reasons also emphatically negative the suggestion that the act was not passed to promote the safety, health, peace and quiet and general welfare of the people, and tend to show that it was not a manifest invasion of their constitutional rights.

Finally it is contended that inasmuch as it is impossible under this act for a resident of Southwest Harbor to leave that town and the island of Mount Desert without passing through a portion of the towns of Eden and Mount Desert, the act must be deemed oppressive and unreasonable; and since the provisions of the act relating to the four towns are inseparable, the act must be construed as an entirety and the whole declared unconstitutional.

It is provided in section four of the act that "in such towns as shall accept this act . . . . it shall take effect ten days after it shall have been so accepted." It thus appears that the Legislature anticipated the contingency that the act might possibly be rejected by one or more of the towns, but did not consider that it would be an unjust discrimination against the owners of automobiles in such towns, since they would still enjoy the same right possessed by the residents of the town accepting the act to travel by every other legitimate means of conveyance over the public highways of all the towns. Doubtless the further fact was also taken into consideration that the island of Mount Desert is surrounded by navigable waters over which there is a public right of travel, and that Southwest Harbor, as well as several other harbors on its shores, is on a line of public steamboats running to Bangor and prominent points on the coast of Maine.

It has been seen that the act in question directly prohibited the use of automobiles on the highways and streets of the four towns named, and left nothing to the discretion of the people but the

question of its acceptance. The court would not be warranted in declaring that the act manifestly has no tendency to promote the safety, health and welfare of the people, and hence that it was not enacted in the exercise of the police power of the State. The Legislature has determined that it was reasonable and expedient and its judgment must be deemed conclusive. It cannot be reviewed by this court.

The legislation in question does not appear to be in violation of any provision in the Constitution either of this State or of the United States and the certificate must therefore be,

Judgment for the State.

STATE OF MAINE *vs.* JACOB BORNSTEIN.

Androscoggin. Opinion November 2, 1910.

Licenses. Commerce. Interstate Commerce. Constitution of Maine, Article IV, part 3, section 1. Revised Statutes, chapter 4, section 93.

While the State may impose taxes in the form of licenses upon different occupations within its limits, such power must be exercised in obedience to the federal Constitution.

A city ordinance, providing that no person should sell or offer for sale any foreign-grown fruit from any vehicle in any public street or place of the city, unless under a written permit and payment of a license fee of $20, is a discrimination against foreign-grown fruit, and an attempt to regulate interstate commerce, which cannot be upheld by legislation enacted in the exercise of the police power of the State.

On agreed statement of facts. Defendant discharged.

The defendant was arrested on a warrant issued by the Municipal Court of Auburn, for an alleged violation of an ordinance of the City of Auburn, relating to the sale of "foreign grown fruit from any vehicle in any public street or place" in said City. The defendant pleaded not guilty but upon hearing was found guilty

and fined $10 and costs. The defendant then appealed to the Supreme Judicial Court. An agreed statement of facts was filed in the appellate court and the case then reported to the Law Court for determination.

The case is stated in the opinion.

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

H. E. Holmes, for defendant.

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

WHITEHOUSE, J. This is a complaint against the defendant for a violation of that part of one of the ordinances of the city of Auburn which provides that "no person . . . . shall sell or offer for sale any foreign grown fruit from any vehicle in any public street or place of the city" unless by virtue of a written permit so to do from the Board of Mayor and Aldermen or from some person by them duly authorized to grant the same; and that "any person" so licensed shall pay as a fee therefor, the sum of $20 the same to be paid to the city treasurer for the use of the city.

The case is reported to the Law Court upon the agreed statement of facts in which it is stipulated that if the foregoing ordinance is constitutional and valid, judgment shall be rendered for the State; otherwise judgment to be rendered for the defendant.

It appears from the agreed statement of facts that the defendant was engaged in the business of peddling from his cart in the streets of Auburn, certain foreign grown fruit, to wit, bananas, without having obtained the permit or license mentioned in the foregoing ordinance. Upon a complaint charging him with a violation of the ordinance, he was found guilty by the Judge of the Municipal Court and sentenced to pay a fine of $10 and costs. From this judgment and sentence, the defendant appealed to the Supreme Judicial Court.

It is contended in behalf of the defendant that the foregoing ordinance is invalid for two reasons; first, because it discriminates in terms against foreign grown fruit and is therefore an attempt on

the part of the city to regulate foreign commerce, and second, because it is in effect if not in terms, an attempt on the part of the city to raise revenue from an occupational tax, by the exercise of a power not given to the city either by the charter or by the general law.

It is provided by the Constitution of this State, Art IV, part third, section one, that "The Legislature . . . . shall have full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this state, not repugnant to this Constitution nor that of the United States." And by section 93 of chapter 4, of the Revised Statutes, cities and towns are authorized to make and enforce ordinances for the numerous purposes specified in the thirteen paragraphs comprised in that section. But it is manifest upon an examination of these several provisions of the statute, that the ordinance in question prohibiting the sale of foreign grown fruit in any public street of the city, was not enacted for any of the purposes enumerated in this section of the statute, but primarily for the benefit of tradesmen. It can only be upheld if at all, by legislation enacted in the exercise of the police power of the State as necessary to provide for and promote the safety, peace, health, morals and general welfare of the people. But while the general power of the State to impose taxes in the form of licenses upon different pursuits and occupations within its limits is not controverted, like all other powers it must be exercised in obedience to the requirements of the Federal Constitution. As stated by the Federal Court in *Welton* v. *State of Missouri*, 91 U. S. 275, "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." That case involved the question of the validity of a statute of Missouri, discriminating in favor of goods and merchandise which were the

growth or product of that State and against those which were the growth or product of other states or countries, by requiring the payment of a license tax from vendors of the latter class of goods and requiring no such license from vendors of the former class. The statute is held to be in conflict with the power vested in Congress to regulate commerce with foreign nations and the several states. In the opinion the court further said: "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be a subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the state, from any burdens imposed by reason of its foreign origin." So in *Webber* v. *Virginia*, 103 U. S. 344, a statute in like manner required the agent for the sale of articles manufactured in other states, to obtain a license and pay a tax therefor, while no such license was required for the sale of articles manufactured in the State; and it was held that such a statute was in conflict with the commerce clause of the Federal Constitution and was therefore void. It was further declared that "Commerce among the states is not free whenever a commodity is, by reason of its foreign growth or manufacture subjected by state legislation to discriminating regulations or burdens."

The question again arose in *State* v. *Pratt*, 59 Vt. 590, upon a statute of that State prohibiting peddlers without a license, from selling goods or merchandise, the growth or manufacture of foreign countries, and it was in like manner held that the statute was in conflict with the Federal Constitution as an attempted regulation of commerce between the States.

But it is unnecessary to multiply authorities, for the precise question arose in our own State in the case of *State* v. *Furbush*, 72 Maine, 493. That case involved the validity of a statute which authorized "goods manufactured in this state to be peddled free and exacted a license fee from those who peddled similar goods manufactured out of the state," and it was held, in obedience to the decisions of the Federal Supreme Court that such a discrimination in favor of goods manufactured in this State and against those

manufactured in other States was an attempted interference with the power vested in Congress to regulate commerce.

It is accordingly the opinion of the court that the ordinance in question is unconstitutional and void and judgment must be rendered for the defendant. *Defendant discharged.*

ALFRED L. MILLER et als. *vs.* JAMES A. SPAULDING.

Cumberland. Opinion November 2, 1910.

Banks and Banking. Stockholders. Double Liability. Actions to Enforce. Laws of Colorado, 1885, page 264. Mills' Ann. Code of Colorado, section 12.

The laws of Colorado, 1885, page 264, impose upon stockholders in banking corporations a liability to creditors in double the amount of the value of the stock held by them respectively, but no special remedy is provided for enforcement of the liability. *Held:* That section 12 of the Civil Code of Colorado (Acts 1887, chapter 1), providing that when a question is one of a general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue the defendant for the benefit of all, and the court may order the action to be so prosecuted or defended, obviously enacted without any special reference to the method of enforcing the liability of stockholders for the debts of insolvent corporations, making no provision for appointment of an assignee or receiver to be vested with the rights of creditors, and empowered as their representatives to enforce the liability of stockholders, but simply establishing a local method of procedure, without force beyond the jurisdiction of the State, and no part of the contract entered into by the shareholders in subscribing for their stock, furnishes no remedy to creditors of a Colorado Bank to enforce the double liability of a non-resident stockholder in Maine.

The laws of Colorado, 1885, page 264, providing no method for enforcing the double liability imposed in an action outside the State, the course of procedure must be regulated by the law of the State where it is sought to make the remedy available, under the rule that remedies are regulated by the lex fori, and no law existing in Maine whereby, in actions at law, one or more persons may sue for the benefit of themselves and others interested in a question of common or general interest an action in Maine by three creditors of a Colorado bank to enforce double liability imposed by the Colorado statute upon stockholders cannot be maintained.

On report. Plaintiffs nonsuit.

Action of debt brought to enforce the double liability of the defendant who was a non-resident stockholder in the State Bank of Monte Vista in the State of Colorado. Plea, the general issue. At the conclusion of the evidence the case was withdrawn from the jury and reported to the Law Court under the following stipulations: "By agreement of parties, this case is reported to the Law Court for its determination upon the evidence admitted at the trial without objection, and upon such parts of the evidence offered and objected to as are legally admissible."

The case is stated in the opinion.

Dennis A. Meaher, Geo. W. Heselton, and Tolles & Cobbey, (of the Denver, Colorado Bar), for plaintiffs.

Anthoine & Talbot, for defendant.

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

WHITEHOUSE, J. This is an action of debt brought to enforce the double liability of the defendant who was a non-resident stockholder in the State Bank of Monte Vista in the State of Colorado. The defendant is summoned to answer to the three plaintiffs, Miller, Workman and Smith "who bring this action for and in behalf of themselves and all others similarly situated" and after reciting the statute of Colorado which imposes upon such stockholders an individual responsibility for debts of the corporation in double the amount of the par value of the stock owned by them respectively, the declaration in the writ contains the following allegations:

"This liability is solely for the benefit of the creditors of the bank, and constitutes a fund exclusively for the benefit of all the creditors, and forms no part of the assets of the corporation, and the right of action to enforce said liability accrues to the creditors themselves and not to the assignee of said bank.

And the plaintiffs say that on June 9, A. D. 1905, certain creditors of said bank brought an action for and on behalf of all the creditors of said bank against said State bank of Monte Vista, and

Norman H. Chapman, assignee thereof, and all the stockholders thereof, including this defendant, in the district court of the City and County of Denver in the State of Colorado, to ascertain and fix the amount due from each stockholder to the creditors of said bank under said liability above set out, upon an accounting of all the assets and indebtedness of said bank; and that it appears from the proceedings and record in said case that judgments have been rendered against all the stockholders of said bank who reside in the State of Colorado, and $3250 has been collected on said liability from those who are solvent and applied on the indebtedness of said bank to the creditors, and that executions have issued against all the others and been returned "No property found."

And the plaintiffs say that sec. 12, of the Civil Code of Colorado, Acts of 1887, provide as follows:

"If the parties to the action, those who are united in interest, shall be joined as plaintiffs, or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended."

And the plaintiffs say that under said section 12 of the Civil Code, said court duly entered a decree on May 28, A. D. 1907, a copy of which the plaintiffs crave leave to produce at the trial of this action in proof thereof, whereby said Alfred L. Miller, Dan Workman and Phoebe C. Smith, the above named plaintiffs, were appointed to represent all creditors and are authorized to sue for the benefit of all the creditors of said State Bank and bring all necessary action and proceedings, for the purpose of collecting the stock liability from the stockholders of said bank residing outside of the State of Colorado, to the end that any and all sums, so collected by them, be divided ratably among the creditors of said bank in proportion to the amount of their respective claims; and by said decree, it further appeared that after deducting the amounts

paid by the assignee, derived from the assets and the amounts paid on the stock liability, as aforesaid, there was still due from said bank to the plaintiffs and the other creditors, the sum of $84,319.89; that said bank is wholly insolvent and without money or property from which said sum can be collected in whole or in part, and that no judgment rendered therein against said bank can be collected by execution, or otherwise; that, in order to raise a fund to pay the remainder of said amount, to wit, $84,319.89, still due from said bank to the plaintiffs and the other creditors, and in order that the same be prorated equally among the stockholders, according to the amount of stock held by each of them, it is necessary for the remaining stockholders, who have not paid anything to pay 53½ per cent, of their stock liability and by said decree, the defendant is adjudged liable to the plaintiffs upon the said number of shares to an assessment of Five Hundred and Thirty-Five Dollars and interest to be collected by the plaintiffs for the benefit of all the creditors of said bank."

It is not in controversy that the "double liability" thus imposed upon the stockholders of the bank by the statute of Colorado is a contractual one, and that upon the facts disclosed by the evidence in this case and the repeated decisions of this court an appropriate action could be maintained by the creditors of the bank whose claims have been established by the decree of the Colorado Court, to collect from Maine stockholders their pro rata share of the corporate deficiency. But it is contended in behalf of the defense

1. That inasmuch as it appears from the record as well as from undisputed testimony that the defendant had never been served with summons to appear and did not in fact appear in the legal proceedings above stated in the Colorado Court, no personal judgment was rendered against him which could be the foundation of an action of debt in this State.

2. That if the action be considered an appropriate one to enforce the original statutory liability of the defendant arising from his subscription to the stock of the corporation, it cannot be maintained by these three plaintiffs in any representative capacity to recover the full amount due from the defendant as his proportionate

part of the bank's indebtedness, for the benefit of all the creditors, for the reason that the plaintiffs' are not authorized by any statute or decree of court in Colorado to institute such an action, and that they cannot recover in their individual right for the reason that they have not alleged nor proved the amount of their ascertained personal claims against the bank; and

3. That there was no competent evidence of the amount of the bank's capital stock nor of the amount of stock held by the defendant, for the reason that the Colorado court had no statute authority to find these facts, and that there is nothing in its decree to justify the claim that the defendant as a stockholder is liable to the amount of $535.

On the other hand with respect to the defendant's second objection, it is contended in behalf of the plaintiffs that the statute of Colorado above quoted, and the decree of its court alleged to have been made in pursuance of it, in legal effect vested the title to these individual liabilities of stockholders, in the plaintiffs as trustees for all of the creditors, and directly authorized them to maintain actions for their collection wherever the stockholders might be found. It is insisted that the plaintiffs thereby became statutory assignees within the rule adopted in *Relfe* v. *Rundle*, 103 U. S. 222; *Bernheimer* v. *Converse*, 206 U. S. 516; *Childs* v. *Cleaves*, 95 Maine, 498, and other similar cases, state and federal.

The conclusion reached by the court respecting the defendant's second proposition, renders it unnecessary to consider the other objections interposed, for after a careful examination of the questions involved in the light of the previous decisions in this State and of those in other jurisdictions to which attention has been called, it is the opinion of the court that the defendant's second objection that the action cannot be maintained by these plaintiffs against a single stockholder, must be sustained.

In *Childs* v. *Cleaves*, 95 Maine, supra, the construction of the constitution and statutes of Minnesota upon which the decree of the court in that State was based, authorizing the receiver to institute actions against non-resident stockholders, was considered in the light of the latest judicial utterance upon the subject in that State,

and with respect to the receiver's authority to act extraterritorially, the court said in the opinion: "His authority emanated directly from the statute under which he was appointed. It appears from the declaration in the writ that he was expressly authorized and directed by a decree of the Minnesota court to institute, in his own name as receiver, all auxiliary actions necessary to enforce the liability of non-resident stockholders, and it has been seen that this decree was expressly authorized by the statute under which this receiver was appointed. In *Relfe* v. *Rundle*, 103 U. S. 222, the statute made an official designation of the Insurance Superintendent as the receiver or trustee and the power of appointing that officer was intrusted to the Executive. In neither case does the statute make a personal selection of the receiver; and no essential difference in principle can be suggested between the receiver in *Relfe* v. *Rundle*, and the receiver in the case at bar, respecting the rights to sue in a foreign jurisdiction."

The authority of the receiver under the Minnesota statute was directly involved and the same view was adopted in the U. S. Circuit Court, in *Hale* v. *Hardon*, 95 Fed. Rep. 747, and *Hale* v. *Helliker*, 109 Fed. Rep. 273. It is also in harmony with the result announced in *Hale* v. *Tyler*, 104 Fed. Rep. 757, and several other cases in both state and federal jurisdictions.

The double liability of the stockholders in the Minnesota banking corporations was created by the express terms of both the Constitution and the statutes of that State, and chapter 76 of the General Statutes of 1894, contained special and distinct provisions for the enforcement of this liability. It declares that upon complaint filed for the purpose of charging the stockholders "on account of any liability created by law," "the court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers;" that if it appears that the corporation is insolvent, the court may proceed without appointing any receiver to ascertain the liabilities of stockholders "and enforce the same by its judgment as in other cases;" that upon final judgment the court shall cause a just and final

distribution of the proceeds of the property of the corporation to be made among its creditors; that if the property of the corporation is insufficient to satisfy its debts, the court shall enforce the payment of anything unpaid on the shares of stock, and if the debts still remain unsatisfied,—the court shall proceed to ascertain the liabilities of the stockholders and adjudge the amount payable by each and enforce the judgment "as in other cases."

It will be seen that here were imperative requirements that the "court . . . . shall appoint one or more receivers" and if the debts remain unsatisfied "the court shall proceed to ascertain the liabilities of the stockholders and adjudge the amount payable by each, and enforce the judgment as in other cases." In view of the manifest scope and purpose of the act it was deemed by this court a reasonable construction to hold that it authorized the court to appoint one receiver to represent the interests of the corporation and another who should be a special representative of the creditors with power to enforce the liability of stockholders wherever situated, or to appoint one receiver to exercise both of these functions. In the proceedings involved in *Childs* v. *Cleaves*, 95 Maine, supra, the latter course was pursued, and the receiver was expressly authorized by the decree of court based upon the foregoing statutes, to institute all necessary actions for the purpose of enforcing the individual liability of non-resident stockholders.

But the Supreme Court of the United States, in *Hale, Receiver*, v. *Allinson*, 188 U. S. 56, declined to accept this construction of the Minnesota statute which had been adopted by the circuit courts and refused to recognize the authority of such a receiver to institute actions in foreign jurisdictions to enforce the liability of stockholders. But after the Minnesota statute of 1894 was amended or supplemented by the enactment of 1899, which explicitly declared what had been reasonably implied by the language and scope of the Act of 1894, the Supreme Court held in *Bernheimer* v. *Converse*, 206 U. S. 516, that the plaintiff, receiver in that case had authority by statute as a quasi assignee and representative of the creditors to maintain an action to enforce the liability of non-resident stockholders.

There is a clear and broad distinction, however, between the Colorado case now before the court and the cases arising under the Minnesota statute. In the case at bar the source of the alleged authority of the plaintiffs respecting the enforcement of the liability of non-resident stockholders, is radically and totally different from that of the plaintiff receiver in *Bernheimer* v. *Converse*, 206 U. S., supra, or in *Childs* v. *Cleaves*, 95 Maine, supra, and other cases involving the construction of statutes by virtue of which it has been held that the receiver was authorized, either expressly or by implication, to act extraterritorially.

It is not in controversy that the Colorado statute of 1885 imposed upon stockholders in banking corporations a liability to creditors in double the amount of the value of the stock held by them respectively, but no special remedy appears to have been provided in the code of that State for the enforcement of this liability.

The plaintiffs say that they base their right to maintain this action not alone upon the decree of the court but upon section 12 of the Civil Code of Colorado of 1887 hereinbefore quoted. The latter part of this section provides that "When the question is one of a common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue the defendant for the benefit of all, and the court may make an order that the action be so prosecuted or defended." This statute was obviously enacted without any special reference to the method of enforcing the liability of stockholders for the debts of insolvent corporations. It makes no provision for the appointment of an assignee or receiver who should be vested with the rights of creditors and as their representative be empowered to enforce the liability of stockholders. It simply establishes a purely local method of procedure and practice. It does not purport to have and obviously was not designed to have any force beyond the jurisdiction of the State in which it was enacted.

In *Abbott et als.* v. *Goodall et als.*, 100 Maine, 231, in sustaining the demurrer filed by the defendants on the ground that the corporation was not made a party, the court said: "When the statute creating the liability provides a special remedy, it can be

enforced in no other manner. *F. N. Bank of New York* v. *Francklyn*, 120 U. S. 747. In the case before us the statute of Colorado provides no remedy. Under such conditions, both upon authority and reason, the proper remedy is by a suit in equity by or for all the creditors and against all the stockholders and the bank itself."

In *Miller* v. *Aldrich*, 202 Mass. 109, these same plaintiffs brought an action at law against a Massachusetts stockholder, and the averments in their declaration were substantially identical with those in the case at bar. In sustaining the demurrer filed by the defendants, the court said in the opinion; "But it does not appear that the proceedings taken in Colorado were in accordance with the provision of any statute or rule of law fixed by the decisions of its courts and enforced when the defendants became stockholders and incurred their contractual liability as such. The reason for the rule adopted in *Converse* v. *Ayer*, 197 Mass. 453; *Francis* v. *Hazlett*, 192 Mass. 137; *Howarth* v. *Lombard*, 175 Mass. 570, fails here. The difficulty is not merely as to the plaintiffs' right to sue in their own names. Though not called receivers, they yet might perhaps be shown to have become quasi assignees of the right of action within the rule stated in *Howarth* v. *Lombard*, supra, and *Bernheimer* v. *Converse*, 206 U. S. 516. But the difficulty goes deeper. It does not appear that the statute of Colorado as construed by its courts, has provided any remedy for its enforcement which can be made available outside that State. That did appear or was assumed so far as we have been able to ascertain in the cases in which under similar circumstances statutes like these have been sustained against all domestic stockholders of foreign corporations. . . . . But it does not appear that there is or was in Colorado any statute or any fixed rule of law authorizing such proceedings as were had and so making them final and conclusive upon all stockholders as being represented by the corporation itself. The statute set out in the declaration merely established a rule of practice. It can be given no other effect."

For the reason above noted, that the method of enforcing the liability prescribed by the statute creating it must be deemed the

exclusive remedy, the case at bar is also readily distinguishable from *Pulsifer* v. *Green*, 96 Maine, 438. In that case a creditor of a Kansas corporation obtained judgment against it in that State and brought an action at law in Maine to enforce the double liability of a stockholder. The remedy sought by the plaintiff was the one expressly provided by the statute creating the liability of the stockholder, and it was held to be the exclusive one; and as the period of limitation was not prescribed by the same statute which conferred the right, the plaintiff was allowed to recover.

It was held in *Drinkwater* v. *Marine Railway*, 18 Maine, 35, that where a statute of another State created a liability on the part of the stockholders of a corporation, but prescribed no method by which that liability was to be enforced, the course of procedure must be regulated by the law of the State where it was sought to make the remedy available. And it is a general and well settled rule that remedies are regulated and governed by the lex fori. *Taft* v. *Ward*, 106 Mass. 518; *Iron Co.* v. *B. L. Works & Tr.*, 51 Maine, 585.

It has been seen that the practice act of Colorado which allows one or more parties to sue for the benefit of all, was not a part of the statute of 1885, which created the liability of stockholders in banks organized in that State but was enacted in 1887. It had no reference to the enforcement of the liability of non-resident stockholders, and was no part of the contract entered into by the shareholders in subscribing for their stock. It is local, not transitory. It has no extra-territorial force and cannot be recognized in this State. Nor has any such rule of practice been established by the statutes of this State respecting the procedure in actions at law.

The conclusion is therefore irresistible that this action cannot be maintained by these plaintiffs, and the certificate must be,

Plaintiffs nonsuit.

BENJAMIN E. SPROUL, Petitioner,

vs.

CHARLES L. RANDELL et als.

Lincoln. Opinion November 2, 1910.

Constitutional Law. Judicial Power. Construction of Statutes. Courts. "Civil Proceeding." Probate Appeals. Failure to Enter Probate Appeals. Exceptions. Revised Statutes, chapter 65, sections 30, 31; chapter 84, sections 1, 24.

1. However the legislature may have understood an existing statute, only the court can authoritatively determine its force and scope.
2. A petition under Revised Statutes, chapter 65, section 30, for leave to enter and prosecute a probate appeal is a "civil proceeding" within Revised Statutes, chapter 84, section 1, and notice thereon may be ordered by a Justice in vacation.
3. A failure to enter in the Supreme Court of Probate an appeal taken from a decree of the probate court is within the statute, R. S., chapter 65, section 30, and a petition for leave to enter and prosecute such appeal can be sustained.
4. That the failure to enter a probate appeal was because of an understanding on the part of the petitioner that some official of the probate court would have it entered is a sufficient reason for granting leave to enter and prosecute the appeal, if the Justice finds that such understanding was without the fault of the petitioner and that "justice requires a revision" of the matter.
5. The affirmance, without hearing, of a decree of the probate court by the Supreme Court of Probate under Revised Statutes, chapter 65, section 31, because of the failure to enter and prosecute the appeal taken, does not necessarily bar a subsequent petition under section 30 for leave to enter and prosecute the appeal.
6. Whether the granting such petition will work inconvenience or even hardship, and whether any and what terms should be imposed upon the petitioner are questions solely for the Justice hearing the petition. His decision of those questions is not reviewable on exceptions.

On exceptions to a decree permitting a probate appeal on the ground that appellant omitted, without fault on his part, to prosecute his appeal in time, under Revised Statutes, chapter 65, section 30, the contention that the petition for appeal sets forth reasons for appeal not contained in the original reasons filed in the probate court cannot be considered, where the original reasons are not made a part of the bill of exceptions.

On exceptions by defendant Randell. Overruled.

Petition for leave to enter an appeal from the decree of the Judge of Probate, Lincoln County, made May 25, 1909, admitting to probate an instrument purporting to be the last will and testament of Adelia R. Sproul.

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Rodney I. Thompson, and W. H. Miller, for defendant Randell.

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

EMERY, C. J. May 25, 1909 the judge of probate for Lincoln County made a decree allowing a certain instrument as the will of Adelia R. Sproul, deceased. On the same day, after the decree was made, Benj. E. Sproul, an heir of Adelia, claimed an appeal and filed reasons of appeal and the bond required by the statute. No service of the reasons of appeal was made upon any other party, nor was the appeal entered at the term of the Supreme Court of Probate at which it was cognizable, viz., the Lincoln County October term 1909. On the last day of that term, on complaint of the appellee, under R. S., ch. 65, sec. 31, that the appellant had failed to enter and prosecute his appeal, the presiding Justice affirmed the decree of the probate court. This action, however, was without any notice to the appellant.

Later, in December, 1909, being in vacation and within a year from the date of the decree, Mr. Sproul presented to a Justice of this court a petition under R. S., ch. 65, sec. 30, for leave to enter and prosecute an appeal from that decree, and requested an order of notice thereon. The Justice made thereon an order in vacation for service of notice returnable at the next term in Lincoln County. This order was seasonably and duly complied with.

On the first day of the return term, the respondent filed a motion to dismiss the petition for reasons stated in his motion. The presiding Justice overruled the motion and after hearing granted the petition. The respondent had various exceptions which are now to be considered.

1. The statute under which the Justice assumed to make the order of notice in vacation is found in sec. 1, ch. 84, R. S., as follows. "Any justice of the Supreme Judicial Court, or of either of the Superior Courts, may order notice concerning any civil proceeding in or out of term time" etc. The respondent contends that the statute does not govern this case: *First*, because a petition for leave to enter an appeal is not a "civil proceeding" within the meaning of that term in the statute. He claims the term as there used refers only to judicial writs, and not to petitions, and cites *Mitchell* v. *Emmons*, 104 Maine, 76. In that case, however, the court upon this point simply decided that a motion for a new trial upon the ground of newly discovered evidence was governed by sec. 53, instead of sec. 1 of ch. 84,—that under sec. 53 notice of such motion could only be ordered by the court in session. In preparing the opinion in that case it was deemed advisable, in view of the arguments, to emphasize the fact that a Justice in vacation is not the court, and does not have the power of the court to order notice in vacation except as authorized by statute. It was not decided that sec. 1 of the statute did not authorize a Justice in vacation to order notice upon an original petition of which the court had jurisdiction. True, it was said in the opinion that the term "civil proceeding" as employed in the statute is "a generic term for writs of the class called judicial" but that language was used simply in antithesis to the proposition that a mere motion in court was in itself a civil proceeding within the purview of the statute. It should not be taken out of that connection. On the other hand in *Backus, Appellant*, v. *Cheney*, 80 Maine, 17, it was held that a probate appeal was a "civil action" within the purview of the statute authorizing the transfer of "any civil action," from one county to another for trial (R. S., ch. 84, sec. 24). In *Carpenter* v. *Jones*, 121 Cali. 362, (53 Pac. 842) a petition to annul the probate of a will was held to be a "civil case." *Second*. The respondent reminds us that since the enactment of the statute in question the legislature has enacted several statutes specifically conferring the power in the particular case named in each such statute. His argument is that the court should understand from the enactment of these later statutes

that the legislature did not intend the statute now in question to be construed so broadly as to include petitions like that in this case. The argument is not valid. Even though subsequent legislatures may have construed the earlier statute strictly and narrowly, and hence may have deemed further and more specific legislation necessary to confer the power in various cases, the court must declare its own judgment as to the real scope of the statute.

The petition in this case was an original petition. It initiated a proceeding in court. We have no doubt it is a civil proceeding within the purview of the statute, and in the absence of any other statute specifically directing how notice of it should be given, notice may be ordered by a Justice in vacation under the statute in question.

2. The statute upon which the petition is based (R. S., ch. 65, sec. 30) provides that where a person aggrieved by a decree of the judge of probate, "from accident, mistake, defect of notice or otherwise, without fault on his part, omits to claim or prosecute his appeal," etc., the supreme court may allow an appeal upon petition therefor. The respondent contends that the statute nowhere provides against a failure to enter an appeal; that where there is a failure to enter an appeal, sec. 31 of the same chapter governs the case and requires the decree to be affirmed if asked for by the appellee; that the petitioner's only permissible course was to enter his appeal and then obtain from the court an order for the service of the reasons of appeal. The respondent further contends that the statute does not include cases where there is an entire want of notice, as distinguished from "defect of notice." We think however the spirit, if not the strict letter, of sec. 30 includes an omission to give any notice, and also an omission to enter the appeal. *Gurdy's Appeal*, 103 Maine, 356.

3. The respondent again contends that the petition should have been dismissed for want of any statement of facts from which it could be reasonably inferred that the omissions to give the notice and enter the appeal were without the petitioner's fault. Though not very directly or clearly stated, enough is alleged in the petition from which it can be reasonably inferred that the petitioner understood and expected that some probate court official would give the

required notice and enter the appeal in the Supreme Court. Whether he was without fault for such misunderstanding, was a question of fact for the presiding Justice hearing the petition. Such a misunderstanding, without fault, would justify the granting of the petition if the court also found that justice required a revision of the decree, as we must assume it did.

4. The respondent further contends that the affirmance of the decree made on his complaint under sec. 31, as above stated, bars this petition. Not necessarily so. The affirmance of the decree without hearing under sec. 31 was subject to the future action of the court upon a petition under sec. 30. True, sec. 31 is placed after sec. 30 in the present revision of the statutes, but in the original statute (that of 1821, ch. 65) sec. 65, providing for petitions for leave to appeal, follows sec. 64 providing for an affirmance of a decree. The change in the order of the sections does not change the effect of the statute.

5. The respondent contends in argument that incompetent evidence was received and considered by the presiding Justice. It appears, however, that the case was heard upon statements of counsel upon both sides without objection and it does not appear that any exception was reserved to the reception of any evidence.

6. The respondent contends that the petition sets forth reasons for appeal not contained in the original reasons filed in the probate court; but, as the original reasons are not made a part of the bill of exceptions, we cannot consider that matter.

7. Lastly, the respondent contends earnestly that the granting of the petition will occasion much inconvenience and hardship, and also contends that terms should have been imposed on the petitioners. These were questions solely for the presiding Justice whose decision of them is final, not subject to exception.

It follows that the decree allowing an appeal must stand,

Exceptions overruled.

OAKLAND ELECTRIC COMPANY

vs.

UNION GAS AND ELECTRIC COMPANY.

Kennebec County. Opinion November 3, 1910.

Corporations. Contracts. Ultra Vires. Electricity. Damages. Private and Special Laws, 1897, chapter 556, sections 2, 4.

1. In an action upon the contract of a corporation (other than municipal at least) the defense of ultra vires will not be sustained unless the contract is shown to be hurtful to the public, or clearly forbidden by some provision of the corporate charter or other statute.
2. A contract merely in extension of some granted corporate power may be upheld, if not hurtful to the public, when a contract foreign to the purposes of the incorporation would not be upheld.
3. Every corporation has by implication the power to do whatever is appropriate for carrying into effect the purposes of its creation, unless the doing the particular thing is affirmatively prohibited by its charter or some other provision of law.
4. The Union Gas and Electric Co. of Waterville was chartered by chapter 556 of Special Laws of 1897 for the purposes among others, of "making, generating, selling, distributing and supplying gas or electricity or both, for lighting, heating, manufacturing or mechanical purposes in the City of Waterville and adjoining towns" (section 2). *Held:* That under this section (2) the corporation had the power to contract to supply electricity to the town of Oakland, adjoining Waterville.
5. Power was also granted to the corporation, by section 4 of the charter to set poles and extend wires in and through the streets of Waterville and four other specified towns, not including Oakland, and to transmit electric power to such points in those towns as might be feasible. *Held:* That this enumeration of powers to set poles, etc., in the towns specified, did not prohibit the corporation from contracting to supply electricity to the town of Oakland.
6. The contract of the Union Gas and Electric Co. with the Oakland Electric Co. to generate and transmit electricity to the town line of Oakland for distribution over the lines of the Oakland Electric Company in Oakland, is not shown to be hurtful to the public, or expressly prohibited, and hence must be held valid.

7. Where in a contract three distinct agreements are made, each in a separate, distinct clause, and in one clause is a stipulation as to damages for the breach of the agreement named in that clause, that stipulation does not apply to the other agreements in the other clauses.
8. That one party was unable to perform his contract by forces beyond his control does not relieve him from the obligation of his contract, unless it be so stipulated in the contract.

On report. Judgment for plaintiff.

Action of covenant broken on a contract under seal. Plea, the general issue with a brief statement alleging that the contract was ultra vires. At the conclusion of the evidence the case was reported to the Law Court for determination, that court upon such evidence as was legally admissible to "render such judgment as the law and equity require."

The case is stated in the opinion.

Harvey D. Eaton, for plaintiff.

Charles F. Johnson, and Dennis F. Bowman, for defendant.

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

EMERY, C. J. The Union Gas and Electric Company (the defendant) was incorporated in 1897 by ch. 556 of the Special Laws of that year. The purposes of its incorporation are stated in section 2 of the charter which is as follows: "Sect. 2. The purposes of said corporation are the making, generating, selling, distributing and supplying gas or electricity, or both, for lighting, heating, manufacturing or mechanical purposes, in the city of Waterville and adjoining towns, or for either or any of such purposes, with all the rights and privileges and powers, and subject to all the restrictions and liabilities, by law incident to corporations of a similar nature."

Section 4 of the charter is as follows:— "Sect. 4. Said corporation is hereby empowered to set poles and extend wires in and through the streets and ways of the city of Waterville and the towns of Winslow, Benton, Vassalboro and Fairfield, for the purpose of furnishing electric lights for public and private use in said city and towns, under such reasonable restrictions as may be imposed

by the municipal officers thereof, subject to the general laws of the state regulating the erection of posts and lines for the purposes of electricity. It is also empowered to transmit electric power for lease or sale to such points in said city and towns as may be feasible, in such manner as may be expedient, and, subject to the general laws aforesaid, it may erect and maintain all posts, wires and fixtures necessary therefor. Said corporation shall have the right to lay gas pipes in any of the public streets or highways in said city of Waterville and said towns of Winslow, Benton, Vassalboro and Fairfield; the permit of the municipal officers of said city and towns having first been obtained in writing, and to relay and repair the same, subject to such regulations as the health and safety of the citizens and the security of public travel may require and as may be prescribed by the authorities thereof."

Dec. 8, 1899, the defendant company entered into a contract under seal with the assignors of the plaintiff company and their assigns, in which it covenanted to erect and maintain a line for the transmission of electricity from its station in Waterville to the Oakland line, (Oakland being an adjoining town to Waterville) and to furnish over said line, for lighting purposes in Oakland, electricity as required by the other party not exceeding one hundred and fifty horse power per year. The contract was to continue for three years and on Dec. 28, 1899, it was assigned to the plaintiff company, a corporation engaged in furnishing electricity for lighting purposes to customers in Oakland.

After the making of the contract the defendant company erected and maintained a transmission line from its station in Waterville to the line between Waterville and Oakland, and, up to June 23, 1901, in accordance with the contract, furnished over that line electricity to the plaintiff company, which latter company received the electricity there directly upon its own line constructed to that point, and passed it to its own customers in Oakland. The electricity passed directly from the station in Waterville to the consumers in Oakland without transformation. At that date, however, June 23, 1901, the defendant ceased to furnish electricity as required by its contract. This action is for that breach of the

contract. In defense, the defendant company claims that the contract was void in its inception because not within the corporate powers of the company, or, in technical language, was ultra vires.

It would seem from the later opinions of courts and jurists that the doctrine of ultra vires is thought to have been heretofore too often and too strictly applied, especially in cases of contracts of corporations (other than municipal at least) not in themselves harmful to the public. The doctrine is elaborately and exhaustively discussed with many citations of cases, etc., by the learned editor of the American State Reports, in a note to the case, *In re Assignment Mutual Ins. Co.*, 70 Am. St. Rep. 156. A later ample discussion is by the court of Minnesota in *Bell* v. *Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. 793.

But, however the doctrine is regarded or applied by the courts when invoked by the State or by stockholders to prevent a corporation from avoiding its duties to the public, or from engaging in enterprises foreign in nature to those for which it was incorporated, its invocation by the corporation itself to avoid contracts found to be unprofitable is regarded with disfavor. In such cases, in most jurisdictions, the defense of ultra vires is not sustained merely because the contract is not within the express terms of the charter, nor where to sustain the defense would work any wrong or injustice. *Hawkes* v. *Eastern Counties*, 1 De G. M. G. 737, at page 760; *Norwich* v. *Norfolk R. R. Co.*, 82 E. C. L. 397, at page 445; *Third Av. Savings Bank* v. *Dimock*, 24 N. J. Eq. 26, at page 28; *Wright* v. *Pipe Line Co.*, 101 Pa. St. 204; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62.

Also a distinction is made, and is apparent, between contracts foreign in nature to those contemplated in its charter, and contracts merely in extension of some corporate power. Thus a contract by a bank for the construction of a railroad would clearly be foreign to the banking business, while a contract by a railroad company to transport passengers and freight beyond its own line would not be foreign to the railroad business, and would be upheld though the power so to contract was not expressed in the charter. *Perkins* v. *P. S. & P. R. R. Co.*, 47 Maine, 573.

Recurring now to the case at bar; the defendant company was incorporated for the purposes of "making, generating, selling, distributing and supplying gas or electricity or both for lighting (and other purposes) in the city of Waterville and adjoining towns." The company's incorporation for those purposes gave it, without further legislation, authority to make and execute any contracts, not in themselves illegal, which would be adapted to the furtherance of those purposes. "It is a general principle of law that every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law, or its charter." Thompson on Corp., sec. 5641, and cases there cited. The contract in question was not foreign to the purposes for which the defendant company was incorporated but clearly was in furtherance of them. It provided for the making and selling electricity to be distributed for lighting purposes in an adjoining town, *Oakland* being an adjoining town. It was not a contract malum in se and hence, unless prohibited by some law or by the charter of the company, it must be held obligatory on both parties.

No clause in the charter or other statute is cited expressly prohibiting such a contract. It is urged, however, that the contract is impliedly prohibited by sec. 4 of the charter which specifically empowers the company to set poles and extend wires through the streets of "Waterville, Winslow, Benton, Vassalboro and Fairfield" for the purpose of furnishing electricity for electric lights in those municipalities. The argument is the familiar one, expressio unius exclusio alterius, that by enumerating those four towns the legislature prohibited the company from furnishing electricity to any other town even though it be an adjoining town to Waterville. We do not think sec. 4 has that effect. Without that section, or some equivalent legislation, the defendant company would have had no right to set poles and extend wires through the streets and ways of any of the towns named, and in order to do business it might have been obliged to purchase similar rights over private property. Sec. 4 enlarged, rather than limited, the power given the company by sec. 2 to sell electricity in Waterville and adjoining towns. It gave powers that

sec. 2 did not give. If it be suggested that sec. 4 did not give the company the right to furnish electricity to the plaintiff company over the transmission line authorized by that section, the answer is that that is a matter between the company and Waterville. The plaintiff company is not limited by the contract to electricity to be furnished over that line. If the defendant company cannot furnish electricity over that line it must provide some other line.

The cases cited by the defendant company do not in our opinion sustain the defense of ultra vires in this case. Cases of leases where the corporation undertakes to relieve itself of its obligations to the public (as in *Brunswick Gas Light Co.* v. *United Gas Co.*, 85 Maine, 532), are clearly not in point. Much stress, however, is laid upon the case, *City of Chicago* v. *Mutual Electric Light Co., and Hyde Park Electric Co.*, 55 Ill. App. 429. In that case the Hyde Park Co. had a municipal license to extend wires in one part of Chicago, and the Mutual Co. in another part. The former company agreed to furnish electricity to the latter company, and for that purpose united the two systems of wires. The city disconnected them and the companies sought to enjoin the city from preventing a re-connection. The case was not between the two companies, but between them and the city. The only question was as to the rights of the companies against the city. Even upon that question the judge of the court of the first instance granted the injunction, and upon appeal one of the then judges of the appellate court held the same. The four judges considering the case were thus equally divided in opinion.

The defense of ultra vires must be overruled.

Another defense was set up. Besides agreeing in one distinct clause of the contract (the first) to erect and maintain a line for the transmission of electricity, and agreeing in a second clause to furnish over that line electricity for lighting purposes, the defendant company further agreed, in a third and separate clause, to furnish over the same line "if desired" electricity for power purposes. In this third clause was this stipulation viz: "In case of interruption of service, a pro rata deduction (from the price to be paid) shall be made and there shall be no other penalty." This stipulation, how-

ever, only applies to the agreement in that clause, the agreement to furnish electricity for power. To apply it to all the defendant company's agreements in the contract would be to destroy all obligation of the contract, a result which the language of the contract does not show to have been intended.

It also appears that the failure of the defendant company to furnish electricity to the plaintiff after June 23, 1901, was caused by a washout of part of the defendant company's dam, crippling the company's power to generate electricity. There was, however, no stipulation in the contract that such an event should relieve the defendant company from the obligation it assumed of furnishing electricity to the plaintiff for lighting purposes.

No other defense is suggested and it follows from the above that the plaintiff must have judgment, but the evidence does not enable the Law Court to make a satisfactory estimate of the damages. Hence the certificate should be,

Judgment for the plaintiff.
Damages to be assessed at nisi prius.

SETH C. GORDON *vs.* ROSE A. CONLEY and Trustees.

JAMES B. O'NEIL *vs.* ROSE A. CONLEY and Trustees.

HERBERT F. TWITCHELL *vs.* ROSE A. CONLEY and Trustees.

Cumberland. Opinion November 5, 1910.

Witnesses. Compensation. Experts. Statute 1907, chapter 66. Revised Statutes, chapter 117, section 13.

Where physicians were employed by the plaintiff in a personal injury case to examine her physical condition to enable them to qualify as medical expert witnesses at the trial, and made the examination and appeared voluntarily, and testified without any agreement as to their compensation, they were entitled to reasonable compensation for their services above the legal fee due to the ordinary witness prescribed by Revised Statutes, chapter 117, section 13, as amended by Public Laws, 1907, chapter 66.

Where the decision of a case upon the merits is clearly correct, it will not be disturbed on review because of abstract errors of law not affecting the truth of the result.

On motion and exceptions by defendant. Overruled.

Three actions of assumpsit on accounts annexed, severally brought in the Superior Court, Cumberland County, by the plaintiffs, physicians and surgeons, against the defendant, to recover for professional services as expert witnesses for the defendant in an action brought by her against the Grand Trunk Railway to recover for personal injuries. Plea, in each action, the general issue, with a brief statement, in each action, alleging "that the claim upon which the plaintiff now sues her in this action, has been determined, adjudged and settled by our Supreme Court, at a term thereof, which was begun and held at Portland in said County, on the second Tuesday of January, A. D. 1909, by a decree of the Honorable Henry C. Peabody, Associate Justice of said Court, who presided at said term of said court and which decree was handed down by the said Honorable Justice on the twenty-fifth day of January, A. D. 1909, and is now on file with the clerk of said Court: and the defendant now is and

always has been ready to pay and settle said claim in accordance with said decree." The three actions were tried together. Verdict for Dr. Gordon for $112.50. Verdict for same sum for Dr. O'Neil, and verdict for Dr. Twitchell for $150. The defendant filed a general motion, in each action, for a new trial and also excepted to several rulings of the presiding Justice.

The case is stated in the opinion.

Joseph B. Reed, for all plaintiffs.

Henry J. Conley, for defendant.

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

SPEAR, J. These were three actions of assumpsit on accounts annexed, severally brought by Seth C. Gordon, James B. O'Neil and Herbert F. Twitchell, all of Portland, in said County of Cumberland, physicians and surgeons, against Rose A. Conley and Trustees, to recover for professional services as expert witnesses, three days each in the case of Dr. Gordon and Dr. O'Neil, and four days in the case of Dr. Twitchell, they having, at the request of Rose A. Conley, and her attorney, Henry J. Conley, made a physical examination of the said Rose A. Conley, and at the request of her said attorney, attended court and gave evidence of their opinion relative to her condition and the causes that might have produced it, in an action for personal injuries brought by said Rose A. Conley against the Grand Trunk Railway, tried at the January term of the Supreme Judicial Court for Cumberland County, A. D. 1908.

These three cases present substantially the same conditions of facts and were tried together at the December term of the Superior Court for Cumberland County, A. D. 1909.

The jury rendered a verdict for the plaintiffs, Seth C. Gordon and James B. O'Neil, each the sum of $112.50, and for the plaintiff, Herbert F. Twitchell, the sum of $150.00. The defendant introduced no testimony. The evidence conclusively shows that the plaintiffs were employed by the defendant or her attorneys to make an examination of her physical condition for the purpose of enabling

them to qualify as medical expert witnesses in her case about to be tried in the Supreme Court against the Grand Trunk Railway for injury alleged to have been received by her through the negligence of the railway. While Dr. O'Neil was her regular attending physician he nevertheless was used as an expert upon the witness stand. The evidence of Judge Foster, who was counsel for the defendant in her case against the railway, is so conclusive upon the nature of the employment of the three physicians in case at bar, their required attendance at court during the trial and the time they spent at court, that the verdict of the jury must be regarded as fully warranted upon this issue if the law permits it to stand. The plaintiffs were not summoned but appeared voluntarily at the request of the defendant's counsel, but without any agreement as to the compensation they were to receive for their services. Under these conditions the plaintiffs contend that they were entitled to reasonable compensation instead of the regular witness fee.

But the defendant asserts, admitting the facts as claimed by the plaintiff, that they are entitled to only the witness fees provided by law. The defendant's own statement of her contention is this: "The defendant claims that the compensation of all witnesses, including expert witnesses, is established by sec. 13 of chap. 117 of the Revised Statutes as amended by chap. 66 of the Public Laws of 1907, which reads as follows, to wit: 'Witnesses in the supreme judicial or superior courts and in the probate courts, and before referees, auditors or commissioners specially appointed to take testimony shall receive one dollar and fifty cents, or before county commissioners, one dollar for each day's attendance, and six cents for each mile travel going out or returning home; and before a justice of the peace, a judge of a municipal or police court, fifty cents a day for attendance, and for travel the same as at the court aforesaid.'

"As there is no other provision made in our statutes for the payment of witnesses, the Courts nor the law cannot distinguish between different classes of witnesses, between 'expert' testimony, so called, and that which is not expert, but must pay them all the same fee, which is the fee established by law."

It will be observed that the question raised is not whether an expert witness can be summoned into court in the regular way and be required to give in evidence all the knowledge he may have acquired as an expert upon a particular subject under investigation, for the regular witness fee, but whether having been employed by a party to give special attention to the investigation of a matter out of court and then to appear in court, not only to testify as an expert witness but to remain in court for a specific length of time with loss of regular occupation, not by order of the court but by request of the party employing, a witness is entitled to receive reasonable compensation beyond the regular witness fee for such services. If a party saw fit to summon an expert witness to testify in court without any knowledge as to what he might say, whether the witness would be required for the usual fee to give all the expert knowledge he might have upon the subject under investigation, does not now arise. That is not the case before us. In the case at bar the plaintiffs, without summons, came into court not only to testify, but by special request remained in court three days in order to listen to the experts on the other side of the case, advise counsel and testify in rebuttal, if necessary, while a witness under subpœna after testifying for an hour or half an hour might be excused by the court and enabled to pursue his ordinary occupation instead of losing three days. He is under no contractual obligation whatever to the party calling him. He cannot even be unwillingly interviewed before testifying. He takes the stand, testifies and leaves it. This is all he is required by law to do. The court of course could require him to remain in attendance, but it is an unusual case in which an expert witness, capable of earning perhaps one hundred dollars per day would be required to remain at $1.50 per day for the benefit of private interests. Hence it appears that a witness summoned into court, and for non-appearance subject to contempt, stands in an entirely different relation to the court and the parties, from the witness who appears in court without summons but upon a special agreement not only to prepare and testify but to remain in court for the special benefit of the party calling him. Such a witness performs services outside the statutory requirement and is

entitled to whatever his services are reasonably worth above the legal fee due to the ordinary witness. This conclusion with respect to the rights of expert witnesses brought into court, without summons, upon agreement to perform services, not required by law of a witness summoned in the regular way, seems not only to be reasonable and equitable but is fully sustained by a strikingly parallel case, *Barrus* v. *Phaneuf*, 166 Mass. 123.

It should be here observed that the case at bar is stronger in favor of the doctrine herein promulgated than the Massachusetts case, inasmuch as in the latter the expert was regularly summoned and accepted without protest the statutory fee and was not in fact asked questions calling for his opinion as an expert. This case was an action of contract to recover extra compensation as an expert. In stating the case the court say: "The jury must have found upon the evidence that the defendant engaged the plaintiff to go into court at a future date, and testify for him as an expert, in regard to a matter which the plaintiff had examined as a civil engineer. . . . The plaintiff agreed to do this and talked over the matter, and went into court and testified, and during the progress of the trial advised the defendant's attorney in regard to questions to be asked to himself and to other witnesses." It would be difficult to find a state of facts more similar than those disclosed in the case at bar to those in the case quoted. Judge Foster, who assisted in the trial of this case and "examined all the witnesses of the plaintiff and cross-examined all the witnesses for the defense, and opened and argued the case," says that he examined all the plaintiffs as expert witnesses; consulted with them relative to their testimony before it was put on; had to have them " in court for the reason that he did not know what the defense was to prove or attempt to prove, and therefore must have their attendance, not only during the introduction of the plaintiff 's evidence but also during the testimony of the defense in order that they might rebut if it became necessary," and that the nature of the case was such as to render expert testimony very material.

The court in the *Barrus case* states the application of the law to the existence of the facts there found as follows: "In the present

case, we are of opinion that, upon the facts in evidence, there was sufficient consideration to support a promise to pay a reasonable compensation, in addition to the statutory fees, and that the jury was warranted in finding a promise to that effect, or a mutual understanding that the plaintiff was to be so paid. If such promise was made, or such understanding existed, the plaintiff's right to recover would not be taken away or lost by his omission to claim or demand extra compensation or to notify the defendant that he should make such claim, or by his acceptance of the statutory fee without objection, or by the omission of the defendant at the trial to put any question to him of an expert witness, and the consequent omission of the plaintiff to testify as an expert. All these were merely matters for the consideration of the jury in determining whether any such promise was made, or such understanding existed." We also quote the following paragraph from *Dodge* v. *Stiles*, 36 Conn. 463, which is precisely applicable to the facts in the case at bar: "If a witness agrees with a party, that he will attend and testify without being summoned, and he is not summoned and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute." The evidence in the case before us conclusively shows that the plaintiffs appeared at court at the request of the defendant without subpœna; were not under the order of the court; were under no obligation to remain in court; and voluntarily remained for three days, one four, at the special instance of the defendant, as already appears from the testimony of Judge Foster.

It is the opinion of the court that the jury were fully warranted in finding an implied promise on the part of the defendant to pay the plaintiffs whatever their services were reasonably worth, and a sufficient consideration to support it. The plaintiffs rendered a bill of $50 per day. The jury allowed in their verdict $37.50 per day. In view of the reputation and skill of the plaintiffs it would seem that the damages were entirely reasonable.

During the course of the trial the defendant filed forty-three exceptions to the rulings of the presiding Judge. In view of the

conclusion of the court upon the motion it becomes immaterial whether the rulings of the court as abstract principles of law were right or wrong. We shall, therefore, not undertake to discuss the exceptions. Upon the law and legal evidence, whatever the errors in the rulings of the court, the result of the trial was evidently right. It would seem like trifling with the ends of judicial procedure to say that an erroneous ruling, which did not affect the truth of the result, should be regarded as a sufficient reason for the overturning of a fair and honest judgment. If the court erred, the jury did not. They were right. If the exceptions were sustained and the case retried along the lines of law laid down in the discussion of the motion, the only possible difference in the result would necessarily be confined to the amount of damages a new jury might render. But as the damages are clearly not excessive, the case should not be sent back for a new speculation upon this question.

In view of our conclusion upon the merits in this case we have not examined the exceptions for the purpose of determining whether as abstract principles of law the rulings of the court were right or wrong. A careful examination of the law and the evidence fully satisfies the court that the case upon its merits has been rightly decided and that the result should not be disturbed because of abstract errors of law, if they exist, which could not and do not interfere with the truth.

This view of the law with respect to the consideration of exceptions seems to have been established in one of the very first opinions ever announced by the court of Maine. In *Farrar et al.* v. *Merrill*, 1 Maine, 17, at the August term in 1820, the court laid down the rule of law in precise accord with that stated in the present opinion. The case was a writ of entry, putting in issue the title of a certain tract of land. It seems that a paper, apparently bearing upon the question was offered and admitted under objection. The court say that this evidence "being viewed alone would seem to be inadmissible as proof. . . . . But we consider the question as to the admissibility of the paper as wholly unimportant in the view we have taken of the cause for we are all of the opinion that the facts appearing on the undisputed records of the proprietors, taken in connection

with some other facts which have been proved, fully justify the instructions and objections delivered by the Judge to the jury, and the verdict which the jury have returned. It is our duty, in deciding on exceptions to look to the whole evidence, and not disturb the verdict when the facts proved, independent of the papers objected to, furnish the tenant with substantial defence." It will also be observed that in *Elliott* v. *Sawyer*, 107 Maine, 195, this doctrine was reiterated. In this case the court did not undertake to determine whether the testimony was erroneously admitted or not, saying: "Exceptions to the erroneous admission of testimony will not be sustained, if the excepting party was not aggrieved by it." Between these two decisions, covering a period coincident with the judicial history of the State, may be found numerous analogous cases by referring to the digest under "New Trial" and "Misdirection." The doctrine, however, is so well established that it is not deemed necessary to cite the cases in detail.

Motion and exceptions overruled.

NATHANIEL HOBBS, Judge of Probate, *vs.* JOHN BENNETT et als.

York. Opinion November 5, 1910.

Executors and Administrators. Action on Bond. Instructions. Witnesses. Evidence.

In an action on a probate bond, given by an executor on petition for sale of realty, for failure to pay to the residuary legatee her share of the proceeds upon a decree of distribution, evidence *held* not to show that the legatee authorized the executor, after the order of distribution, to invest her share in the estate, so as to discharge the sureties rendering it proper to refuse a request of the defendant which assumed the existence of a contract between the legatee and executor, authorizing him to handle her funds.

In such condition of the evidence, the giving of a request for plaintiff that if there was any such contract between the executor and the legatee, or for the definite extension of time for payment of her distributive share, and if such contract was induced by fraud or untrue statements of the executor, it would not constitute a valid contract nor release sureties on the bond, was not prejudicial.

In an action by a distributee of an estate in the name of the judge of probate on the executor's bond where the executor was called as a witness by plaintiff, his co-defendants and sureties could testify to any conversation made by him which tended to contradict his testimony, but their evidence of statements made by him in a conversation, not in the presence of plaintiff, was inadmissible for other purposes.

On motion and exceptions by two of the defendants. Overruled.

Action of debt on a probate bond given by the defendant Bennett with the other defendants, Albert R. Leavitt and Silas M. Boothby, as sureties thereon. Verdict for plaintiff for $2500. The defendants Leavitt and Boothby filed a general motion for a new trial and also excepted to certain rulings.

The case is stated in the opinion.

James O. Bradbury, for plaintiff.

Samuel M. Came, for defendant Bennett.

J. Merrill Lord, and Matthews & Stevens, for defendants Leavitt and Boothby.

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

SPEAR, J. This case comes up on motion and exceptions by the defendants. It is an action on a probate bond, given by Bennett as executor of the will of Margaret R. Giveen on petition for sale of real estate, and is brought in the name of the Judge of Probate against Bennett and his sureties for the benefit of Julia S. Douglass, residuary legatee under the will. The bond in suit was legally filed in the Probate Court of York County at the February term, 1897, and contains the usual statutory provisions. It appears from the testimony that the executor settled three accounts, one in April, 1896, one in October, 1899, and one in December, 1899. On the 6th day of February, 1900, upon a petition filed prior to that time upon which due notice was given, the Judge of Probate made a decree of distribution directing, with the exception of ten dollars ($10) that the balance in the hands of Bennett, as executor, should be distributed as follows: To Emma P. Sands, $856.00; to Julia S. Giveen, the actual plaintiff, $2568.00; with an order to deposit in the Limerick National Bank in Limerick, York County, in the name of the Judge of Probate, any sums remaining unpaid after six months. The executor paid Emma P. Sands her distributive share but did not pay Julia S. Giveen, who after her marriage appears in the case as Julia S. Douglass. On the 19th day of June, 1905, Mrs. Douglass having received but a few hundred dollars under the order of distribution, filed a petition for authority to bring suit upon the bond in the name of the Judge of Probate, to recover the damages sustained by reason of the alleged negligence or malfeasance of the executor. It appears that the plaintiff had received from time to time $319.00 from the executor, and the jury brought in a verdict for the plaintiff for $2500.00.

The main defense offered at the trial seems to have been a denial by the sureties of their signatures purporting to appear upon the bond. Upon this issue the jury found a verdict in favor of the plaintiff and without discussion of the testimony, it is the opinion of the court that the verdict cannot be disturbed.

The defendants at the trial also raised another issue of fact, which they aver if found in their favor would constitute a legal defense, namely, that the plaintiff, after the executor had been ordered to make a distribution of the estate remaining in his hands, by a contract with him express, or fairly implied from the testimony, allowed him to retain in his possession her distributive share, $2568.00 for the purpose of investing it for her benefit thereby becoming her agent in the use to which he put her money, whatever it may have been; that, inasmuch as he was under no obligation to account to the probate court for the performance of the order of distribution, but simply to pay over the money in his hands and take the receipt of the distributee therefor, any arrangement he might make with the distributee with reference to the disposal of the money in his hands would be binding upon such distributee and would after that date release the sureties upon his bond. Upon this theory the defendants requested the presiding Justice to instruct the jury as follows: "If the jury find that subsequent to the order of distribution, John Bennett held and invested the amount due plaintiff in interest under said order for the purpose of income therefrom for the benefit of the plaintiff, and that such investment was assented to and known by said plaintiff, such act would be outside the scope of his authority as such executor, and the sureties upon his official bond would not be holden." The instruction was refused and exception taken and allowed. The plaintiff proceeded upon a different theory and requested the court to give this instruction: "That if any alleged contract was entered into between Mrs. Douglass and Mr. Bennett for the alleged handling of the funds by him or for the definite extension of time for the payment of her distributive share, and if such contract was brought about or induced by any fraudulent or untrue statement made by him to her, it would not constitute a valid contract, and would not release the sureties from their liability on the bond in suit." This was given and exceptions taken. In view of the fact that the evidence when fairly considered in the light of all the circumstances and probabilities involved in the case, shows that each of the requested instructions assumed a statement of fact not deducible from the evidence, namely, that a contract was made

with the executor by the plaintiff authorizing him to handle her funds, the request of the defendants was improper and that of the plaintiff harmless.

The plaintiff appears very frankly to have stated her relations with the executor during the years in which he was claiming to her to be engaged in the settlement of Mrs. Giveen's estate. She readily admits that she received money from him after the order of distribution, called interest, and that she gave receipts for remittances, so called. Her true understanding of the nature of the remittances may be inferred from the following question and answer: Q. He paid you interest? A. It was called interest, but I do not know whether it was interest or not. At the end of her testimony she says she had no actual arrangement or agreement with Mr. Bennett in regard to his holding the funds belonging to her and paying her interest thereon. We are unable to find any evidence in her testimony that would warrant the inference that she by express or implied agreement authorized Bennett, the executor, to make use of her funds in the manner in which he evidently did. But were such an inference possible, we think it is fully negatived by the letters offered in evidence from Bennett to her. These letters, and the course of proceeding portrayed in them, clearly warrant the inference that the estate of Mrs. Giveen, and consequently the distributive share belonging to the plaintiff, were being used by the executor upon his own responsibility long prior to the date of the order of distribution.

It is very easy from Bennett's letters to discover why the plaintiff called the money which she received—interest. An examination of his correspondence with her will show that on July 26, 1899, long before the order of distribution, he wrote her saying, "I will go right to work on the business so as to get matters ready for a settlement, although it will take time to get the investments all into money, as I have been getting better than bank interest." On October 19, 1899, he again wrote, "After the bills against the estate were settled, the balance was placed at interest. The amount of the estate I have allowed to accumulate but perhaps it would have been more satisfactory to you had I paid it to you annually, but as

long as you get it all right now at the last end you will be all right." January 4, 1900, before the order of distribution, he again wrote, "I have been quite successful in obtaining a high rate of interest," etc. Again on January 29, 1900, also before the decree of distribution he wrote, saying, "In order to obtain such a high rate of interest I have had to invest in all kinds of ways, as I wanted to get a good rate of interest while I had the control."

It is very important in analyzing this testimony in its bearing upon the plaintiff's understanding of the word "interest" to observe that these letters were all written before the decree of distribution and consequently before the plaintiff was entitled to any part of her distributive share. But notwithstanding this, the executor was informing her of the accumulation of interest upon the estate, saying it might have been more satisfactory had he paid it annually, "but as long as you get it all right now at the last end, you will be all right." This letter specifically states that the money she is getting at the "last end" is the interest accumulated upon the estate; and while she received what was called "interest" after the order of distribution, there is no evidence in the case which tends in the least to show that she had any knowledge of any distinction between the meaning of what was termed interest before the order of distribution and what was termed interest after such order. The inference is, therefore, irresistible that the plaintiff did not receive any interest after the order of distribution which she can be fairly said to have known or understood to have come from the investments by the executor of her distributive share of the estate. On the contrary it seems to us that it is fully established by Bennett's letters that he had invested the proceeds of the whole estate before the order of distribution was made and was undoubtedly guilty of a breach of his bond before the date of the order. The above quotations from his letters are inconsistent with any other conclusion. On October 19, 1899, he expressly said, "After the bills against the estate were settled the balance was placed at interest." October 29, he says, "In order to obtain such a high rate of interest I have had to invest all kinds of ways." This was about four months before the order of distribution. The case is silent upon any change of these invest-

ments, after the order of distribution, with even an intimation of the knowledge or consent of the plaintiff. In fact, there is no evidence of any change at all either with or without her consent. Upon this undisputed and unequivocal evidence of Bennett's letters, written at the time when he was evidently using every expediency at his command to blind her to the true situation of the estate, and postponing a settlement as long as possible, it is the opinion of the court that, whether the executor was guilty of a breach of his bond before the date of the order of distribution or not, the plaintiff had no definite knowledge at all about the estate, much less sufficient to enable her to make an agreement with reference to the investment of her share. The evidence, then, appearing to be conclusive against the contention of the defendants that the plaintiff authorized the executor, after the date of the distribution, to invest her share in the estate, we reiterate that the defendants' requested instruction assumed facts not proven and was therefore improper, and the plaintiff's request whether proper or improper was harmless.

The other exceptions raised by the defendants may be considered together as they practically involve the same question. Upon the issue of signature the defendants offered to show a conversation between Bennett and his co-defendants, claimed to be relevant, but not made in the presence of the plaintiff. Bennett had been called as a witness by the plaintiff, and the court ruled that the co-defendants could testify to any conversation made by Bennett which tended to contradict his testimony, but that his evidence beyond that, not made in the presence of the plaintiff, was inadmissible. We think the ruling was right. It may be proper to say that the question, relative to the renewal of notes, offered and excluded, is not shown from any statement in the exceptions to have been material to the issue involved.

It is further claimed that the plaintiff has failed to show any demand upon the executor for the payment of the legacy due her. We cannot construe the evidence in this way. The whole effect of her evidence, for the years covered by the correspondence in this case, shows that she was continually demanding payment of the amount due her from the estate. While no specific statement can

be construed into a demand, the effect of the evidence clearly shows one. The defendants upon this point rely upon a statement as tending to show that she asked only for interest; but a specific answer brought out on cross-examination for the purpose of establishing a technical legal defense, cannot be permitted to overcome a perfectly apparent conclusion based upon a reasonable inference from all the evidence presented. In fact, whatever she may have said in her testimony and whatever she may have written to the executor, to declare upon the evidence in this case, that the plaintiff was not constantly demanding, for a period of four years, payment of the amount due her from this estate, would tend to disparage the value of common sense and override the ends of justice.

Motion and exceptions overruled.

ISABELLE M. GOODALE *vs.* WILLIAM GOODALE.

York. Opinion November 5, 1910.

Easements. Deeds. Construction. Obstruction.

A grant of a right of way provided that it should be kept open for the common use of the grantor and grantee, their heirs and assigns, in the same manner as a lane connected therewith and leading easterly to the highway. The lane in question had been kept open and free from obstruction since 1857. *Held*, that 39 years having passed during which the lane was free from obstruction at the time the right of way was given, the parties to the deed must be deemed to have intended such condition to be the "manner" in which the right of way conveyed should be kept open, and the grantor's successor in title cannot place obstructions in the right of way.

On exceptions by plaintiff. Overruled.

Trespass quare clausum fregit brought against the defendant for removing a pair of bars erected by the plaintiff across a certain narrow strip of land alleged to belong to the plaintiff. Plea, the general issue with a brief statement alleging as follows: "That the place where the alleged trespass is alleged to have been committed was and is subject to said defendant's use as a right of way free of all obstructions to his use over the premises described in said plaintiff's declaration, said right of way as aforesaid being derived by said defendant by legal title by deed to him of the same from plaintiff and her predecessor in title to the fee of the premises dated Mar. 21, 1896, recorded in York Registry of Deeds Book 476, page 489, that upon said day of said alleged trespass said defendant was in the lawful use of his said right of way." Heard by the presiding Justice, without a jury, who ruled that judgment should be for the defendant, and the plaintiff excepted.

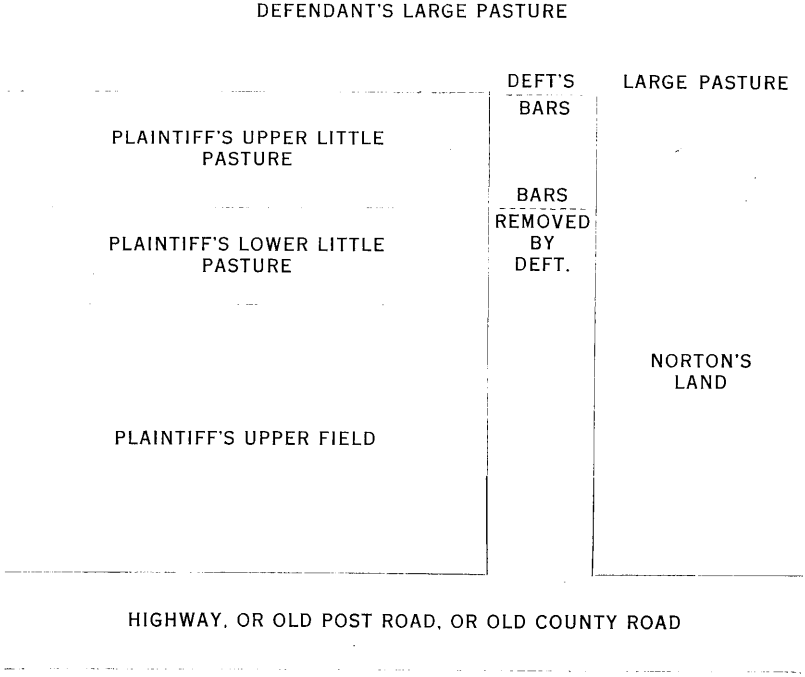
The case is stated in the opinion.

Geo. F. & Leroy Haley, for plaintiff.

William M. Tripp, for defendant.

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

SPEAR, J. This is an action of trespass for removing an obstruction across an alleged right of way. At the close of the testimony the court ordered a verdict for the defendant, and the case comes up on exceptions to the order. The locus is a lane leading from the "old post road," so called, to the pasture of the defendant. On the left side of the lane going toward the pasture of the defendant is the land of the plaintiff known in the case as plaintiff's upper field, lower and upper Little pasture; on the right of the lane is Norton's land; upon both sides of the lane its whole length is a continuous line of stone wall or fence. The accompanying chalk may give some assistance in tracing the locus as it is found upon the face of the earth.



Prior to 1896 the plaintiff's husband, George B. Goodale, her immediate predecessor in title, and his brother, the defendant, William Goodale, owned and used in common and undivided, the whole tract of land on the left side of the lane. In 1896 a division of this land was made by George and William, each giving to the other a warranty deed of the part conveyed. The grant of the right of way in the deed to William Goodale, dated March 1, 1896, is as follows: "And the lane between Norton's land and said Little pasture, as now indicated by partial fence, shall be kept open for the common use of the grantor and grantee, their heirs and assigns, in the same manner as the lane connecting therewith and leading easterly to the highway."

The highway referred to in the deed is mentioned by the witnesses as the Old Post Road or the Old County Road. Up to 1896, the time of the division, there had been for many years a pair of bars across the lane at the point adjoining the foot of the upper Little pasture. In 1896, after the division, the bars were removed. Twelve years later in 1908 the bars were again erected by the plaintiff, and removed by the defendant, whence the present controversy.

The defendant contends that the lane was a right of way, which he was entitled to have kept open and unobstructed, and that the bars erected by the plaintiff were an illegal obstruction which he had a right to remove and did remove. Whatever the legal significance of the words "shall be kept open" it is not necessary to consider, as the case turns upon the clear and unequivocal specification in the division deed of George B. to William Goodale, that the lane should "be kept open in the same manner as the lane connecting therewith and leading easterly to the highway." The undisputed evidence shows that the lane referred to in the deed for the purpose of defining the "manner" in which the lane in controversy should be kept open had been free from gates or bars or other obstructions since 1857. Thirty-nine years conclusively show that the lane "leading easterly to the highway" must be considered to have been, at the time this deed was given, open and free from obstructions. The plaintiff's predecessor in title and the defendant

must both have thoroughly so understood it. The clause in the deed, therefore, describing the manner in which the lane in question was to be kept open, must be regarded as an expression of the mature intention of the plaintiff's predecessor in title, and to be conclusive upon her.

Exceptions overruled.

HATTIE A. ESPEARGNETTE *vs.* EDWIN K. MERRILL.

Androscoggin. Opinion November 8, 1910.

New Trial. Motion in Supreme Judicial Court. Jurisdiction. Revised Statutes, chapter 79, sections 46, 53.

The jurisdiction conferred upon the court as a court of law by Revised Statutes, chapter 79, section 46, over "cases in which there are motions for new trials upon evidence reported by the justice" is limited to cases of jury trials, and does not include cases submitted to the presiding Justice for decision without the aid of a jury.

On motion by defendant. Dismissed.

Real action to foreclose a mortgage. Plea, the general issue. Heard by the presiding Justice, without a jury, who rendered judgment for the plaintiff as of mortgage and fixed the sum to be paid in order to redeem at $175. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Newell & Skelton, for defendant.

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

EMERY, C. J. This was an action at law, a writ of entry. The plea was nul disseisin. The case was by agreement of parties sub-

mitted, without any reservations or stipulations, to the presiding Justice for decision without the aid of a jury, as authorized by R. S., ch. 79, sec. 53. The presiding Justice heard the case and awarded judgment for the plaintiff, whereupon the defendant filed a motion to have the decision set aside and a new trial ordered upon the ground that the decision was against the law and the evidence.

The motion cannot be considered. The Law Court has no jurisdiction over such a motion. R. S., ch. 79, sec. 46, does not include it. The parties selected their own tribunal, entrusted to that tribunal the final decision of their case and of all questions of law and fact involved, and authorized it to enter final judgment accordingly. That decision is not reviewable by the Law Court. No leave to except to rulings of law was reserved, and the presiding Justice was made by the parties the sole judge of the weight and effect of the evidence. They must abide by his judgment.

We think no citation of authorities is necessary to establish the above propositions.

Motion dismissed.

W. P. HURLEY *vs.* LUCY C. FARNSWORTH, Admx.

Knox. Opinion November 8, 1910.

Executors and Administrators. Claims Against Estate. "Waiver." Statute, 1907, chapter 186. Revised Statutes, chapter 89, section 14.

1. The written claim presented to an executor, or administrator, under Revised Statutes, chapter 89, section 14, must exhibit the nature, as well as the amount, of the claim.
2. A written claim for "balance due Jany. 1, 1904, $2265.50" does not exhibit the nature of the claim and is not a compliance with the statute.
3. A waiver in pais is more than a passive, negative state of mind. It is a positive, affirmative act; not mere negligence to claim a right, but a voluntary choice not to claim it.
4. When an executor or administrator has received a written claim that does not exhibit the nature of the claim, he is not bound to call attention to the defect, and his omission to do so is not sufficient evidence of a waiver of his statutory right to be informed of the nature of the claim; nor is his statement that he "will not pay a wrong bill" sufficient evidence of such waiver.

On exceptions by plaintiff.

The bill of exceptions states the case as follows:

"This was an action of assumpsit upon an account annexed for the recovery of a claim against the estate of one James R. Farnsworth deceased. The declaration and account annexed are made a part of these exceptions.

"The defendant seasonably demurred to the declaration, demurrer was sustained, and plaintiff had leave to amend. The amendment is made a part of these exceptions.

"To prove the presentation to the administratrix of the claim required by section 14, chapter 89, Revised Statutes, as amended, plaintiff offered the account annexed as a true copy of the paper presented to the administratrix for that purpose. That it was a true copy was admitted. Defendant admitted that said paper was properly sworn to, seasonably presented, and the action seasonably brought.

"The defendant contended that the first item in said paper was not a compliance with the statute, to the extent of said first item, and therefore, to that extent, not a claim within the meaning of said statute and seasonably objected to its admission, to that extent, and to the admission of all evidence tending to prove said first item, or the items in the amendment. These contentions were overruled, for the purposes of the trial.

"The plaintiff contended that said paper was a compliance with said statute, legally admissible and that the evidence received in support of said first item, and the amendment was legally admissible.

"From the foregoing admitted facts and from the cross-examination of the defendant, now made a part of these exceptions, plaintiff contended that the defendant had waived the objections by her now asserted against the legality or regularity of the paper presented to her as aforesaid.

"The plaintiff introduced evidence tending to prove the various debits and credits in the amendment, with other evidence in support of the remainder of the account annexed. The general verdict was for the plaintiff in the sum of $2803.49. By special finding the jury found that of said general verdict the sum of $1426.00 was due the plaintiff under the amendment.

"If the Law Court is of the opinion that the foregoing paper, to the extent of the first item thereof, is a legal claim, within the meaning of the statute aforesaid, and the evidence thereunder admissible, defendant admits that the general verdict should stand.

"Defendant admits that if the foregoing contention of plaintiff as to waiver should have been sustained then the general verdict should stand.

"If, however, the contentions of the defendant as above stated, are now sustained, and the contention of plaintiff as to waiver is overruled, then it is agreed between the parties that the sum found due under the amendment shall be deducted from the general verdict and remainder thereof shall stand."

The gist of the case is stated in the opinion.

Foster & Foster, and Arthur S. Littlefield, for plaintiff.

Heath & Andrews, for defendant.

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

EMERY, C. J. By R. S., ch. 89, sec. 14, as amended by ch. 186 of the Public Laws of 1907, it is enacted that (with certain exceptions not applicable to this case) all claims against estates of deceased persons "shall be presented to the executor or administrator in writing, or filed in the probate office," etc., and that no action shall be commenced against an executor or administrator on any such claim until thirty days after the claim has been so presented, etc. The plaintiff in this case against the estate of James R. Farnsworth did, thirty days before the commencement of his action, present to the defendant the administratrix of the estate, a writing headed "Estate of James R. Farnsworth, Miss Lucy C. Farnsworth Admx. to W. P. Hurley—Debtor"—and containing numerous items of cash paid and of labor performed at various times and also containing various items of credit. The balance due plaintiff was stated to be $4562.34. This balance, however, included another item, the first in the list, stated as follows: "1904 Jan'y 1. To balance due Jan'y 1, 1904 $2265.50." The only controversy is over this item.

1. The first question presented is whether this particular claim for $2265.50 was so presented in writing as to be a compliance with the statute cited. The purpose of the statute was declared in *Marshall* v. *Perkins*, 72 Maine, 343, at page 345, as follows. "The evident design was to prevent actions involving needless cost and expense to the estate in collecting honest claims against it, by compelling a claimant to hand to the administrator the nature and extent of his claim and allow the reasonable prescribed period for investigating it." To effect this purpose, the administrator is entitled to have disclosed in the writing the nature, as well as the extent, of the claim; to have disclosed what considerations are claimed to have been received by the deceased from the claimant, or what torts committed by him against the claimant. At the least, the administrator is entitled to as much particularity of statement in the prior presentation of the claim, as he would be entitled to in the declaration in an action against him. The intent

of the statute is to give him thirty days before suit in which to investigate the claim proposed to be put in suit. If he cannot have all the information the suit itself would disclose, he does not have the opportunity for prior investigation contemplated in the statute. Tried by this test, the writing in question is clearly not a compliance with the statute. In *Bennett* v. *Davis*, 62 Maine, 544, the statement of the claim was, "To groceries as per bill of particulars rendered." It was held to be insufficient to show cause of action. In *Turgeon* v. *Cote*, 88 Maine, 108, the statement of claim was "For balance due on account, for labor performed and materials furnished as contractor for wood work for the erection and construction of the above buildings, as per agreement,—$725." Held insufficient. The court said (page 111) "It is not alleged what the price of the work contracted for was, nor does it in any way appear what any or all the items are, constituting the balance due on account of $725. The defendant is entitled to know what these particulars are before he can be required to determine whether he will admit or contest the claim." By parity of reasoning an executor or administrator is entitled to as much information in the written presentation of a claim to him.

2. The second question is whether the defendant administratrix waived her right to the information required by the statute to be given her thirty days before suit could be commenced. A waiver in pais is something more than a passive, negative state of the mind. It is a positive, affirmative act. It is an intentional relinquishment of a known right. The intention to waive is essential to be proved. Of course it may be proved otherwise than by evidence of express declarations. It may be inferred from acts and even from non-action, but, whatever the evidence, it must have probative force sufficient to prove that there was in fact an intention to waive the right, though of course it may be assumed that the party intended what all his words, acts or non-action under the circumstances, naturally and logically indicate to have been his intention. There must appear, not mere negligence to claim the right, but a voluntary choice not to claim it. *Stewart* v. *Leonard*, 103 Maine, 125,

at page 132. *Burnham* v. *Austin*, 105 Maine, 196, at page 199; *Farlow* v. *Ellis*, 15 Gray, at page 232.

In considering the evidence reported and relied on to prove waiver, it should be borne in mind that there was but one presentation of claim though made up of numerous items; that all those items except the single one in controversy were in compliance with the statute and amounted to over $2000. It should also be borne in mind that, as to the single item in controversy, the defect in the statement of it is not in form only but is a defect in substance, the omission of material matter.

The evidence goes to this extent only: Upon receiving the written statement of the claim, the defendant sent it to her counsel in a distant town, and did nothing more about it; did not ask for any other or further statement or information. When the plaintiff afterward met her on the street and asked if she would not rather pay the bill than have a law suit, she answered she would not pay a wrong bill. She did not tell him that his claim as presented did not embrace all the items it should, and she did not express any objection to the form of the claim, but she does not appear to have been asked whether she had any objection to the form of the claim, or desired any further information or more detailed statement. The talk appears to have been casual and brief.

We think it clear that the evidence does not establish the proposition that the defendant intentionally waived the duty of the plaintiff to furnish her with the information required of him by the statute. It was not her duty to ask for the information. It was his duty to furnish it. Neither was it her duty to point out to him omissions in his claim as presented. It was his duty to present his whole claim, all the items and details of it. Assurance from her merely that she would not pay a wrong bill did not release him from the duty of presenting his claim as required by the statute before beginning his action. At the most, that assurance could only apply to the claims or items of claim that were sufficiently presented.

The counsel for the defendant contended that an executor or administrator could not lawfully waive the requirement of the statute, but we have here no occasion to consider that question.

According to the stipulation of the parties the sum of $1426.00 must be deducted from the amount of the general verdict for the plaintiff $2803.49 and judgment be rendered for the balance $1377.49 with interest from the date of the verdict.

So ordered.

In Equity.

GEORGE F. HALEY *vs.* FRANCIS PALMER et als.

York. Opinion November 9, 1910.

Wills. Estates Created. Equitable Fee Simple. Trusts. Liability for Debts of Cestui Que Trust. Equitable Trustee Process. Revised Statutes, chapter 79, section 6, par. IX.

A will bequeathed and devised the residue of the testatrix's estate to such of her children as might outlive her, share and share alike, but provided that the portion which would fall to her son C. should be held in trust for him by her son F., to be used for his comfort and necessities according to the discretion of such son. *Held*, that the testatrix's children other than C., surviving her, received their shares absolutely in fee simple, and C. received his share in equitable fee simple in trust, the legal estate passing to the trustee F., the beneficiary interest to the cestui que trust, and the trust terminating at the death of C., the remaining portion of the trust estate passing by his will or descending to his heirs.

An equitable fee simple estate in trust is liable for the debts of the cestui que trust, and the trustee may be charged as equitable trustee by equitable trustee process to reach and apply the trust funds in his hands in payment of the cestui que trust's debts, under the statute authorizing such process to reach and apply in payment of a debt any property or interests, legal or equitable, of a debtor which cannot become apt to be attached on writ, or taken on execution in suit at law.

In equity. On appeal by defendants. Decree affirmed.

Bill in equity brought by the plaintiff against "Francis Palmer of Trenton in Mercer County, State of New Jersey, Chase Palmer of Washington District of Columbia, and Chase Eastman of Portland in the County of Cumberland and State of Maine as executors of the last will and testament of Elizabeth C. Palmer, late of Kennebunkport, in said County of York, deceased, and said Francis Palmer as trustee under the last will and testament of said Elizabeth C. Palmer, and Clinton C. Palmer of Portland in the County of Multnomah and State of Oregon," praying that it "be ordered and decreed that the plaintiff has a lien on the share of the defendant Clinton C. Palmer, in the residuary of the said estate of said Elizabeth C. Palmer, deceased, for the full amount due" on two promissory notes given to the plaintiff by the said Clinton C. Palmer, and "that it be further ordered and decreed that out of the assets of said estate and particularly out of the property set apart by the executors of the will of said deceased as a portion of the residuary of said estate for the benefit of said defendant Clinton C. Palmer said defendants executors of said will and said defendant Francis Palmer as trustee thereunder pay to the plaintiff the full amount of said lien." The defendants, except said Clinton C. Palmer, filed an answer with a demurrer therein inserted. The said Clinton C. Palmer filed a cross bill, but afterwards consented that the plaintiff's bill be taken pro confesso as to himself with decree thereon in plaintiff's favor. A hearing was had and the presiding Justice sustained the plaintiff's bill and decreed that the plaintiff "has a lien on the share of the defendant Clinton C. Palmer, in the hands of defendant Francis Palmer, trustee" under the aforesaid will, and ordered payment of the plaintiff's debt from the funds in the hands of the trustee.

The defendants, Francis Palmer, Chase Palmer and Chase Eastman, executors, and Francis Palmer, trustee, then filed an appeal.

The case is stated in the opinion.

NOTE. See *Holcomb* v. *Palmer*, 106 Maine, 17.

Geo. F. & Leroy Haley, for plaintiff.

James O. Bradbury, Chase Eastman, and Clinton C. Palmer, for defendants.

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

SPEAR, J. This is a bill in equity in which the plaintiff seeks to charge the defendant, Francis Palmer, trustee under the will of Elizabeth C. Palmer as equitable trustee of the defendant, Clinton C. Palmer, for funds in the hands of Francis, which the plaintiff contends are attachable in equity for the payment of the debts of Clinton C. The sitting Justice sustained the bill and ordered the payment of the plaintiff's debt from the funds in the hands of the trustee. From this decree the case comes here on appeal. The facts pertinent to the issue upon which the case turns are as follows: In 1907 Elizabeth C. Palmer, mother of Francis and Clinton C., died testate. No controversy arises with reference to preliminary questions relating to the probate of the will, and the appointment and qualification of the executors and trustees. The plaintiff in December 1908, loaned the defendant, Clinton C. Palmer, the sum of $500.00, and, as evidence of the debt, took the defendant's promissory note for the amount of the loan. In March, 1909, he loaned him the further sum of $500.00, for which he also received his promissory note. To secure the payment of these notes Clinton C. Palmer for a legal consideration executed and delivered to the plaintiff an assignment in writing "whereby he conveyed all his right, title and interest in and to the estate of said Elizabeth C. Palmer." Demand for payment of the amount due was duly made by the plaintiff upon the executors and trustee. The bill and answer raise many other questions of fact but they are not pertinent to the determination of the legal question here involved. The case turns upon the construction placed upon the following clause of Mrs. Palmer's will, namely: "I give, bequeath and devise, all the rest and remainder of my estate to such of my children as may outlive me, share and share alike, but I will that the portion which would fall to my son Clinton C. Palmer 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." No other clause is found in the will which shows any purpose on the part of the testatrix to make any gift or devise over, but as was said in *Holcomb* v. *Palmer*

et al., 106 Maine, 17.—"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."

But this clause has already been construed with reference to the quality of estate vested in Clinton C. in *Holcomb* v. *Palmer et al.*, supra. The court say: "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 C. Palmer received his share in equitable fee simple in trust, the legal estate passing to the trustee, Francis, the beneficiary 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 died testate, or descend to his heirs if he died intestate. This was the evident purpose of the testatrix. Her intention to dispose of her whole estate is manifest." The court further say: "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." *Fay* v. *Phipps*, 10 Metc. 341; *Chauncey* v. *Francis*, 181 Mass. 513, 63 N. E. 913. It being specifically established that the estate, vested in Clinton C. Palmer by the will of his mother, was an equitable fee simple in trust, the vital question in the case then arises:—Can his interest in the estate be attached in equity? Upon this question it is laid down in Pomeroy's Equity, section 989, as an elementary principle in such cases, "that the interest of the cestui qui trust is alienable; if real estate, it may be conveyed by ordinary deed, if personal, it may be assigned. . . . It is also liable to the debts of the beneficiary." See also *Sawyer* v. *Skowhegan*, 57 Maine, 500; *Warren* v. *Ireland*, 29 Maine, 62; *Buck* v. *Paine*, 75 Maine, 582.

Chauncey v. *Salisbury et als.*, 181 Mass. 516, is a case in which the testatrix made the following bequest: "The sum I bequeath to William Salisbury, and the sum I bequeath to Sam Salisbury, I

wish to put in trust to Elihu Chauncey and they should have the income only." In construing this clause the court held that the bequests were absolute gifts, it being the declared purpose of the testatrix to dispose of her whole property, and that "such an estate both as to income and principal could be reached by creditors, and this the testatrix must be presumed to have known." This case is cited in *Holcomb* v. *Palmer* "as strikingly like the case at bar." *Holcomb* v. *Palmer* declared the trust bequest to create an equitable fee simple estate. The other cases establish the principle, that liability for debts, is an attribute of such an estate.

Our conclusion is that an application of the foregoing rules of law to the facts in the case at bar fully sustain the decree of the sitting Justice. In determining the right of the plaintiff we have ignored the effect of the assignment purporting to operate as security for the debt. Whether the assignment under the facts and circumstances of the case could be regarded as an alienation of the trust fund or not, is immaterial to the real issue involved. The plaintiff's bill is not brought for the purpose of enforcing the assignment, but to impress upon the funds in the hands of the trustee an equitable liability for the payment of the debt of Clinton C. Palmer who admits his liability.

The bill brings the case clearly within the provision of the statute, R. S., chapter 79, section 6, paragraph IX, authorizing what is generally termed an equitable trustee process, for the purpose of reaching and applying "in payment of a debt any property, right, title or interest, legal or equitable, of a debtor or debtors, which cannot become at to be attached on writ, or taken on execution in a suit at law." The prayer of the bill "that it may be ordered and decreed that the plaintiff has a lien on the share of the defendant, Clinton C. Palmer, in the residuary of the said estate of said Elizabeth C. Palmer, deceased, for the full amount due on said two notes," is in accord with the purpose and provision of the statute. The conclusion of the court in *Holcomb* v. *Palmer*, supra, that the property in the hands of the executors could not be held in an action at law in the form of trustee process can in no sense be regarded as res judicata of the question now presented.

The only matter remaining to be noticed is the contention on the part of the defendants that the trust in question was created and intended to operate as a spendthrift trust. The doctrine of such a trust was established in *Roberts* v. *Stevens*, 84 Maine, 325, but upon a state of facts entirely different from those in the case before us. In that case the doctrine was applied to an equitable life estate, the income of which was destined to go to one person and the corpus to another. Alienation and liability for debts are not and cannot be made attributes of the corpus of life estates. But, as already seen, a different rule applies to equitable fee simple estates in trust. Besides in the Roberts case the court found that by the terms of the will the trust fund was made inalienable and put beyond the reach of creditors.

Decree affirmed without costs to either party.

GEORGE W. TOWLE *vs.* DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Cumberland. Opinion November 14, 1910.

Insurance. Fire Insurance. Construction of Policy. Additional Insurance. Transfer of Property. Change of Title. Waiver. Revised Statutes, chapter 49, section 4.

The defendant, a Mutual Fire Insurance Company, in consideration of a cash payment and a premium note, in 1904, issued to one Adrianna Smith a policy in the standard form, insuring her dwelling house and barn. The policy contained no permission for other insurance. Mrs. Smith died in 1905. By her will she devised the insured premises to her son, and in 1906 the son conveyed them to his father, Eben Smith. After the death of Mrs. Smith, Eben Smith notified the defendant of that fact, and directed that notices of assessments on the premium note should thereafter be sent to him. This was done, and he paid all subsequent assessments of which he had notice, including one made after a fire which destroyed the buildings in 1909, and after due proofs of loss had been made by Eben Smith. After the property was conveyed to Mr. Smith he procured additional insurance on the dwelling house, but none on the barn. The proofs of loss disclosed the additional insurance, as well as the transfer of title to the son by will, and from the son to Eben Smith by deed. Prior to Jan. 8, 1907 the policy, by endorsement, had been made payable to the executor of the assignee of a mortgage upon the premises, as his mortgage interest might appear, and on that day the executor, with the assent of the defendant, assigned his interest in the policy as mortgagee to the plaintiff. At the time of the fire the plaintiff held two other mortgages upon the insured premises. After the proofs of loss were made Eben Smith assigned his claim for insurance to the plaintiff as mortgagee. The defendant had no notice of the additional insurance until after the fire, and none of the transfer of the title, except such as should be inferred from the notice by Eben Smith that Mrs. Smith was dead, and the request that thereafter notices of assessments should be sent to him. The plaintiff claims both as mortgagee and assignee of Eben Smith's claim.

Held: 1. That under the terms of the policy, by which it was provided that "it shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent of the Company, or if, without such assent, the said property shall be sold," the policy was avoided, at least as to the dwelling house, by the procuring of the additional insurance, and as to all of the property, by the sale and conveyance from the devisee of the insured to another person.

2. That the provision in the policy to the effect that if made payable to a mortgagee, no act or default of any other person shall affect the mortgagee's right to recover does not protect the plaintiff, since the policy was not made payable to him as mortgagee under the two mortgages which he now holds, but under an entirely distinct mortgage.
3. That the plaintiff as assignee has no greater right than his assignor, Eben Smith, had.
4. That the notice given to the defendant of the death of the insured, and the direction to send the notices of assessment thereafter to Eben Smith was not sufficient to charge it with notice that the property had been "sold" to him; and that the defendant, having no other notice, is not estopped by the making of assessments upon the premium note, the giving notice thereof to him, and the receipt and retention of the assessments paid by him, to set up the conveyance to him by deed, contrary to the provisions of the policy, as a defense in an action upon the policy.
5. That change of title by will or descent does not avoid a policy in the standard form.
6. That the making of an assessment upon a premium note by a Mutual Fire Insurance Company, and the collection and retention of the assessment after the loss has occurred and after the Company has become informed of the facts which create a forfeiture, is not a waiver of the forfeiture, and does not revive a void policy.
7. That the foregoing rule is applicable to the facts in this case. Although Eben Smith did not give the note, it was treated by both parties as a valid subsisting obligation. The assessment paid after the loss occurred was made on account of that note, and was paid by Smith on account of that note. So far as he is concerned, therefore, it is the same as if it had been his note, and that brings the case within the rule stated.

On agreed statement of facts. Judgment for defendant.

Action upon a fire insurance policy. Reported to the Law Court on an agreed statement of facts.

The case is stated in the opinion.

Augustus F. Moulton, for plaintiff.

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

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

SAVAGE, J. This action is brought upon a fire insurance policy. The plaintiff claims both as mortgagee, and as assignee of the claim, under the policy, of the owner of the equity of redemption, the as-

signment having been made after the property insured had been destroyed by fire. The fire occurred January 21, 1909.

The essential facts are these. The defendant is a mutual fire insurance company organized under the laws of this State. November 12, 1904, the defendant, in consideration of a cash payment and a premium note issued to one Adrianna S. Smith a policy in the standard form, insuring buildings described as belonging to her, as follows:—$800 on a dwelling house and $200 on a barn. The policy contained no permission for other insurance. Mrs. Smith died testate in 1905, having paid all the assessments on the premium note levied to the time of her death. By her will she devised the insured premises to her son, and in 1906 the son conveyed them to his father, Eben Smith. After the death of Mrs. Smith, Eben Smith notified the defendant of that fact, and directed that notices of assessments should thereafter be sent to him. Accordingly, from the time of the notice to the time of the fire the defendant sent the assessment notices to Eben Smith, who paid the assessments.

Prior to January 8, 1907, by endorsement upon the policy, it had been made payable to the executor of an assignee of a mortgage upon the premises, as his mortgage interest might appear, and on that day the executor, with the assent of the defendant, assigned his interest in the policy as mortgagee to the plaintiff. Also at the time of the fire the plaintiff held two other mortgages upon the insured premises, of which the defendant had no knowledge until afterwards, one given in 1904 by Mrs. Smith, and one in 1907 by Mr. Smith.

In 1908 Mr. Smith procured additional insurance on the dwelling house, but none on the barn. This was not known to the defendant until after the fire. The latter insurance has been paid.

On January 27, 1909, Mr. Smith made proof of the loss under the policy in suit on a blank form furnished by the company, and the blanks were filled in by the defendant's Secretary. The proof disclosed the additional insurance, as well as the transfer of title from Mrs. Smith to her son by will, and from the son to Mr. Smith by deed. The claim was rejected February 8, 1909. On February 24, 1909, the defendant sent notice to Mr. Smith, of another assess-

ment upon the premium note, which he paid, and the defendant has retained the money.

On March 8, 1909, Mr. Smith assigned to the plaintiff as mortgagee his claim against the defendant for insurance.

It is provided in the policy in suit as in all policies of the standard form that "It shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company, . . . or if, without such assent, the said property shall he sold, or this policy assigned." R. S., c. 49, sect. 4. And the defendant contends that the policy became void, at least as to the dwelling house, because of the additional insurance procured, and as to all the property insured, because of the sale and conveyance from the son to Eben Smith. And, of course, this was the result, unless the forfeiture has been waived, or the result avoided in some other way.

The plaintiff seeks to avoid the result. He claims in the first place that as mortgagee he is protected by another provision in the policy to the effect that "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover, in case of loss on such real estate." The answer to this proposition is that the policy is not made payable to the plaintiff as mortgagee, under the mortgages of 1904 and 1907, both given after the policy was issued. It is true that by endorsement with the defendant's assent the policy was made payable to the plaintiff as mortgagee in 1907. But that endorsement related only to the mortgage interest which the plaintiff had under another mortgage, originally given to another party. The endorsement was limited to that mortgage. It had nothing to do with the mortgages under which the plaintiff now claims. The language of the agreed statement is this: "The policy was by due endorsement made payable to Henry W. Swasey, executor of Isaac R. Rogers estate as his mortgage interest might appear and the *said mortgage interest* was by endorsement upon the policy dated January 8, 1907, assigned to the plaintiff as mortgagee." And since it is also stated in the agreed statement that after the

deed from the son to Eben Smith in 1906, the latter "then became sole owner subject to the Towle mortgage of $1600," which was the 1904 mortgage, we think we must assume, though it is not expressly so stated, that the mortgage interest referred to in the policy has ceased. It follows that as to the mortgages of 1904 and 1907, the plaintiff is not protected by the clause in the policy upon which he relies, and which we have quoted above. In fact, since the policy is not made payable to him as mortgagee under these mortgages, he has as mortgagee no right of action under them directly against the defendant, but his remedy, if any, would have been under R. S., c. 49, sect. 55, relating to the enforcement of a mortgagee's lien upon the policy.

If therefore the plaintiff has any enforceable claim against the defendant, it must be his claim, not as the mortgagee under these mortgages, but as the assignee of Eben Smith of the claim for the loss. And in this capacity he has no greater right than his assignor would have had.

What would have been Eben Smith's right? He was not the insured in the policy. He was not named in the policy. He was not a party to it, originally, nor by assignment and assent afterwards. By the policy the defendant had made no agreement with him. He therefore had no right of action on the policy. His suit on the policy, if maintainable at all, should have been brought in the name of the executrix of Mrs. Smith's will, but for his benefit. But this point has not been made in argument. The parties in interest are before the court. When a case is before this court upon an agreed statement, the court may, and generally will, proceed to consider the case on its merits, and disregard errors in pleading, unless questions of proper pleading have been reserved. As all the parties in interest are before the court, we will examine into the merits of Eben Smith's claim.

The plaintiff contends that, although Eben Smith was not a party to the policy, the defendant is estopped to deny that in fact it insured the property as the property of Eben Smith after the death of his wife, and is estopped to set up the transfer from the son to Eben Smith as an avoidance of the policy. It is claimed that the

defendant virtually continued the policy after the transfer as a policy upon Eben Smith's property, assessed him as if he had given the premium note, and received and kept his assessments; in other words, treated him precisely as if he had been named as the insured in the policy. And it is earnestly urged that after having so treated Eben Smith and the property for more than three years, the defendant ought not now, after a loss has occurred, to be heard to say that the property was not insured for Eben Smith.

It is not necessary to inquire now what would have been the effect, if the defendant had done these things, with a knowledge of the transfer and of the entire situation, for we think the case does not show such knowledge; nor does it show enough to make the defendant chargeable with such knowledge. The only knowledge the defendant appears to have had was contained in a letter from Eben Smith that Adrianna S. Smith, the insured, was dead, and that he wished the assessment notices to be sent to him. It does not appear whether this information was communicated to the defendant after Eben Smith took title by deed, or before. At any rate, the letter said nothing about any change of title by deed. It did say that the insured was dead, and hence it was to be inferred that the title had passed to some other person by will or by descent. But such a change of title did not avoid the policy. By such a change the property was not "sold" within the meaning of the policy. The policy remained in force for the benefit of heirs or devisees. So that notice that Mrs. Smith was dead was not notice that the property had been "sold," much less that it had been sold to Eben Smith. Neither do we think was the request of Smith that the assessment notices should be sent to him, notice, under the circumstances, that the premises had been "sold" to him. He had been the husband of the insured. It would be a natural presumption that he would be interested in the property either by descent, or as devisee. It might reasonably be supposed that he was the executor or administrator. The circumstances all afforded a reasonable explanation of his request, without resort to the inference that the property had been "sold" to him. It was a proper and natural request for a surviving husband or an executor or an heir to make.

So we think the defendant is not chargeable with knowledge of the sale. And this being so, there is no ground for an estoppel. It has done nothing to mislead Eben Smith, or to put him in a false position. It has acted only as he requested it to act. He was acting in the light, as to the facts, but the defendant in the dark. Eben Smith cannot complain. The defendant is not barred from setting up the conveyance to Eben Smith as a defense.

Finally, the plaintiff claims, that the defendant has waived the defenses set up, because, after the loss occurred, and after it had full knowledge that there had been additional insurance procured, and that there had been a transfer of title, it made an assessment upon the premium note, and gave Mr. Smith notice thereof, and received and retained the assessment paid by him.

In the recent case of *Knowlton* v. *Insurance Co.*, 100 Maine, 481, following *Philbrook* v. *Ins. Co.*, 37 Maine, 137, and *Gardiner* v. *Ins. Co*, 38 Maine, 439, this court held that the making of an assessment upon a premium note by a mutual insurance company, in all essential respects like the defendant, and the collection and retention of the assessment after the loss has occurred and after the company has become informed of the facts which create a forfeiture, is not a waiver of the forfeiture, and does not revive a void policy. The reason is that although the policy may become void, the note is not thereby cancelled. It still remains an obligation of the maker, and the maker is not excused from the payment of assessments made afterwards. So that, by insisting upon payment of such an assessment the company is only enforcing its contract right against the insured, irrespective of whether the insurance remains in force or not, and it waives nothing.

But the plaintiff attempts to meet this doctrine by saying that it does not apply to this case. Here, so it is said, there was no premium note of Eben Smith. He was not a member of the defendant company. He was under no contract obligation to pay any assessment upon any note. And knowing these facts, the company by making and collecting the assessment recognized him as being insured under the policy, and thus waived the forfeiture.

But we think this contention loses sight of the real character of the defendant's act. Since the defendant had no authority to make an assessment except upon a premium note, it must be presumed that it made the assessment as upon the premium note. In fact it is said in the agreed statement that the assessment was "upon said premium note." The defendant treated the note, as both parties had treated it since the death of Mrs. Smith, as a valid, subsisting obligation. It could not have been intended to make any claim upon Eben Smith except on account of that note, and it must have been so understood by him. There is no question but that the assessment was made on account of the note, and when Smith paid it he did so because of the note. So far as Eben Smith is concerned therefore, it is the same as if it had been his note, and the case falls within the doctrine of *Knowlton* v. *Ins. Co.*, supra.

Accordingly we conclude that the policy was void at the time the loss occurred, and that the defendant is not estopped to set up this defense, and has not waived it.

Judgment for defendant.

In Equity.

L. O. ANDERSON *vs.* SAMUEL M. GILE.

Piscataquis. Opinion November 12, 1910.

Trusts. Resulting Trust. Payment by Cestui Que Trust. Implied Trust in Land. Evidence.

In order for a resulting trust in land to arise when the purchase money is paid by one person out of his own money and the land is conveyed to another, the money may be paid by the cestui que trust himself, by another for him, or for him by the trustee, but it must belong to the cestui que trust in specie, or by its payment by another he must incur an obligation to repay, so that the consideration actually moved from him at the time.

The establishment of a trust in land by implication of law being in defiance of the statute of frauds, and subversive of paper title, the trust must be proved by the most satisfactory and convincing evidence.

In a suit to establish a resulting trust in land purchased by the defendant, evidence *held* not to show any legal liability of plaintiff for the consideration of the deed made by defendant; and hence not sufficient to establish the trust.

In equity. On appeal by defendant. Sustained. Decree reversed.

Bill in equity praying that it be decreed that certain real estate purchased and held by the defendant, was held in trust for the plaintiff and that the defendant be ordered to convey the same to the plaintiff upon payment of the amount due thereon. An answer and a replication were filed. Heard before the Justice of the first instance on bill, answer, replication and proof, who filed a decree in favor of the plaintiff. The defendant duly appealed to the Law Court.

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

J. S. Williams, for defendant.

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

SPEAR, J. This is a bill in equity praying the court to declare that a certain transaction between the plaintiff and the defendant in consequence of which the defendant purchased a certain tract of land, operated in establishing a resulting trust in favor of the plaintiff. The presiding Justice found the law and facts in favor of the plaintiff. As the case must therefore be analyzed from the standpoint of the plaintiff's evidence, we take the statement of the case verbatim from the plaintiff's brief, which is as follows:

"The plaintiff in his bill alleges that he owned in fee simple certain real estate situate in Monson in the County of Piscataquis; that on the 8th day of May, 1886, this real estate was conveyed in mortgage to the Piscataquis Savings Bank to secure a note in the sum of $422.80; that in said mortgage there were two tracts of land, one known as the Draper farm, the other known as the Seventy-acre lot; that Anderson paid his interest upon said mortgage debt regularly up to about the year 1902, and on the 12th day of December, 1902, the Savings Bank gave notice to foreclose said mortgage; that this notice was printed in the Piscataquis Observer; that the time of redemption upon said mortgage expired on the 18th day of December, 1903; that some time after said notice had been given to foreclose said mortgage the plaintiff learned that fact and went and saw the officers of said bank in regard to said mortgage; that the officers of said bank told said plaintiff that he could have said real estate and would make arrangement with him in regard to the same; that said Anderson in the fall and winter of 1905-6 was at work for said Gile in cutting, yarding and hauling logs and other kinds of lumber; that in the spring of 1906 said Gile was where said Anderson was at work and Anderson told Gile in regard to the mortgage which he had given to the Savings Bank on the land in Monson, being the old farm where he formerly lived, and he asked him if he would not buy from the bank said real estate and pay for it for him, and that if he would buy it from the bank, and pay for it he would pay Gile what he had to pay the bank for said real estate; and that soon after said Gile and said Anderson

went over the land and said Gile agreed with said Anderson that he would buy said real estate from said bank for him, and could have said land for such price as said Gile paid said bank for said land."

But two questions arise in this case: (1) Whether under the laws of this State a resulting trust can be created with respect to lands, and (2) Whether the facts in this case are sufficient to establish a resulting trust as claimed by the plaintiff. The first question has been definitely settled in *Herlihy* v. *Coney*, 99 Maine, 469. In the opinion of the court in this case is fully stated the grounds upon which a resulting trust may arise by implication of law as follows:

"A resulting trust arises by implication of law when the purchase money is paid by one person out of his own money, and the land is conveyed to another. *Baker* v. *Vining*, 30 Maine, 121; *Stevens* v. *Stevens*, 70 Maine, 92. It may be paid by the cestui que trust himself. It may be paid by another for him. It may be paid for him by the trustee. *Page* v. *Page*, 8 N. H. 187; *Boyd* v. *McLean*, 1 Johns. Ch. 582; *Kendall* v. *Mann*, 11 Allen, 15. But the money must belong to the cestui que trust in specie, or by its payment by the hands of another he must incur an obligation to repay, so that the consideration actually moves from him at the time. He may take money from his purse, or he may borrow it, and he may borrow it from the trustee. And if the lender pays the money borrowed for the borrower, the borrower pays it. The test is whose money pays the consideration for the purchase. The trust arises from the circumstance that the money of the real purchaser and not that of the grantee of the deed formed the consideration of the purchase. The plaintiff says the money was a loan to him. If by force of the loan the borrower became bound by law to repay, then a resulting trust arose, even if the money did not pass through the plaintiff's hands. And from the use of the term "loan" in its ordinary signification, the law implies a promise to repay. And if the cestui que trust is bound to repay, it matters not whether it is by implied or by express promise."

It is evident from this quotation that the evidence must establish the fact that the money with which the land is purchased belonged to

the cestui que trust. It is also apparent that the test of ownership of the money advanced is the legal liability of the cestui que trust to repay it. It is not contended in this case that the plaintiff advanced any money for the purchase of the land in question. The only issue then is, are the facts, considered in the most favorable light for the plaintiff, sufficient to warrant the conclusion that the defendant loaned to the plaintiff the money advanced for the purchase of the land.

As a legal proposition we think it will not be denied by the plaintiff that the attempt to establish a trust in lands by implication of law is in defiance of the statute of frauds, subversive of paper title and must be proven by the most satisfactory and convincing evidence. In *Baker* v. *Vining*, 30 Maine, 124, the court intimate that were the question a new one the establishment of a resulting trust in lands in favor of the one who advanced the purchase money might be denied. The opinion further says quoting Chancellor Kent: "The cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof as tending to perjury and insecurity of paper title, and they have required the payment by the cestui que trust to be clearly proved." Then speaking for our own court the opinion further says: "This court have manifested a regret that long practice had established the doctrine, and have felt the necessity of requiring full and convincing proof of payment, as the basis of a resulting trust, in favor of one making it against the person having the legal title." In *Buck* v. *Fife*, 11 Maine, page 9, our court seemed to have passed for the first time upon this question and with reluctance adopted the doctrine laid down in *Boyd* v. *McLean* by Chancellor Kent saying that "although he admits that such evidence may be dangerous in its consequences, he felt himself constrained to come to the conclusion that such proof was admissible in courts of equity. The Chancellor examined the cases with his usual ability, and without going over the same ground, which we cannot regard as necessary, we find ourselves compelled by the weight of authority to adopt the same opinion, however distrustful of its policy." In *Dudley* v. *Bachelder*, 53 Maine, 403, it is said: "Courts are stringent in the requirement of unquestion-

able evidence to establish implied or resulting trusts." See also *Burleigh* v. *White*, 64 Maine, 23, in which the court reiterates its adherence to the rigid rule of proof required in this class of cases, saying: "Nor are we inclined to relax in any degree the rule adverted to in most cases, that in order to establish a resulting trust by parol evidence, the proof must be full, clear and convincing. Obviously a claim so inconsistent with the tenor and ordinary effect of deeds conveying real estate ought not to be allowed except upon proof sufficient to satisfy a reasonable mind of its validity." 3 Pomroy, page 1999, sec. 1040, (third edition), summarizes the question of proof in this class of cases as follows: "It is settled by complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of a payment by the alleged beneficiary beyond a doubt."

In view of these rigid rules of evidence in proving the existence of a trust by implication of law, is the plaintiff's evidence, regardless of the opposing evidence of the defendant, sufficient to establish, at the time the plaintiff alleges the defendant agreed to purchase the land in question for him, a loan from the defendant which could be legally enforced? We are compelled to the conclusion that this evidence does not quite meet the high degree of proof required. In the first place the circumstances surrounding the transaction have no particular probative force in favor of the plaintiff's contention or in support of his testimony. It is evident that the plaintiff made no effort to redeem this property from foreclosure and none for two or more years afterwards to raise the amount due the bank for which the bank was willing at any time to transfer it to him. It also appears that the first conversation with reference to the purchase of this property by the defendant arose by way of a casual talk in regard to the matter.

Nor does the testimony itself relating to the question of a loan of the money by the defendant to the plaintiff, all of which will appear in the following quotation, in the opinion of the court, furnish the proof required to establish a loan. The testimony introduced upon this point was as follows: Q. Now when you were at work there for Mr. Gile, did you say anything to him about the old farm? A.

Yes, sir, I told him to go and buy it for me, and he went down afterwards. Q. What did he say, did you see him afterwards? A. He was gone, and he went to the bank and buy that farm, buy it for me. I tell him to buy it for me. Q. You asked him to buy it for you? A. Yes, sir. Q. What did he say? A. He said he should do it, he should go and see and try to get it for me. Q. He said he would go and try and get it for you? A. Yes, sir. Q. After he told you that did he see you again? A. He saw me after he bought it again, and tell me "I bought that farm now." Q. What did he tell you then? A. Well, He tell me I cannot have it. Q. After he got the deed he told you you could not have it? A. Yes, sir. Q. Now at the time you asked him to buy it for you, did you know about the 70 acres being in? A. No, I did not know anything about that at all; I forgot all about it. Q. At that time? A. Yes, at that time. Q. At the time you asked him to buy it for you, did you tell him you would pay him for it what he paid? A. Yes, sir. Q. At that time did he say to you he would go to the bank and get it? A. Yes, he went to the bank to get it and pay for it there. Gile he came back, and he say he keep it himself. On cross-examination the testimony upon this point is as follows: Q. Did you ever give Mr. Gile any note? A. No. Q. Did you ever give him any security for this money that you said he paid for the place? A. No, I never gave him no money. Q. Did you ever become liable to him in any way for the amount he paid to the bank for that place? Mr. Hudson. "I object to that in that form." The Court: "That is a question of law, I exclude it. There is no claim in the bill of any note or any writing, so you need not disprove what they have not alleged." Henry Hudson testified that in conversation with Mr. Gile he did not deny that he purchased the farm for the plaintiff. Albert W. Chapin said that Gile said that Anderson got him to take up the mortgage from the Savings Bank. This is all the direct evidence we are able to find in this case on the part of the plaintiff, tending to establish a loan from the defendant to the plaintiff. It will undoubtedly be conceded that in order to establish a loan it is incumbent upon the plaintiff to prove a contract, that is, an agree-

ment between the plaintiff and the defendant whereby the plaintiff understood that he was receiving a loan of money from the defendant and whereby the defendant understood, or ought to have understood, that he was making a loan to the plaintiff. Upon the plaintiff's own evidence we are unable to find that the defendant understood, or ought to have understood, that he was making a loan. He received no note; he received no writing; he received no security; he paid no money to the plaintiff; he received no promise from the plaintiff to pay for money advanced to him; the plaintiff was not present when the money was paid over; it was the defendant's own money and never went into the hands of the plaintiff; no time was fixed for payment. The plaintiff's only reference to the payment for the money advanced by the defendant for the farm is found in a categorical answer to the following leading question: Q. At the time you asked him to buy it for you, did you tell him you would pay him for it what he paid? A. Yes, sir. This question was put by the plaintiff's attorney and contains the gist of this whole transaction, from the standpoint of the plaintiff's contention in the case at the time of the trial, although perhaps not from the standpoint of his contention in his argument before the court. At that time the case seems to have proceeded upon the ground of a contract on the part of the defendant to purchase the place for the plaintiff, allowing the plaintiff at some future time to pay the defendant the amount advanced. But such a contract as this cannot be made the basis of a trust in land by implication of law. The money advanced to create such a trust must have belonged to this plaintiff at the time it was advanced. Therefore, the plaintiff's argument seems to be based upon a theory different from that upon which the case was tried. As this question and answer constitute the only reference to payment to the defendant, they become very important in determining the real transaction. Let us then analyze the question, as the answer is simply a categorical affirmative. The question contains this language: "At the time you asked him to *buy it* for you." *It* refers to the farm. This language given its plain and ordinary meaning would convey to the mind of the ordinary reasonable person the impression that the defend-

ant was asked to buy the farm for the plaintiff. The question then proceeds: "Did you tell him you would pay him *for it* what he paid?" Again the ordinary meaning of this language can convey to the reasonable mind only one impression and that is, that the plaintiff would pay the defendant "for it," the farm, what he paid. In this question and answer we are unable to discover a single element of loan, or hiring money, or an agreement to let money, or a promise to pay money. This question and answer then, if given full weight, instead of showing an implied promise to pay a loan, is rather evidence of an express promise to pay for the farm, at some time, what the defendant had paid for it.

That the defendant, in this loose manner, without note, writing, promise to pay in specie, or time of payment fixed, understood that he was making a loan, cannot, under the strict rule of proof required in this class of cases, be fairly inferred from the evidence. A contract to purchase the place for the defendant would seem more nearly to fill the intent of the transaction. By an allusion to the statement of the case it will be seen that the plaintiff's own version of the transaction herein involved is in perfect harmony with the analysis of the above question and answer. The last sentence of the statement is as follows: "And that soon after said Gile and said Anderson went over the land and said Gile agreed with said Anderson that he would buy said real estate from said bank *for him* and he could have said land for such price as said Gile paid said bank for said land." This states an entirely different ground from that upon which the plaintiff seeks to recover and one which we believe no court has ever found to be sufficient proof for the basis of a resulting trust.

Now adverting to the test, that legal liability of the cestui que trust for the consideration of the deed determines the character of the conveyance, what can be found in the plaintiff's evidence which tends to establish his legal liability for the money advanced by the defendant for the land in question? He gave no note, he gave no writing, he furnished no security, he made no promises to repay. He simply said he would pay for the farm what the defendant paid for it, which, in the common and ordinary meaning of the language,

would be a verbal agreement to buy the farm of the defendant and pay him a certain price. If this agreement had been put in writing it might suggest, at least, a trust within the statute. In view of this evidence, suppose the farm had depreciated so that it was actually worth much less than the amount paid for it, and that the defendant, at the time this bill was brought, had instituted an action at law against the plaintiff for the recovery of the money invested in the farm, can there be found, even in the plaintiff's testimony, a contract or promise upon which such action could be sustained? We are unable to discover it. It therefore follows that the test which it is incumbent upon the plaintiff to prove in order to sustain his bill, has failed.

But of course the case does not stop with the plaintiff's evidence. The defendant specifically denies that he ever at any time told Mr. Anderson that he would buy the property for him or that he would loan money to him to buy it. The defendant further said in response to questions that he never had any evidence of indebtedness or anything, by which he could recover of Mr. Anderson if he did not take the farm. It seems to us it would be crossing the border line to declare, upon the evidence in this case, that the doctrine of the statute of frauds can be avoided and the force of a deed effaced. If so, if one should stand by and see his neighbor buy a piece of real estate, which in a year or two had rapidly advanced in value, and conclude that he would like to have the benefit of such purchase, it would only be necessary for him to say that the purchaser agreed to buy the property for him upon his promise to pay, at some future date, the original purchase price. It is the opinion of the court that specific proof of the facts upon which to base a trust by implication of law, is wanting in this case.

Appeal sustained. Decree reversed.
Bill dismissed with costs.

HARRY M. TAYLOR *vs.* MORGAN & COMPANY.

Cumberland. Opinion November 21, 1910.

Review. Judgment by Default. Reopening. Burden of Proof. Discretion as to Review. Revised Statutes, chapter 83, section 79; chapter 91, section 1, clause VII.

Revised Statutes, chapter 91, section 1, clause VII, provides as follows: "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice had not been done, and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment." *Held:* That this clause cast upon a petitioner seeking a review thereunder, in an action in which he was defaulted and judgment was rendered against him, the burden of negativing negligence on the part of himself and of his attorney and that the burden was not sustained, it not affirmatively appearing that the judgment was rendered without the negligence of the attorney employed by the petitioner, and the negligence of the attorney, unexplained, was the negligence of the petitioner.

Each petition for review is addressed to the sound discretion of the court, and must rest upon its own proven facts.

On report. Petition denied.

Petition for review of an action of assumpsit brought by Morgan & Company, a corporation, against the petitioner and in which he was defaulted and judgment was rendered against him for $184.85. The defendant filed an answer. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

NOTE. The plaintiff's attorney in the case at bar is not the attorney employed by him to defend in the action brought against him by Morgan & Company.

Michael T. O'Brien, for plaintiff.

William H. Gulliver, for defendant.

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

CORNISH, J. The facts are these.

On March 24, 1909, Morgan & Co. brought suit against Harry M. Taylor, the now petitioner for review, returnable at the May term, 1909, of the Superior Court for Cumberland County. The attachment of personal property made in this suit was vacated before entry, by the defendant giving bond with sureties under R. S., ch. 83, sec. 79. No appearance was entered for the defendant in the Superior Court and judgment was rendered for the plaintiffs Morgan & Co. by default, on June 4, 1909, for $184.85.

On April 15, 1909, Taylor was adjudged bankrupt upon involuntary proceedings in the United States District Court and a composition settlement was confirmed on June 5, 1909. Morgan & Co. were included in the list of creditors but did not appear and file proof of their claim. Taylor employed an attorney in his bankruptcy proceedings and instructed him to enter his appearance in that case and to protect his interests. The attorney assured him that he would, but failed to do so. The plaintiff's attorney also called Taylor's attention to the case after it was entered in court and before judgment and suggested that he see his attorney in relation to it as he was going on with the matter if it was not attended to. Taylor says that he subsequently interviewed his attorney and told him again to look after the matter and "see what the trouble was," which the attorney promised to do. It further appears that during the pendency of the suit several interviews took place between the attorneys of the two parties in which was discussed the question whether the bankruptcy of Taylor relieved the sureties on the attachment bond. Whether Taylor's attorney came to the conclusion that this was the legal consequence and therefore thought it useless to enter his appearance in the suit and suggest the bankruptcy of the defendant, there being no controversy as to the debt itself or its amount, or whether he simply neglected to do so does not appear. The attorney was not called as a witness in these proceedings. His explanation we are deprived of. We do not know whether it was a mistake or

neglect on his part, or whether he intentionally refrained from appearing because of his opinion of the legal rights of the parties. We are left simply with the facts that Taylor employed an attorney to defend the suit and the attorney failed to do so. This is not adequate proof to give the petitioner relief under R. S., ch. 91, sec. 1, cl. VII, viz. "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done and that a further hearing would be just and equitable." This clause casts upon the petitioner the burden of negativing negligence on the part of himself and of his attorney and that burden is not sustained. It does not affirmatively appear that this judgment was rendered without the negligence of the attorney, and his negligence unexplained is the negligence of the client. True, such apparent neglect on the part of the attorney may arise through such a mistaken belief as to what has been done by himself or others as to bring a given case within the terms of the statute, as in *Shurtleff* v. *Thompson*, 63 Maine, 118; *Sherman* v. *Ward*, 73 Maine, 29, and *Grant* v. *Spear*, 105 Maine, 508; or it may not, as in the somewhat analogous proceeding in *Beale* v. *Swasey*, 106 Maine, 35. Each petition for review is addressed to the sound discretion of the court and must rest upon its own proven facts. The evidence adduced in the one at bar is wholly inadequate to bring the case within the purview of the statute and to secure the relief prayed for. We reach this conclusion with less reluctance because the judgment is admitted to be just and the re-opening of the case would serve simply to deprive the plaintiff of a portion at least of his honest claim.

Petition denied with costs for respondent.

MARTHA H. PAINE *vs.* OMAR J. FOLSOM.

Piscataquis. Opinion November 21, 1910.

Courts. Probate Court. Jurisdiction. Insane Persons. Guardianship. Revised Statutes, chapter 69, sections 4, 5; chapter 144, sections 15, 16, 17.

Probate Courts, being wholly creatures of the legislature and tribunals of special and limited jurisdiction only, if the preliminary requisites and the course of proceedings prescribed by law are not complied with, jurisdiction does not attach, and the decree rendered is not merely voidable, but void.

Revised Statutes, chapter 69, section 4, provides that the judge of probate may appoint guardians for an insane person on written application of the municipal officers of the town where he resides. Section 5 provides that guardians may be appointed on application, as aforesaid, for persons certified by the municipal officers of any town to have been committed by them or their predecessors to an insane hospital. *Held:* that in an application under section 5 by municipal officers of a town, the proceedings were not in compliance with the statute, where there was no certificate of such officers that the insane person had been committed "by them or their predecessors," and the application merely alleged that such person had "recently been duly committed to and is now in the asylum at Augusta."

Under an application for appointment of guardian for an insane person under Revised Statutes, chapter 69, section 5, the court did not acquire jurisdiction where no notice was given either by the municipal officers prior to the application or by the judge of probate subsequently; personal notice being required, independent of statute, before one can be deprived of his liberty or property.

It is inconsistent with the commonly accepted ideas of personal rights that the entire estate of a citizen can be taken from him and committed to another upon an ex parte proceeding.

Personal rights cannot be too far abridged even by statutory enactments.

On agreed statement of facts. Judgment for plaintiff.

Trover to recover the value of certain personal property alleged to have been converted by the defendant. Plea, the general issue with brief statement as follows: "And for brief statement defendant further says: That whatever of the goods and chattels of the

plaintiff he has in his possession he has and holds by virtue of being guardian of the said plaintiff, duly and legally appointed by the Probate Court of Piscataquis County and that he has given bond for the performance of said trust." An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

C. W. Brown, for plaintiff.

R. E. Hall, for defendant.

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

CORNISH, J. Action of trover to recover the value of certain personal property in the possession of the defendant, who admits the possession but justifies as guardian of the plaintiff, duly appointed by the Judge of Probate of Piscataquis County. The plaintiff attacks the validity of the appointment. The basis of the attack is want of jurisdiction, not in the subject matter but in the course of the proceedings, rendering the decree of appointment not merely voidable, but void, and therefore open to collateral impeachment under the doctrine of *Tuber* v. *Douglass*, 101 Maine, 363, where this court says: "Courts of probate are wholly creatures of the legislature and are tribunals of special and limited jurisdiction only. It is true that when its proceedings have all been regular with respect to any matter within the authority conferred upon it by law, the decrees of the Probate Court when not appealed from are conclusive upon all persons, and cannot be collaterally impeached. It is equally well settled in this state that jurisdiction of the subject matter alone is not sufficient to establish the validity of its decree. If the preliminary requisites and the course of proceedings prescribed by law are not complied with jurisdiction does not attach and the decree will be, not voidable merely, but void. The petition to this court is the foundation upon which to base its jurisdiction and it must allege sufficient facts to show the authority and power of the court to make the decree prayed for. The record of its proceedings must show its jurisdiction."

The proceedings in this case were instituted under R. S., ch. 69, secs. 4 and 5. Section 4, provides among other things, that the Judge of Probate may appoint guardians for insane persons on written application of any of their friends, relatives or creditors, or of the municipal officers or overseers of the poor of the town where they reside. Then follows the section which is under consideration, viz.

Section 5. "Guardians may be appointed on application as aforesaid for persons certified by the municipal officers of any town to have been committed by them or their predecessors to either insane hospital and there remaining upon proof of the facts after personal notice to the parties. In all cases where the municipal officers or overseers of the poor are applicants, if they have given at least fourteen days notice to such person by serving him with a copy of their application, the judge may adjudicate thereon without further notice or may order such notice, if any, as he thinks reasonable."

The application here was made by the municipal officers of the town of Abbot and recites that "Martha H. Paine, a resident of said Abbot is a person of unsound mind, who by reason of infirmity and mental incapacity is incompetent to manage her own estate, and to protect her rights, and they allege and say that said Martha H. Paine has recently been duly committed to and is now confined in the asylum for the insane in Augusta &c." Upon this application without any notice whatever to the party, the appointment was made.

It is evident that the statutory requirements were not complied with and that the appointment was void.

If the first part of section 5 could be held to include applications made by municipal officers as well as by friends, relatives or creditors, which is doubtful, the necessary jurisdictional facts do not appear here. There is no certificate of the municipal officers that Martha H. Paine had been committed "by them or their predecessors." Assuming that an application by the municipal officers reciting all the jurisdictional facts might obviate the necessity of an independent certificate restating the same facts, still this application

is insufficient. It merely alleges that she has "recently been duly committed to and is now in the asylum at Augusta." By whom was she committed? The application is silent on this point. It may have been by the municipal officers of another town, R. S., chapter 144, sec. 16; it may have been by order of the Supreme Judicial Court, for observation, under R. S., chapter 138, section 1, or by her parents under R. S., chapter 144, sec. 15, if she was a minor at the date of commitment. That she had been "duly committed" does not fulfill the statutory requirement that she has been committed "by them or their predecessors." This statutory provision evidently has in view the public record of commitment required to be kept by municipal officers under R. S., ch. 144, sec. 16.

If the procedure falls within the second part of section 5 of chapter 69, as would seem to be the case, it is equally inadequate because no notice was given either by the municipal officers prior to the application or by the Judge of Probate subsequently. The voluntary transfer of one's property should not be accomplished without actual notice to the owner even though such owner be confined in an insane asylum. It is common knowledge that many such inmates, while irrational upon certain subjects, are rational upon others, and that notwithstanding their mental aberrations they may have strong feelings and sane opinions as to who their guardian should or should not be, feelings and opinions that ought properly to be considered by the court having the matter in charge. *Allis* v. *Morton*, 4 Gray, 63. The principles of the common law as well as the dictates of natural justice militate against such procedure even though sanctioned by statute. *Chase* v. *Hathaway*, 14 Mass. 222; *Hathaway* v. *Clark*, 5 Pick. 490; *Holman* v. *Holman*, 80 Maine, 139. It opens the door to injustice and even fraud. Under R. S., ch. 144, secs. 16 and 17, a person cannot now be committed to the insane hospital, except a minor committed by the parent or guardian, without an inquisition and examination by the municipal officers, after at least twenty-four hours actual notice to the person alleged to be insane. But the requirement of even this notice was not made until the passage of chapter 1 of the Public

Laws of 1903, evidently resulting from the decision of this court in *Holman* v. *Holman*, 80 Maine, 139. The same necessity that, independent of statute, requires personal notice before one can be deprived of his liberty, requires similar notice before one can be deprived of his property. It is inconsistent with the commonly accepted ideas of personal rights that the entire estate of a citizen can be taken from him and committed to another upon an ex parte proceeding. If notice was legally indispensable at the examination before the municipal officers, although no statute required it, *Holman* v. *Holman*, supra, it would seem no less indispensable upon the appointment of a guardian although a statute may permit it. Personal rights cannot be too far abridged even by statutory enactments.

These proceedings fail, under whichever provision of the statute they may be considered, and in accordance with the stipulation in the agreed statement of facts, the entry must be,

Judgment for plaintiff.
Case remanded to nisi prius for assessment of damages.

ALICE P. ANDERSON et als. *vs.* GEORGE EDWIN DYER et al.

Cumberland. Opinion November 25, 1910.

Easements. User. Right of Way. Prescription. Presumption.

1. A public right by user is not gained by an occasional use of a parcel of land twenty feet square for the more convenient turning of teams.
2. A public right of way over land is not gained by user unless the use was adverse, as of right, without permission of the owner.
3. There is no presumption that the use of land as a way by the public is without the permission of the owner. Such want of permission must be shown affirmatively by evidence from which it can be inferred.

On report. Judgment for defendants.

Action on the case to recover damages "caused by the alleged wrongful act of the defendants in erecting a fence and obstructing a certain right of way and easement, claimed to have been gained by the plaintiffs by prescription in common with the inhabitants and public at large of the city of Portland, by open, adverse and uninterrupted use of the same under claim of right for more than twenty years." Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

LeRoy L. Hight, and Robert Treat Whitehouse, for plaintiffs.

Charles J. Nichols, and Foster & Foster, for defendant.

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

EMERY, C. J. In the business district of Portland is a business square bounded on the four sides by business streets, viz.: Exchange, Milk, Market and Fore streets. This square is covered by buildings facing the street, except an open space or court in the rear of, and bounded by, the rear walls of the buildings, and also except a narrow passage into this open space from Market street. This open space

was not set apart for the common use of the owners or occupants of the various buildings bordering on it, but, as to the fee, was and is owned by different owners in severalty.

In 1878 Mrs. Carroll and Mrs. Day were the owners in common of several lots and buildings on this square which lots, each, included more or less of the above described open space or court in the rear of the buildings. They made a division of their property and in the division established over the lots a definite passage way from Market street, for the use of themselves, their heirs, assigns, tenants and occupants of the lands included in the division and for the use of all persons having business there with them.

As a result of this division, the defendants became the owners, through Mrs. Day, of a lot on Fore street upon which lot was and is a store extending from Fore street back to within about twenty feet of the rear line of the lot, so that in the rear of the store there was left of the lot a small, open space about twenty feet square. The plaintiffs are the owners of lots adjoining the defendants' lot and their lots are fully occupied by buildings extending back to the rear lines. As their title did not come to them under the Carroll-Day division, the plaintiffs have no right by grant in the passage way established in that division, but they and their predecessors in title had been wont for some years (less than twenty) to make use of the Carroll-Day passage way and also of the open part of the defendants' lot in the transportation of articles to and from their buildings. In 1906 the defendants fenced the open part of their lot and prevented the plaintiffs from making any further use of it. The plaintiffs thereupon brought this action to recover damages caused them by that obstruction.

The plaintiffs do not claim any right over this part of the defendants' lot by grant, nor any private right by prescription, and they concede the evidence would not support either such claim. They concede also there is not sufficient evidence to establish a dedication of the land to the public. They base their right of action solely on the proposition that the small open space on the defendants' lot in the rear of their store had become a public way by the use of it as a way by the public in the manner and for the time

requisite for making it a public way; and that they, the plaintiffs, have suffered special damage from its obstruction by the defendants. The burden is upon the plaintiffs to establish their proposition to the reasonable satisfaction of the court by a fair preponderance of legal and applicable evidence.

We do not think the plaintiffs have sustained their burden. There does not appear to have been any general use of the defendants' land by the public. There was no use of it as a thoroughfare. Indeed the whole open space or court in the rear of the various buildings was a cul de sac. There was no way through. Only persons having private business with the occupants of buildings abutting on that court, appear to have used it, and even that use was limited and intermittent. Further, the only use made by such persons of the small open space upon the defendants' land was momentary, for the more convenient turning of their teams. Still further, and finally, it does not appear that the use was not permissive, which is an essential element to be proved affirmatively. There is no evidence that the turning of teams was so frequent, or occupied so much space, as to injure the land or cause any interference with any use the owners had occasion to make of it; nor is there any evidence of any objection made by the owners or occupants. In the absence of such evidence we do not think it should be inferred from all the evidence that the use was adverse as of right and not permissive. *Mayberry* v. *Standish*, 56 Maine, 342, 353.

Judgment for the defendants.

PASCAL P. GILMORE, Treasurer of the State of Maine,

vs.

COUNTY OF PENOBSCOT.

Hancock. Opinion November 26, 1910.

Constitutional Law. Legislative Powers. Sheriffs. Executive Powers. Intoxicating Liquors. Officers Appointed by Governor. Constitution of Maine, Article IX, section 10. Statute, 1905, chapter 92, section 5; 1909, chapter 255, section 1. Revised Statutes, chapter 32, section 49; chapter 41, section 2.

1. A power long exercised by the legislature without question must be held to be within its constitutional powers unless plainly prohibited by some express provision of the constitution.
2. The constitution does not plainly prohibit the legislature from imposing upon a county the expense of enforcing the laws of the State within that county and the power to do so has been exercised so long without question, it must be held to be a constitutional power of the legislature, even if otherwise questionable.
3. The constitutional provision that sheriffs shall be elected by the people of their respective counties (Const. Art. IX, section 10) does not prohibit the legislature from authorizing the governor to appoint other officers with the powers of the sheriff for the enforcement of the laws of the State within the counties.
4. Executive officers necessarily have the power, so far as not limited by the constitution or statute, to determine when and in what locality within their jurisdiction there is need of the exercise of their powers for the enforcement of the laws. The people and local officers of that locality have no constitutional nor statutory right to be heard on that question.
5. Neither the Act of 1905, chapter 92, popularly known as the "Sturgis Law" and authorizing the appointment by the governor of special officers to enforce certain laws in any county, nor the Act of 1909, chapter 255, imposing upon the county the payment of the fees and expenses of such special officers in enforcing the laws in that county, violates any constitutional right of the county or its sheriff.

On agreed statement of facts. Judgment for plaintiff.

Action of debt brought against the County of Penobscot, in the name of the Treasurer of the State of Maine, for the benefit of the

State, under the provisions of section 5 of chapter 92 of the Public Laws of 1905 as amended by section 1 of chapter 255 of the Public Laws of 1909, to recover the sum of $7,171.78 paid by the State Treasurer for the services and expenses of the deputy enforcement commissioners, during the months August, September, October, November and December, 1909, in enforcing, in the cities and towns in Penobscot County, the law against the manufacture and sale of intoxicating liquors. Plea, the general issue. An agreed statement of facts was filed and the case reported to the Law Court with the stipulations that "if the section of the statute upon which plaintiff bases the right to recover is in violation of the provisions of the Constitution of the State of Maine, or if other sufficient defense in law exist, then plaintiff is to be nonsuited; otherwise judgment is to be entered for plaintiff in accordance with the demands of the writ."

The case is stated in the opinion.

Section 5 of chapter 92 of the Public Laws of 1905 as amended by section 1 of chapter 255 of the Public Laws of 1909, reads as follows:

"Section 5. It shall be the duty of the said deputy enforcement commissioners to exercise all the powers herein conferred when, where and as directed by said commission, and for their services they shall be paid three dollars per day and the actual expenses occasioned by the performance of such duty, and shall, at such time as may be fixed by the commission, present their accounts for approval and after approval the governor and council shall draw their warrant against any moneys in the treasury not otherwise appropriated, in payment thereof. The state auditor on or before the fifteenth day of each month shall notify the county commissioners of each county where the powers aforesaid are executed, of the sum paid by the state treasurer during the preceding calendar month for the services and expenses of said deputies in such county, and such sum shall be paid by the county treasurer of said county to the treasurer of state within thirty days after such notice is mailed. In case of failure to make such payment within said thirty days an action of debt may be maintained against said county in

the name of the treasurer of state, for the benefit of the state to recover said sum, or the amount payable as aforesaid may be deducted by the treasurer of state from any sum due from the state to such county."

Warren C. Philbrook, Attorney General, for plaintiff.

George E. Thompson, County Attorney, for defendant.

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

EMERY, C. J. By ch. 92 of the Public Laws of 1905 the Governor was authorized to appoint a commission of three persons to be known as enforcement Commissioners. They were empowered to appoint deputies with authority to exercise in any part of the State all the common law and statutory powers of Sheriffs in their respective counties in the enforcement of the laws against the manufacture and sale of intoxicating liquors. It was further provided in the Act that upon being satisfied that the local authorities failed to enforce such laws in any city or town in the State the Commissioners should instruct their deputies in the county to enforce those laws, and also might send deputies from other parts of the State for that purpose. By an amendatory Act, ch. 255 of the Public Laws of 1909, it was further provided that the deputies should be paid by the State a per diem compensation and their actual expenses while in the performance of their duties under the Act, and that the treasurer of the county in which the deputies exercised their powers under the statute should pay to the State Treasurer the sums so paid out to such deputies. In case such repayment was not made, the State Treasurer was authorized to recover the amount in action of debt in his name in behalf of the State against the county.

Under the statute cited, the Governor appointed three enforcement Commissioners who duly qualified. Being satisfied that the local authorities in Penobscot County were not enforcing the law, the Commissioners during the last five months of 1909 instructed their deputies to enforce there the law against the manufacture and sale of intoxicating liquors. The bills of the deputies for such

services were duly audited by the State Auditor and paid from the State treasury, and repayment thereof demanded from the treasurer of Penobscot County. The County Treasurer not complying with the demand, this action was brought by the State Treasurer against the county as provided in the statute.

No technical objections are made and it is admitted that the plaintiff is entitled to judgment for the amount claimed in the declaration if the legislature had the constitutional power to impose on the county the burden of paying for the services of those deputies in enforcing in the county the laws against the manufacture and sale of intoxicating liquors.

The legislature has so long, without objection, exercised the power of imposing on counties some part at least of the cost of enforcing the laws of the State within their limits, even by State officials, the constitutionality of the power must now be held established, even if ever questionable, there being no express prohibition thereof in the constitution. An illustration of the plenitude of this power is furnished by the case *Farwell* v. *Rockland*, 62 Maine, 296. The legislature had imposed upon the city of Rockland alone the burden of paying the salary of the judge of the police court established in that city, though established there for the whole county of Knox. An action by the judge against the city for his salary was sustained. The analogy is evident. True, at that time police judges were to be elected by the people of the town in which the court was established, but they were, none the less, State officers. *Andrews* v. *King*, 77 Maine, 230. The subsequent change in the constitution making such officials appointive by the Governor did not take away the power of the legislature to impose the payment of their salaries upon the town or county. That power long has been, and is being, freely exercised without objection on any constitutional grounds.

In the Matter of Bryant, 152 N. Y. 412, it was held that the constitutional provision that "it shall be the duty of the legislature at each session to make sufficient appropriations for the maintenance" of the militia, did not prohibit the legislature from imposing on counties the expense of maintaining armories within their limits, as had long been the custom.

But the counsel for the county contends that the legislature had no constitutional authority to create the office of enforcement Commissioners and deputies to be appointed by the Governor with the right to exercise any of the powers of sheriffs and deputies in Penobscot County, and hence could not require the county to pay the fees and expenses of the Commissioners' deputies for services within the county. The argument is, that by the constitution the sole authority to appoint sheriffs is vested in the people of the county and that it is a necessary inference from this constitutional provision that the legislature is debarred from creating any other office with any of the powers of a sheriff.

We do not think such an inference is necessary. That provision of the constitution does not in terms, nor by necessary implication, deprive the legislature of the inherent legislative power to provide additional instrumentalities for the enforcement of the State laws in any part of the State. It does not unmistakably show an intention to entrust the enforcement of the laws of the State exclusively to the sheriffs of the various counties, so that, if they neglect to enforce the laws, the laws cannot be enforced. On the contrary, the Governor still has the constitutional duty to "take care that the laws be faithfully executed." The legislature still has the constitutional power to provide him with efficient instrumentalities for the performance of that duty.

It has exercised that power for years without question in many other instances. It has authorized the appointment by the Governor of fish and game wardens with the powers of sheriffs for the enforcement of statutes for the protection of inland fish and game, R. S., ch. 32, sec. 49; also fish wardens with the powers of sheriffs for the enforcement of statutes relating to sea and shore fisheries, R. S., ch. 41, sec. 2. It has also long conferred upon the police and constables of cities and towns many of the powers of sheriffs for the enforcement of the laws of the State. It is too late now to question the power unless some provision of the constitution can be cited expressly forbidding. None has been cited and we find none. The statute in question does not operate to deprive the sheriff of

any right or authority vested in him by the constitution if any. He may still exercise them in all their fullness.

The counsel further contends that the legislature could not vest in the Commissioners the power to determine when and in what county their deputies should act; and still further contends that the provision in the statute that the Commissioners may so determine is unconstitutional, in that it does not provide a right and opportunity for the county to be heard upon the question whether there is occasion for such action. The argument is, that to authorize the Commissioners to mulct the county without notice and hearing because of supposed failure of duty on the part of its local officers, is contrary "to the law of the land." Neither of these contentions can be sustained as an effective defense to this action.

All executive officers charged with the enforcement of the laws necessarily have the power to determine when and where, within their jurisdiction, there is occasion for them to act in discharge of that duty. It was not necessary to provide in the statute, in order to make it constitutional, that the Commissioners should be satisfied of the failure of the local authorities before setting their own deputies in action. As heretofore stated, the legislature has the constitutional authority to provide the executive with instrumentalities for the enforcement of the laws throughout the State concurrently with, and independently of, the local authorities. It also has the constitutional power, as already stated, to impose on the county the cost of such enforcement within the county. No constitutional right of the county is infringed thereby. *A fortiori*, no such right is infringed by requiring a finding by the Commissioners of the fact of the failure of the local authorities before themselves proceeding to enforce the laws even though no notice is to be given the county.

No other objections to the constitutionality of the statute are suggested.

Judgment for the plaintiff's for the sums claimed in the declaration; the amount to be computed by the Clerk of Hancock County, and judgment entered there accordingly.

ELLEN B. DOTEN *vs.* CARROLL E. BARTLETT.

Androscoggin. Opinion December 7, 1910.

Easements. Ways of Necessity. Estoppel. Estopped by Deed.

The basis of a right of way of necessity is the presumption of a grant arising from the circumstances of the case, which is a presumption of fact, and necessity does not, of itself, create a right of way, but is evidence of the grantor's intent to convey one, which intent depends upon the terms of the deed and the facts in the case.

Where a deed of a tract of land not itself abutting on a highway expressly bounded the premises conveyed on the north by land owned by the grantees, which land on the north extended to a highway, so that the grantees would have access thereto from their newly purchased lot over their own land, and the necessity of passing over the grantor's land could not arise, the parties to the deed will not be deemed to have intended that the grantees should have a right of way of necessity by implication over the remaining tract belonging to the grantor, which lay between the tracts conveyed and the highway to the west.

The grantees having accepted the deed to the tract reciting their ownership of the land abutting it on the north, and having executed a mortgage on the premises to the grantor, containing a like recital, they are estopped to deny the truth of such recital, so as to claim a right of way of necessity over the grantor's land, it being precise, unambiguous, and relating to a material fact, especially where the title to the grantor's lot has come to an innocent purchaser, who by examination of the record could not have notice of an implied grant of a right of way over his land, but relying on the recitals could have reached only the opposite conclusion.

On report. Judgment for plaintiff.

Action of trespass quare clausum fregit. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court "to pass on the law and the facts and to assess the damages, if any, and especially to determine: 1. Whether the defendant has a right of way from the Lisbon road across the Doten field to the spring on his land. 2. Whether the defendant has been guilty of a technical trespass."

The case is stated in the opinion.

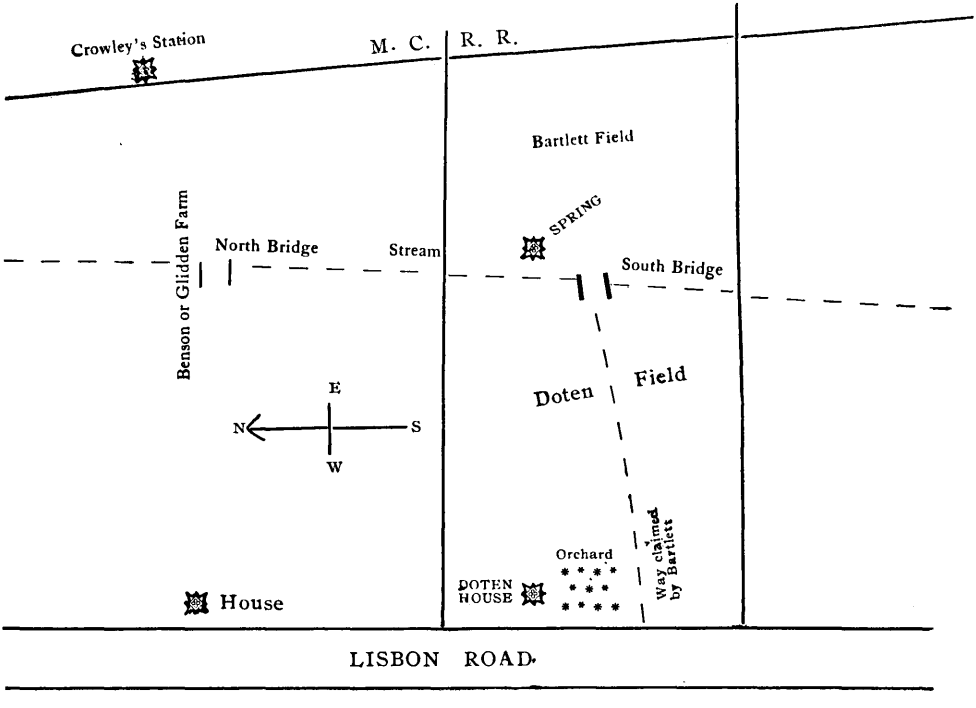
Newell & Skelton, for plaintiff.

McGillicuddy & Morey, for defendant.

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

CORNISH, J. The rights of the parties in this case depend upon the construction to be placed upon a deed from Amos D. Crowley to Arthur F. and Carroll E. Bartlett, dated May 11, 1903. This deed conveyed a rear lot, the grantor still retaining the front lot adjoining the Lisbon road. The plaintiff has succeeded to the title of Amos D. Crowley in the front lot and the defendant is now the sole owner of the lot in the rear. The defendant claims the right to cross the plaintiff's lot to reach the highway, under a right of way of necessity. The plaintiff denies this right and has brought this action of trespass to test the question.

The following diagram will aid in a clear understanding of the locus.



The history of the title so far as it is material to the issue is this: All the premises delineated on this plan were at one time owned by Amos D. Crowley, who on July 17, 1880, conveyed the north parcel marked "Benson or Glidden farm" to George H. Jordan. This land, as was the remaining land of Crowley, was bisected by No Name Pond Stream, and as there was then no bridge across this stream on this land conveyed, Crowley in this deed expressly granted to Jordan "the right to cross and recross on the bridge used by me across No Name Pond Stream in order that the said Jordan may get to land above conveyed that lies on the easterly side of said stream." The Crowley bridge was the south bridge marked on the plan. April 12, 1895, Emma F. Benson, the mother of Arthur F. and Carroll E. Bartlett, obtained title to the foregoing premises including the right of way over the Crowley or south bridge, and conveyed the same to one Glidden in August, 1909, reserving a narrow strip adjoining the Maine Central Railroad.

On May 11, 1903, eight years after Mrs. Benson had purchased the land on the north, Amos D. Crowley conveyed to the two sons, Arthur F. and Carroll E. Bartlett, the rear lot, marked "Bartlett field" on the plan, and the same was mortgaged back to Crowley as security for part payment of the purchase price. In this deed, which was accepted by the Bartletts, the northern boundary was given as follows: "Beginning on the easterly bank of No Name Pond Brook, so called, at the end of the fence dividing land of this grantor from land now owned by these grantees; thence running easterly along the lines of said fence to land of Maine Central Railroad Co.," etc. In the mortgage, which was executed by the Bartletts, the same boundary is given as follows: "Beginning on the easterly bank of No Name Pond Brook so called, at the end of the fence dividing land this day purchased of this grantee from land north of the same owned by these grantors, thence running easterly along the line of said fence," etc. As a matter of fact the title to the land on the north was not in the Bartletts but was still in their mother Mrs. Benson, who had moved to Lewiston leaving the sons in full occupation, and they continued to occupy the place until it was sold to Glidden in August, 1909. It also appears that prior

to this Bartlett deed, the north bridge had been built by them across the stream, connecting the rear and front lots of the Benson property, and that when the Bartlett deed was given the field conveyed was inaccessible except over lands of other parties.

The precise question involved is whether under the facts in this case the defendant as the now sole owner of the Bartlett field has a right of way of necessity over the intervening land of the original grantor Crowley, now owned by the plaintiff, in order to reach the highway. The defendant strenuously claims such a right, the plaintiff as strenuously denies it.

1. The basis of a right of way of necessity is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way but it is evidence of the grantor's intention to convey one. "Necessity is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as it does the way by grant, the only difference between the two is that the one is granted in express words and the other only by implication." *Nichols* v. *Luce*, 24 Pick. 102. As this court said in *Whitehouse* v. *Cummings*, 83 Maine, 91. "This species of right of way, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant indicative of the intention of the parties."

The presumption, however, is one of fact and whether or not the grant is to be implied in a given case depends upon the terms of the deed and the facts in that case. To illustrate; if property in land has been severed by voluntary deed or statutory conveyance and one portion is inaccessible except by passing over the other, or by trespassing on the lands of a stranger, and there is nothing in the deed indicating a contrary intention, a grant of a right of way of necessity is presumed between the parties, for it is not to be presumed that the parties intended the grantee to have no beneficial enjoyment of the estate. But we can conceive of a case where the owner of the front lot would be willing to convey the rear lot provided there should be no right of way over the front lot and the grantee would

be willing to take his chances of procuring an outlet over some other adjoining land. Under such circumstances the deed might convey the rear lot and distinctly recite that there was granted no right of way of necessity or otherwise over the front lot. There can be no doubt that in such a deed there would be no implied grant, and the grantee would acquire simply what he had purchased, the lot without the way.

The question then resolves itself into a construction of this deed, viewed in the light of the surrounding circumstances, on which side of the line does it fall? Did the parties intend that a right of way be granted or not? Clearly not. The deed expressly bounds the premises conveyed, on the north by land owned by the grantees. That northern land extended to the highway. Therefore the grantees could have access to the highway from their newly purchased lot over their own land and the necessity of passing over the land of the plaintiff could not arise, *Leonard* v. *Leonard*, 2 Allen, 543; For it must be necessity and not convenience, that furnishes a basis for the implication. *Warren* v. *Blake*, 54 Maine, 276; *Stevens* v. *Orr*, 69 Maine, 323; *Kingsley* v. *Land Improvement Co.*, 86 Maine, 279; *Hildreth* v. *Googins*, 91 Maine, 229.

2. The defendant, however, contends that this recital of ownership in the adjoining land was untrue, and that as a matter of fact the grantees had no right over any of the land surrounding the lot purchased unless it be a way of necessity over the grantor's land, and therefore the implication of such a grant should stand, notwithstanding the recital in the deed.

But the law will not permit the defendant to maintain this claim. He is estopped by the recitals in the deed which he accepted and under which he claims and in the mortgage which he himself executed and gave to the grantor. "Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting as against the other and his privies any right or title in derogation of the deed or from denying the truth of any material fact asserted in it." 16 Cyc. 685. To work such estoppel the recital must be precise, clear and unambiguous and must relate to a material fact. *Claflin* v. *Railroad Co.*, 157 Mass. 489. Where these requirements are met

the law will not permit one, who has in a solemn manner admitted a matter to be true, to allege it to be false. *Campbell* v. *Knight*, 24 Maine, 332.

The Bartletts admitted by the recitals in the deed and mortgage that they were owners of the adjoining lot. So far as they and all persons claiming under them are concerned, that statement must stand as an uncontrovertible fact, and whatever rights legitimately arise on such admitted facts may be at all times asserted. This recital of ownership overcame the presumption of a right of way of necessity and left the grantor Crowley in possession of the remainder of the lot free from such easement. He may well have relied upon it and understood that no such easement would or could ever be claimed. And the evidence in this case strengthens this view because the defendant admitted in the presence of several witnesses that when his brother and himself purchased the property, Crowley supposed that they "owned the other place." This supposition on his part they did not attempt to correct but on the other hand deliberately confirmed it by the statements in the deed and mortgage. It is too late for the defendant now to deny the truth of those recitals especially when the title to the Crowley lot has come to the plaintiff, an innocent purchaser, who by examination of the records could have had no notice of such an implied grant but relying on the recitals could have reached only the opposite conclusion.

Judgment for the plaintiff for one dollar damages and costs.

HARRY F. HIX et al. *vs.* THE EASTERN STEAMSHIP COMPANY.

Cumberland. Opinion December 7, 1910.

Common Carriers. Contract of Shipment. Limited Liability. Acceptance of Bill of Lading. Principal and Agent. Authority of Agent.

A carrier, in the absence of statute to the contrary, may, by special contract, limit its liability, at least, against all risks but its own negligence or misconduct.

Where a shipper for three years had been receiving bills of lading in the same form and terms as one in question, his knowledge of its terms, in the absence of fraud of the carrier, must be conclusively presumed, and he can not escape the presumption by not reading it.

Where the employee of shippers of horses had supervised several shipments for his employers and signed bills of lading in their name, and had given the duplicate bills to one of them, who had never repudiated the agency or questioned his authority to sign, the agent was held out to the carrier as authorized both to deliver the horses and to sign the bills, and could sign a bill of lading limiting the carrier's liability without express instructions, and where one of his employers received a duplicate bill so signed, and did not repudiate it, but retained it in his possession, he ratified the agent's act and was bound thereby.

On motion and exceptions by defendant. Exceptions sustained.

Action of assumpsit brought in the Superior Court, Cumberland County, to recover the sum of $148.00 for injuries alleged to have been sustained by the plaintiffs, by reason of the defendant's failure to transport, in a proper manner, safely and securely, one bay mare, which the plaintiffs delivered to the defendant at Boothbay Harbor, for transportation over one of the defendant's steamers to Portland. Plea, the general issue with brief statement alleging that at the time of the delivery of the horses by the plaintiffs to the defendant to be carried on its steamer to Portland, the plaintiffs "entered into a special contract with the defendant respecting the terms under which the carriage of said horses was to be performed," etc.

Verdict for plaintiffs for $168.63. The defendant filed a general motion for a new trial and also excepted to several rulings made during the trial. Motion not considered.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiffs.

Benjamin Thompson, for defendant.

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

CORNISH, J. This case is before the Law Court on motion and exceptions by defendant but it is only necessary to consider the exceptions.

On May 27, 1907, the plaintiff shipped from Boothbay Harbor to Portland on one of the defendant's line of steamers, two horses, one of which was injured in transit. The horses were delivered to the defendant, not by the plaintiffs in person but by one Reed, their employee, who at the time of delivery joined with the agent of the company in signing duplicate bills of lading, in the form "Eastern S. S. Co. by R. A. Lewis, Agent, and Hix & Clark by A. B. Reed." One of these bills was retained by the purser of the steamer and the other was taken by Reed and delivered to Mr. Hix. This bill of lading was designed to constitute a special contract between shipper and carrier limiting the responsibility of the carrier far within the bounds of its common law liability as an insurer, and imposing certain stipulated duties and obligations upon the shipper. The extent and scope of these modifications it is unnecessary to consider in this opinion any further than to say that they apparently were not designed to relieve the company from the results of its own negligence or that of its employees.

The plaintiffs contend that they are not bound by the contract signed by Reed as he had no authority to sign it in their name, that they never assented to or accepted its terms and that therefore the common law liability of the defendant remained unmodified. The presiding Justice against the written request of the defendant for instructions to the contrary, left the question of the existence or

non-existence of the special contract to the jury as a matter of fact, and then instructed them fully as to the common law liability of the defendant in the absence of any modifying contract, and its liability for want of due care merely if such contract had been made. The jury found for the plaintiff generally, and it is therefore impossible to ascertain whether the verdict is based upon a finding that the plaintiffs were not bound by the contract but could recover as at common law, or that they were bound by the contract but could recover by reason of the defendant's negligence. This was error. The jury should have been instructed as requested by the defendant "that the evidence in the case shows as a matter of law, that a contract was made between the plaintiffs and the defendant, by virtue of which the defendant's liability as carrier was limited," and then the case should have been submitted to the jury on the question of defendant's negligence.

No principle of law is now more firmly established than that a common carrier in the absence of any statute to the contrary, may by special contract limit its liability, at least against all risks but its own negligence or misconduct. *Fillebrown* v. *G. T. Ry. Co.*, 55 Maine, 462; *Morse* v. *Railway Co.*, 97 Maine, 77; *Gerry* v. *Amer. Exp. Co.*, 100 Maine, 519.

A careful examination of the undisputed facts in this case leads to the indisputable conclusion that a special contract was entered into between these parties and therefore the question of its existence or non-existence was one of law for the court and not of fact for the jury, a situation more likely to arise in commercial transactions than in cases of negligence. *Lasky* v. *R. R. Co.*, 83 Maine, 461-470; *Morey* v. *Milliken*, 86 Maine, 464. Mr. Hix, the active member of the plaintiff firm had been a dealer in horses at Rockland for fifteen or sixteen years with a sales stable at Boothbay Harbor in 1907. During the previous six or seven years he had made frequent shipments over the defendant's steamers, and in 1906 alone, had made five or six, with the number of horses each time varying from six to fourteen. The most of these shipments had been made by him personally, a few perhaps by his agents or employees. At every shipment during all these years a bill of lading in precisely

the same form and terms as the one in this case had been executed and accepted. It was his voucher for the property delivered to the carrier as well as the contract of carriage. His knowledge of its terms under such circumstances and in the absence of fraud on the part of the carrier, must be conclusively presumed. It was not within his power to escape this presumption by saying as he did at the trial, "They give me a bill of lading; I don't know as I paid much attention to them or any need to . . . I don't know as I ever read them through." The law does not permit either party to a written contract to so lightly evade its effect. As the Supreme Court of Massachusetts says in *Grace* v. *Adams*, 100 Mass. 505-507, "The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper."

In *Gerry* v. *Express Co.*, 100 Maine, 519, the same strict but healthy rule is adhered to in these words: "They cannot be permitted to say that, by their own inattention, they did not read the terms and conditions and thereby impose upon the defendant a greater liability than that expressed in the contract." The long and uniform course of business between the parties in the case at bar brings it clearly within the doctrine of these cases.

Nor is there force in the plaintiffs' contention that the bill of lading was signed by Reed without express authority from them. Express authority was unnecessary. Reed was their employee and agent. He had made several prior shipments for them, had signed bills of lading in their name, had given the duplicate bills to Mr. Hix, and the latter had neither repudiated his agency nor questioned his authority to sign. He therefore held out Reed to this defendant, as authorized both to deliver the horses and to sign the bills. On the day in question Hix wrote two tags and asked Reed to take the two horses to the boat but, as he says, did not give him any express instructions to sign any contract limiting liability. Such instructions were unnecessary. The former course of business between the parties had impliedly given Reed that authority and he proceeded to exercise it as before. He delivered the horses, signed the bill and brought back the duplicate so signed, to Hix who did not reject or repudiate it, but accepted it and retained it in his own possession or that of his attorney even down to the time it was produced as an exhibit at the trial. He thereby ratified and confirmed the acts of his agent and denial of agency and authority under such circumstances is futile, *Squire* v. *Railroad Co.*, 98 Mass. 247; *M. K. & T. Ry. Co.* v. *Patrick*, 144 Fed. Rep. 632.

The existence of the special modifying contract being thus indisputably established, the ruling of the presiding Judge in submitting that question to the jury was erroneous, as it gave the jury an opportunity to base the verdict for the plaintiff upon an untenable ground.

The entry must therefore be,

Exceptions sustained.

FRED RUSSELL

vs.

OXFORD COUNTY PATRONS OF HUSBANDRY MUTUAL FIRE INSURANCE COMPANY.

Somerset. Opinion December 12, 1910.

Contracts. Right of Action. Insurance. Mutual Fire Insurance. Premium Note and Policy. By-Laws. Cancellation of Contract. Statute, 1868, chapter 194; 1895, chapter 18. Revised Statutes, chapter 49, sections 27, 30.

One party to a bilateral contract cannot recover thereon against the other without proof that his mutual undertakings, which form a part of the contract, have been performed or waived.

The premium note given on a mutual fire insurance policy, though neither copied in full into the policy, nor written upon its margin, nor across its face, nor attached to it by slip or rider according to the statute relating to the form and use of the standard policy, forms a part of the contract of insurance under Revised Statutes, chapter 49, section 30, expressly providing that the policy and deposit note "are one contract," which statute, at least since the Revision of 1903, is in force equally with that relating to the form and use of the standard policy, being enacted by such Revision equally with the other provisions of chapter 49, relating to the standard policy.

That a mutual fire insurance company had a right of action against insured for an assessment would not relieve the insured of the necessity of performance of his part of the contract before he could sue thereon. A right of action to enforce performance is not an equivalent of performance.

A provision in the by-laws of a mutual fire insurance company, providing that if any member shall neglect or refuse for 60 days after notice of an assessment to pay it, he shall forfeit all claims upon the company for any loss thereafter occurring, is self-executing, and the cancellation of the contract by the company is unnecessary.

Though the by-laws of a mutual fire insurance company were not copied into the policy, nor written on its margin, nor across its face, nor upon a separate slip or rider attached thereto, yet where they were expressly referred to in the deposit note as an essential part of it, and the note was not only mentioned in the policy, but was a part of the contract of insurance by virtue of the express provisions of Revised Statutes, chapter 49, section 30, they formed a part of the contract of insurance, especially in so far as they related to assessment, and the effect of nonpayment thereof.

On report. Judgment for defendant.

Assumpsit on a policy of fire insurance—Maine standard form—dated August 17, 1906, and issued by the defendant to the plaintiff insuring his farm buildings to the amount of $800, for five years. The property insured was totally destroyed by fire June 3, 1909. It was admitted that proof of loss was duly made and that the defendant company waived its right to a reference as provided by the policy. 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 pleaded the said defendant company further says, that long prior to the date of the fire which destroyed the plaintiff's buildings, as alleged in his writ and declaration, there had been a breach of the contract of insurance as expressed in the policy so declared on in said writ, in that the plaintiff had failed to pay to said company assessments made against him, whereby his policy had become void, and said policy was at the date of said fire, and had been for a long time prior thereto, void on account of the failure of said plaintiff to fulfill his part of said contract, and that said plaintiff had notice that his said policy was void long prior to the date of the said alleged fire which destroyed his buildings."

At the conclusion of the evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Butler & Butler, for plaintiff.

James S. Wright, for defendant.

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

KING, J. This case is before the Law Court on report. August 17, 1906, the defendant issued to the plaintiff its policy of fire insurance in the standard form insuring his farm buildings to the amount of $800 for a period of five years. June 3, 1909, the property was destroyed by fire and this action is to recover the amount of the insurance.

The defendant is a domestic mutual fire insurance company and the policy in suit was issued in consideration that the plaintiff had deposited with the company his premium note for $40 as required by the following provisions of sec. 27, c. 49, R. S.:

"The insured, before receiving his policy, shall deposit his note for the sum determined by the directors which shall not be less than five per cent of the amount insured, and such part of it as the by-laws require, shall be immediately paid and indorsed thereon; and the remainder in such installments, as the directors from time to time require for the payment of losses and other expenses, to be assessed on all who are members when such losses or expenses happen, in proportion to the amounts of their notes."

In his premium note the plaintiff promised to pay the defendant forty dollars "in such installments and at such time or times as the Directors of said Company may, agreeably to their By-laws and the laws of the State, require."

Two dollars were paid and indorsed on the note at the time.

Article 9 of the defendant's by-laws is as follows: "In case of loss by fire, and of an assessment upon the deposit notes of the Company, it shall be the duty of the Secretary to give written notice to each member of the Company of such assessment, and the amount assessed upon his or her deposit note. And if any member of said Company, shall neglect or refuse, for the space of sixty days after said notice is given, to pay the amount of such assessment, such member thereby forfeits all claims upon the Company for any loss that he may sustain thereafter by fire in the property insured."

It is admitted that a copy of the by-laws was received by the plaintiff in the same envelope with his policy.

Nov. 10, 1908, an assessment of $2.80 was made against the plaintiff's note and written notice thereof was mailed to the plaintiff, which he claims not to have received. But on Dec. 31, 1908, a "second notice" of the same assessment was mailed to him which he admits he received in due course of mail. In that notice he was informed of the amount of the assessment, that it was "due and payable" that the "Time expires January 10, 1909," and that "Failure to pay this assessment suspends your policy." On Feb. 15, 1909,

the secretary of defendant sent to plaintiff by mail a letter, in which it was stated that two notices of an assessment of $2.80 on his premium note had been sent to him, that his policy had become void on account of his failure to pay the assessment, but that if the assessment was then paid the policy would be reinstated, and requesting his prompt attention "as your buildings are at your own risk till this assessment is paid." This letter was sent in an envelope on which was printed a request that it be returned if not called for in five days, and it was not returned, but the plaintiff claims he did not receive it. The assessment was not paid, and, as above noted, the loss did not occur till June 3, 1909. The foregoing states in substance the evidence presented. The only defense raised here is that the plaintiff's failure to pay the assessment of Nov. 10, 1908 is a bar to this action.

It is an elementary principle that one party to a bilateral contract cannot recover thereon against the other without proof that his mutual undertakings which form a part of the contract have been performed or waived. This principle is disputed nowhere; but there has been much difficulty found in some cases in ascertaining whether the covenants or promises of the parties were dependent and mutual or independent and collateral. In this case we are relieved of all difficulty in this regard, for it is expressly provided by statute (sec. 30, c. 49) that a policy of insurance, issued by a life, fire or marine insurance company, domestic or foreign, "and a deposit note given therefor, are one contract." The language of the original act, chap. 194, Laws of 1868, was that "the policy and note shall be treated as parts of the same contract." Previous to that enactment it had been held that the policy and note "were independent contracts." *N. E. M. Fire Ins. Co.* v. *Butler*, 34 Maine, 451. Hence, the manifest reason for the enactment was to supersede that decision by a statutory provision that thereafter the agreements of the parties, as contained in the policy on the one side, and the premium note on the other, should be treated as mutual and dependent undertakings constituting but one contract.

But the plaintiff contends that it would be a violation of the statute relating to the form and use of the standard policy to regard

the terms of the premium note as a part of the insurance contract since the note in full is neither copied into the policy, nor written upon its margin or across its face or attached to it by a slip or rider according to the requirements of that statute. A sufficient answer to this contention is, that under the express provision of sec. 30, c. 49, the policy and deposit note "are one contract," and effect must be given to this provision of the statute if it was in force at the time the contract was made. If it may have been a debatable question whether this provision (which is now sec. 30, c. 49) declaring that a policy and a deposit note are one contract was so far inconsistent with the provisions of the statute of 1895, establishing and requiring the use of a standard form of insurance policy, as to be repealed thereby, that question was entirely eliminated by the revision of the statutes in 1903 whereby sec. 30 was enacted equally with the other provisions of c. 49, relating to the form and use of the standard policy. The contract of insurance here in suit was made Aug. 17, 1906. By the express provisions of statute the plaintiff's premium note and the defendant's policy of insurance formed one contract. The promises and undertakings of the parties were mutual and dependent. The defendant's promise to indemnify the plaintiff for loss was dependent upon his promise specified in his note to pay the defendant the premium in such installments as its directors should require agreeably to its by-laws and the laws of the State. The plaintiff brings this action upon that contract. It is incumbent upon him to establish the fact that his undertakings under that contract had been performed or waived. This he has failed to do. The evidence clearly establishes that the directors of the defendant company made an assessment upon the plaintiff's premium note in accordance with the by-laws of the company and the laws of the State; that the plaintiff was properly and seasonably notified thereof and required to pay it, which he neglected and refused to do.

There is no sufficient evidence that the defendant waived the performance by the plaintiff of his undertakings under the contract, on the other hand it insisted upon it, and notified him that his failure to pay the assessment "suspends your policy."

Neither can the fact that the defendant had a right of action against the plaintiff for the assessment relieve him of the necessity of performance of his part of the mutual contract before he can maintain an action upon that contract. A right of action to enforce performance is not an equivalent of performance.

It is further suggested by the plaintiff that the defendant had not cancelled the policy in accordance with the terms thereof providing for cancellation. This suggestion does not, we think, reach the defect in the plaintiff's case—which is his failure to perform his part of the contract. But it was unnecessary for the defendant to prove that it had cancelled the contract. According to the express provisions of the by-laws of the defendant company (quoted above) the plaintiff's neglect and refusal to pay the assessment for the space of sixty days after notice thereof worked a forfeiture of any claim he might otherwise have against the company for any loss thereafter sustained. This provision for forfeiture was self executing. *Gifford* v. *Benefit Association*, 105 Maine, page 20. After the second notice of the assessment was given, which the plaintiff admits he received, more than 60 days elapsed before the loss occurred.

The plaintiff claims, however, that the by-laws were not a part of the contract of insurance. We think they were. True, they were not copied into the policy, nor written on its margin or across its face or upon a separate slip or rider attached thereto, and for this reason it may be said that they were not a part of the *policy*, but they were expressly referred to in the deposit note as an essential part of it, and that note was not only mentioned in the policy, but it was a part of the contract of insurance by virtue of an express provision of statute. In ascertaining the mutual and dependent agreements of the contract of insurance between the plaintiff and this defendant—a mutual domestic fire insurance company—of which he was a member, and to which he had given a deposit note under the requirements of the statute, promising therein to pay the premium for his insurance at such times and in such assessment as the directors should require "agreeably to their By-laws, and the laws of the state," the provisions of those by-laws, especially so far as they

relate to assessments and the effect of nonpayment thereof, are to be regarded as a part of the contract of insurance.

For the reasons above stated it is the opinion of the court that the plaintiff is not entitled to recover in this action.

Judgment for defendant.

HERMAN I. BERMAN

vs.

THE FRATERNITIES HEALTH AND ACCIDENT ASSOCIATION.

Androscoggin. Opinion December 13, 1910.

Insurance. Health Insurance. Action on Policy. False Answers. Forfeiture. "Waiver" of Forfeiture.

In an action on a policy of health insurance to recover sick benefits evidence *held* to show that plaintiff's answers to questions in the application as to his health for the last five years, as to his consulting physicians, and as to his having had certain diseases were not true, full, and complete, so as to work a forfeiture of the policy under a provision in the application, made a part of the policy that, if any of the statements, representations, or answers made in the application, were not "true, full, and complete," all rights to the benefits named in the policy should be void.

Under the provision as to the truth of insured's answer, truth in fact was required, and that an answer which was in fact untrue was given by him for the truth according to his belief or understanding could not avoid a forfeiture thereunder.

In an action to recover sick benefits under a policy of health and accident insurance, evidence *held* not to justify a finding that the insurer's agent at the time of making out the application knew the truth as to insured's previous good health, his consulting of physicians, and as to certain diseases which he had had, which insured misrepresented in his answers to questions in the application, so as to work an estoppel against the insurer to claim a forfeiture under a provision of the application, made a part of the policy that, if any of insured's statements in the application were not true, benefits under the policy should be forfeited.

A waiver is the voluntary relinquishment of some known right, benefit, or advantage which the party otherwise would have enjoyed, it being essentially a matter of intent, and, when the only proof of that intent rests in what a party does or forbears to do, his acts or omissions should be so manifestly indicative of an intent to voluntarily relinquish a then known particular right or benefit that no other reasonable explanation is possible, full knowledge of all the material facts that establish such right being necessary, and so that, where a health policy provided that the insured should pay in advance without notice his specified assessments, the insurer, which had no information of facts, establishing a forfeiture of the policy except what it had acquired from its investigations, after his proof of claim for benefits was presented, and which turned the claim over to its attorney for investigation, did not waive the forfeiture by receiving in the ordinary course of business, and receipting for, two monthly assessments during the period of the investigation, and before all the material facts had been acquired, showing that the insured's answers in his application were untrue, insured knowing when he voluntarily made the payments that his claim had been turned over to the company's attorney.

On exceptions by plaintiff. Overruled.

Action of assumpsit brought to recover the sum of $167 as sick benefits under a policy of insurance issued to the plaintiff by the defendant. Plea, the general issue with brief statement as follows: "That by the terms of the contract in suit, if any of the statements, representations or answers made in the application for said contract were not true, full and complete, all rights to benefits thereunder were null and void; and the defendant says that the answers to the first, second, third, fourth, eighth and ninth questions contained in the application for said contract were not true, full and complete;

"That further, by the terms of the contract in suit, attempts by fraud or concealment to obtain benefits rendered the contract or policy null and void; and the defendant says that the answer of said plaintiff to question 14, in the proof of claim filed by him, was untrue, and was an attempt by fraud and concealment to obtain benefits to which he was not entitled."

At the close of the evidence the presiding Justice ordered a verdict for the defendant and the plaintiff excepted.

The case is stated in the opinion.

Jacob H. Berman, for plaintiff.

Harry Manser, for defendant.

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

KING, J. Action to recover sick benefits under a policy of health and accident insurance. At the close of the evidence the presiding Justice directed a verdict for the defendant.

In the plaintiff's application for the policy made January 13, 1908, it was stipulated "That if any of the statements, representations, or answers made herein are not true, full and complete, all rights to the benefits named in my policy shall be null and void, and all money paid by me to the Association forfeited." In the policy of insurance it is stipulated that it is issued "In consideration of the payment of the application fee and the statements, agreements and warranties in the application for a policy, which is made a part of this contract."

Among the questions and answers contained in the application are the following:

2. Have you been in good health for the last five years?

Ans. Yes.

3. Have you consulted, been prescribed for or required the services of a physician or surgeon during the past five years? If so, give date, and state particulars, name and address of attending physician. Ans. Went to Dr. Cummings of Lewiston for advice on being nervous.

4. Have you ever had (here were named several diseases and infirmities, including "nervous prostration")? Ans. No.

The evidence establishes with unquestionable certainty that the plaintiff was afflicted with nervous prostration for a considerable period of time during the summer of 1907. In the early part of July of that year Dr. E. S. Cummings, of Lewiston, examined him and found him suffering from nervous prostration and unfit to attend to his business. On July 15, 1907, he consulted Dr. Addison S. Thayer, of Portland, and also on August 2nd, Aug. 12th and Sept. 5th, 1907. Dr. Thayer says: "By my advice he began at once a rest cure, at Old Orchard, which was prolonged until September 6th." Dr. Cummings, on Oct. 24, 1907, certified under oath that the plaintiff "after leaving the care of Dr. Addison S. Thayer of

Portland was under my care from Sept. 7th to Sept. 30th and unable to attend to his business." With reference to the plaintiff's condition in Sept., 1907, when he came back to Dr. Cummings, the Doctor was asked—"Whether the disease from which Mr. Berman was suffering on September 7th 1907 was nervous prostration?" to which he replied—"Well, it was—you say at that time, 1907? At that time he was recovering." But he added that he was not then fit to do business and that condition continued till Sept. 30, 1907. July 17, 1907, Jacob Judelsohn, a brother-in-law of the plaintiff, at his direction, wrote from Portland to the Secretary of the Order of Knights of Golden Eagle, as follows: "Mr. H. I. Berman of Lewiston, Me., is ill here. Dr. Addison Thayer of this city has ordered him to keep away from business as he is too ill to attend same." From this Order of Knights of Golden Eagle the plaintiff received benefits for sickness from July 15th to Sept. 30, 1907, to the amount of $40. From the Order of Knights of Pythias the plaintiff received, Oct. 31, 1907, $37.50 "on account of 10 weeks sick benefits" during that summer. The plaintiff also made application to the Preferred Accident Insurance Company of New York, in which he was insured, for benefits for sickness for 11 weeks from July 14 to Sept. 30, 1907, and received from that company the sum of $137.50 therefor. He also received benefits for the same sickness from the Order of Beth Abraham the amount of which he did not state.

It is of consequence, we think, to note that the illness for which the plaintiff seeks to recover in this action according to his proof of claim was "complete mental and nervous prostration," on account of which he was wholly disabled from May 28 to Sept. 21, 1908, and that he was "at the New England Sanitarium, Melrose, Mass., for treatment about 3 months more or less." In his proof of claim, in answer to the inquiry if he had been afflicted with the same disability before, he said: "Had a slight attack similar but not exactly like this a year ago."

In view of the foregoing facts, about which there is no question, the conclusion is irresistible that the plaintiff's answers and statements to questions 2, 3 and 4, at least, in his application were manifestly and palpably "not true, full and complete."

If it were a fact, as claimed by the plaintiff at the trial, but which seems incredible, that at the time of his application he was sincere and believed his answers were true, full and complete, that fact could not save him from the forfeiture stipulated by him to be the effect if they were not true, full and complete in fact. His express stipulation that his answers were true called for truth in fact, and not for truth according to his belief or understanding. *Johnson* v. *Insurance Co.*, 83 Maine, 182.

But the plaintiff contends that the information which he gave to the defendant's agent, who was present when he filled out the application, and the advice and suggestions made by the agent with respect to his answers, estops the defendant from setting up the falsity of those answers. He invokes the well settled doctrine, that an insurance company is bound by the knowledge which its agent has of the risk and of all matters connected therewith, and that omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it.

This contention, however, is not supported in fact. The evidence is altogether too weak to justify a finding in fact that the defendant's agent had such knowledge of the truth, which the plaintiff in his answers denied, and of the essential facts, which he did not disclose in his answers, as would work an estoppel against the defendant.

As to his answer to question 2, that he had been in good health for the preceding five years, he claims that he said to the agent: "I have been a little mite under the weather for two weeks," and that when he told the agent he was fully recovered the latter told him to answer the question, Yes. As to his answer to question 3, respecting his consulting physicians, he stated in cross-examination that he told the agent he consulted Dr. Thayer also, and that the agent told him it was unnecessary to put that in his answers, saying: "It isn't necessary; you have got Cummings in there; it is for them to find out and not to tell them." This statement attributed to the agent, especially the last clause, is so out of harmony with a proper discharge of his duty that it seems incredible. The agent denies it. The plaintiff does not claim that he told the agent that he had nervous prostration during the summer of 1907; that he

was under the care of Dr. Thayer from July 15th, to Sept. 6th, after which he was under the care of Dr. Cummings till Sept. 30th, during which time he was too ill to attend to his business; nor that he himself had applied for and accepted sick benefits from three fraternal orders and one health insurance company exceeding in amount $200, for total disability during that period. The only statement which he claims to have made to the agent in respect to his previous health, that he had "*been a little mite under the weather for two weeks*," was not only false in spirit but manifestly calculated to mislead and deceive the agent.

At the trial the plaintiff deliberately asserted that during the summer of 1907 he was not sick but in good health, notwithstanding the convincing and overwhelming evidence to the contrary which was pressed upon him. His claim now, that at the time of his application he disclosed to the agent enough about the facts of his sickness in the summer of 1907 to charge the defendant with knowledge of the truth of it, is so utterly inconsistent with the fact that he denied the truth of it in his application, and persisted in that denial at the trial, that it becomes unreasonable and incredible.

Lastly, the plaintiff claims, admitting that by reason of his false and incomplete answers he had forfeited all his rights and benefits under the policy, that the defendant waived that forfeiture by accepting payments of his monthly assessments of $1.25 each for November and December, 1908. We think this claim is not sustainable. A waiver is the voluntary relinquishment of some known right, benefit or advantage and which, except for such waiver the party otherwise would have enjoyed. *Stewart* v. *Leonard*, 103 Maine, 132. It is essentially a matter of intention; and when the only proof of that intention rests in what a party does or forbears to do his acts or omissions to act relied upon should be so manifestly consistent with and indicative of an intention to voluntarily relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible. Unless one is shown to have full knowledge of all the material facts that establish his right he cannot be held to have waived it.

Applying this test it will readily be found that the evidence in the case at bar is not sufficient to justify a finding that the defendant waived the plaintiff's forfeiture. The policy provided that the assured should pay in advance, without notice, the regular monthly assessment of $1.25 "and upon failure to make such payment the policy shall lapse." The defendant did receive from the plaintiff his November and December assessments, and in the usual course of its business receipted for them. But in order to find that the defendant's act in receiving and receipting for those assessments was a waiver of its right to set up, in defense of the plaintiff's claim, a forfeiture of all rights under the policy, it should clearly appear that at the time the assessments were received the defendant had full knowledge of all the material facts, and then knew that such a forfeiture existed in fact, and intended to waive it.

What are the facts and circumstances? The defendant had no information of facts that established a forfeiture of the plaintiff's policy except what it acquired from its investigations after his proof of claim for sick benefits was presented to it. He gave them no such information but persisted that his answers and statements were true, even at the time of the trial. Oct. 24, 1908, the defendant wrote the plaintiff that it received the certificate of Dr. Bliss the day before and "we will now give the matter prompt attention." Oct. 30, 1908, the defendant received a letter from Dr. Thayer, in answer to its inquiry, in which the Doctor said: "Mr. Berman came to me July 15th 1907. At that time he was suffering from dizziness, confusion of mind, forgetfulness, and certain physical signs of nervous exhaustion. By my advice he began at once a rest cure, at Old Orchard, which was prolonged until Sept. 6th." Nov. 5, 1908, the defendant wrote the plaintiff that it had referred the matter of his claim to its attorney upon whom he could call in regard to it. It appears from the testimony of the president of defendant company that the matter of the validity of the plaintiff's policy was under special investigation by the company after his proof of claim was made. He said: "We waited until we had a chance to examine what we thought was all of the evidence we could reasonably get. When we thought that we had arrived at a conclusion which justified

us in thinking that the claim was not a proper one and that it had elements which seemed to us to appear in it, we then cancelled the policy." On Dec. 21, 1908, the defendant wrote the plaintiff that it had decided to cancel his policy.

The plaintiff now claims that upon receipt of Dr. Thayer's letter, Oct. 30, 1908, the defendant had knowledge of the material facts upon which a forfeiture of the policy depended. The Thayer letter, however, did not disclose all the material facts which show that the plaintiff's answers were false and incomplete; and it is to be borne in mind that the plaintiff contended at the trial that he gave the defendant's agent substantially the information which the Thayer letter contained. But if the information given by Dr. Thayer justifies a conclusion that the plaintiff had made a false answer in his application, it by no means follows that the defendant was bound to cease further investigation of the truth, and was then required to choose between a waiver and a forfeiture. It was entitled to a reasonable time, at least, for investigation until the truth was discovered and the evidence ascertained that would establish it.

The defendant's president testified that after the receipt of the Thayer letter other information touching the matter was obtained, and that they were waiting to ascertain what the statement of its agent was, who was away and "returned on the 11th of December." The truth as to the character and extent of the plaintiff's sickness during the summer of 1907, and his own conduct in applying for and receiving sick benefits therefor, as disclosed by the evidence in this case, was not easily ascertainable outside of those who were interested to conceal it.

The plaintiff's false and incomplete answers made all his rights and benefits under the policy "null and void" according to the express provisions thereof. It is inconceivable that the defendant, with full knowledge of all the facts which established such a forfeiture, could have had an intention to waive it. Certainly such an intention is not to be inferred from the fact that two assessments of $1.25 each were receipted for by the company in its usual course of business, and which the plaintiff voluntarily paid after he knew his claim had been turned over to the company's attorney, and must

have understood it was being investigated. See *Prenster* v. *S. C. of O. of Chosen Friends*, 135 N. Y. 417, a case closely analogous to the case at bar.

In the opinion of the court the evidence is plenary that the plaintiff's rights and benefits under the policy were forfeited and became null and void by reason of his false and incomplete answers in his application therefor, and that the evidence is not sufficient to support a finding that there was any waiver of the forfeiture on the part of the defendant. Accordingly the ruling of the presiding Justice directing a verdict for the defendant was correct.

Exceptions overruled.

LILLIAN R. COOMBS *vs.* ALFRED KING.

Cumberland. Opinion December 14, 1910.

Appeal. Review. Verdict. Damages. Measure of Damages. Physicians and Surgeons. Skill and Care Required. Malpractice. Burden of Proof.

1. While the burden was on the plaintiff to satisfy the jury of the defendant's liability yet after verdict for the plaintiff, the burden is on the defendant to make it clearly appear that the verdict is wrong. In the opinion of a majority of the court in the case at bar the defendant has not sustained that burden.
2. In an action for personal injuries, damages may be awarded for mental chagrin, mortification, and discomfort at physical disfigurement, when they are the direct and natural consequence of the physical injury.
3. A physician contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary or reasonable care and diligence in his treatment of the case, and that he will use his best judgment in the application of his skill to the case, but he is not an insurer of favorable results, and, if he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment.
4. In an action by a patient against a physician for damages from the physician's alleged negligence, the burden is on the plaintiff to show a malpractice.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries suffered by the plaintiff through the use of an X-ray machine prescribed by the defendant. Plea, the general issue. Verdict for plaintiff for $3,500. The defendant filed a general motion for a new trial and also excepted to certain rulings and refusals to give certain requested instructions.

The case is stated in the opinion.

Newell & Skelton, for plaintiff.

Winford G. Chapman, for defendant.

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

SAVAGE, J. This is an action on the case against a physician for malpractice. The verdict was for the plaintiff. The case comes up on the defendant's motion for a new trial, and exceptions. We will first, as briefly as we may, state our conclusion under the motion.

In 1901 the plaintiff was treated by the defendant for what she terms "scrofulous glands of the neck," and what the defendant says were enlarged "lymphatic nodes or glands." They were on both sides of the neck. The defendant cut them out. In 1903 bunches again appeared on the neck, one on the right side under the chin, and the other, the plaintiff says on the right side and the defendant says on the left side. The defendant diagnosed the trouble as being possibly Hodgkin's Disease, and advised X-ray treatment. It turned out not to be Hodgkin's Disease, but that is immaterial, because it is not questioned that X-ray treatment was proper for the real trouble.

The defendant himself administered the treatment three or four times, and afterwards it was administered by his office girl, as he says, under his direction. It was administered twenty-five times in all. The plaintiff says it was administered three times a week for fifteen minutes each time; the defendant says, twice a week, for ten minutes each time. At each treatment the plaintiff was seated in a chair, her head thrown back, and turned somewhat to the right, so as to expose the neck and under part of the chin. Her face

down as low as the lips was protected from the X-rays by a sheet of lead. The tube of the machine was placed somewhat to the left of the patient's neck, and fifteen inches distant. The left side of the neck, therefore, where the plaintiff says there was no bunch, was nearer to the tube than the affected parts were. An unintended result of this treatment was a very severe and greatly disfiguring X-ray burn on the left side of the plaintiff's neck and lower part of the face, for which she seeks to hold the defendant legally responsible.

The measure of a physician's legal responsibility has been stated many times by this court. He contracts with his patient that he has the ordinary skill of members of his profession in like situation, that he will exercise ordinary or reasonable care and diligence in his treatment of the case, and that he will use his best judgment in the application of his skill to the case. *Patten* v. *Wiggin*, 51 Maine, 594; *Cayford* v. *Wilbur*, 86 Maine, 414; *Ramsdell* v. *Grady*, 97 Maine, 319. The physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable even for mistakes in judgment. Medical science is not yet, and probably never can be, in many respects, an exact, certain science. The practitioner cannot be expected to know, or be bound to diagnose correctly, that which is unknowable, as many of our hidden ailments may be.

The rule of liability is not a hard one, it is a reasonable one. And the burden is on the plaintiff to show a malpractice.

In this case it is conceded that the defendant is a physician of great learning and skill. There is no controversy about that. The plaintiff rests her claim to retain her verdict upon the proposition that the defendant failed to use ordinary care, which is reasonable care, and to apply his best judgment, in his treatment of her case. And while she specifies several particulars, we shall notice only one, namely, want of attention and watchfulness. She claims that the defendant did not give the proper and requisite attention to prevent the burning, and that the burning resulted in consequence.

It appears from the evidence that the X-ray treatment is usually safe, so far as burning is concerned, when properly administered, but that it is a treatment that requires continued care and attention. It is contended by the plaintiff, and we think the jury were warranted by the evidence in finding, that the safety of the treatment as to burning, depends upon several elements. Among these is the distance of the tube from the point of exposure, for the shorter the distance, as it seems, the more potent are the rays. Others are the frequency of the application, the length of each treatment, and the strength of the current. It also seems to be agreed that the potency or penetrability of the rays depends in a measure upon the condition of the tube. It seems that there are so called "hard" or high vacuum tubes, and so called "soft" or low vacuum tubes, and that a "soft" tube by time or use will gradually become "hard," and that the same tube may become "soft" again. These qualities affect the penetrability of the rays and their power of doing harm by burning. Then, too, is the personal susceptibility of the patient. The rays do not effect all persons alike. Some are more susceptible to burning than others. And the degree of this susceptibility is not ascertainable in many cases for many days or even weeks after the treatment is commenced. It should be noticed, too, that the burning effects of the X-ray treatment do not manifest themselves externally at once. Ordinarily they do not for one or two weeks, but the time may be shorter or it may be much longer. Meanwhile the process may be cumulative, in the sense that each succeeding treatment adds to the effect of the prior ones.

The mere statement of these phases of the X-ray treatment shows clearly that it cannot be administered according to fixed and unvarying rules. All the medical witnesses concur in saying that it is necessary to watch for the manifestations of burning during the entire period of treatment. The treatment should be adjusted to the person and the exigencies of the case. The physician may vary or temporarily discontinue the treatment. He must watch, examine and use his best judgment. And this is what the plaintiff says the defendant here did not do. The defendant says that he did.

It is argued for the defendant that his responsibility must be considered with reference to the science of X-ray treatment as it was understood in 1903. This is true. There is testimony that great advances have been made in X-ray knowledge since 1903 but it does not appear what they are. But however that may be, in 1903 the defendant knew that X-rays could burn, and he knew of the need of watchfulness to detect the signs of burning, in order that it might be prevented. This appears from his own testimony.

We do not undertake to analyze the testimony here. It is unnecessary. It is sufficient to say that if that offered by the plaintiff is true, she is entitled to hold her verdict. On the other hand, if the jury should have adopted the version of the defendant, the verdict is wrong. There is nothing in the plaintiff's story which is inherently improbable or inconsistent. Unless the jury were not warranted in believing that story, the court cannot interfere. We cannot substitute our own impressions for any findings which the jury were authorized to make. While the burden was on the plaintiff to satisfy the jury of the defendant's liability, the burden is now on the defendant to make it clearly appear to us that the verdict is clearly wrong. That he has failed to do.

The exceptions relate to instructions given and instructions refused on the question of damages. The defendant contends that the plaintiff's mortification and distress of mind from the contemplation of her disfigured condition and of its effect upon her fellows is "too remote, indefinite and intangible to constitute an element of damages" in this case. And at the trial he requested the court so to rule. But the court refused the request, and instructed the jury that the plaintiff might recover for "mental chagrin, mortification and discomfort at her disfigurement."

On this question the authorities are not agreed, and the rule of damages is not the same in all jurisdictions. In this State the question has never been before the Law Court. But at nisi prius, in cases where the mental suffering has been the direct and necessary consequence of the physical injury, the Justices have almost without exception given the rule which was given in this case.

There is good reason for the rule. The disfigurement is a physical injury. It is a continuing injury. The mental suffering may continue with it. The mental suffering is a real injury. It proceeds necessarily and inevitably from the physical injury. It is a natural consequence of the injury. Compensation, omitting this element, is not full compensation. One might be made repulsive to the sight for life with comparatively little physical injury, and yet according to the rule contended for, be entitled to but little compensation. The reason given in some cases, that the amount of mental pain caused by disfigurement necessarily varies so much with the character, temperament and circumstances of the injured person that no just measure of damages from it can be found, applies equally well to physical pain, though perhaps in a less degree. And damages are always allowable for physical suffering. 1 Sedgwick on Damages, sect. 46; *Ballou* v. *Farnum*, 11 Allen, 73. Mental suffering is no more intangible and indefinite than physical suffering is. The damages from suffering, either mental or physical, cannot be weighed; it cannot be measured; it cannot be computed. It can only be estimated. The difficulty in making the estimate affords no good reason for failure to make it, *Ballou* v. *Farnum*, supra. The estimation must depend upon the good sense, sound judgment and enlightened conscience of the jury, under all the facts and circumstances of the particular case, and the sensibilities of the particular person.

There is good authority for the rule. In *McDermott* v. *Severe*, 202 U. S. 606, the trial Judge instructed the jury "to consider mental suffering, past and future, found to be the necessary consequence of the loss of the plaintiff's leg." It was objected that this instruction permitted a recovery for "future humiliation and embarrassment to mind and feelings because of the loss of the leg." The court sustained the instruction, saying, "where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it." So in *Kennan* v. *Gilmer*, 131 U. S. 22, the court said, "When the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous considera-

tion or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded." See also *Atlanta, etc., R. R. Co.* v. *Wood*, 48 Ga. 565; *Sherwood* v. *Chicago & W. M. Ry. Co.*, 82 Mich. 374; *Heddles* v. *Chicago & N. W. Ry. Co.*, 77 Wis. 228; 20 Am. St. Rep. 106; *Newbury* v. *Manufacturing Co.*, 100 Iowa, 441; *Schmitz* v. *St. Louis & Iron Mountain & Southern R. R. Co.*, 119 Mo. 256; 1 Sedgwick on Damages, sects. 44, 46; 13 Cyc. 145 and cases there cited.

We hold, therefore, that when, as in this case, there is mental chagrin, mortification or discomfort at disfigurement, not independent of the physical injury, but the direct and natural consequence of it, the plaintiff may have damages awarded for it.

Motion and exceptions overruled.

UNITED STATES OF AMERICA *vs.* CHARLES C. BURRILL.

Hancock. Opinion December 15, 1910.

United States. Right to Sue. Property of the United States. Adverse Possession. Betterments. Statute, 1821, chapter 47; 1885, chapter 368. Revised Statutes, 1841, chapter 147, section 12; 1857, chapter 105, section 11; 1883, chapter 105, section 11; 1903, chapter 96, section 1; chapter 106, section 20.

The United States acts in a dual capacity, as a sovereign and as a body politic or corporate; and while in its sovereign capacity it cannot be sued, following the common-law doctrine that suit will not lie against the crown, yet in its corporate capacity as a body politic it can contract and hold property, real and personal, and as an attribute to such right, can sue to preserve and protect its property, and can avail itself of the same remedies and in the same tribunals that other owners can, and hence may sue in forcible entry and detainer in a State court to obtain possession of its property.

No title by adverse possession can be acquired except by statute against the sovereign, be it crown, national government or State.

A claim for betterments can be set up only in real actions, Revised Statutes, chapter 106, section 20, relating to betterments, applying only to such actions, and cannot be recovered in forcible entry and detainer, since chapter 96, section 1, provides that such action may be maintained against a disseizor who has not acquired any claim by possession or improvement.

As a claim for betterments can arise only out of an adverse possession of such a character that it could, by lapse of time, mature into a title, no valid claim therefor can be set up against the United States.

On exceptions by defendant. Overruled.

Action of forcible entry and detainer brought by the United States of America in the Ellsworth Municipal Court, against the defendant, Charles C. Burrill of Ellsworth, alleging that said Burrill on the 20th day of September, A. D. 1902, disseized the plaintiff of a certain parcel of land therein described situated in said Ellsworth and constituting a portion of the Federal Building site.

The case is stated in the opinion.

Robert Treat Whitehouse, U. S. District Attorney, for plaintiff.

Henry M. Hall, for defendant.

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

CORNISH, J. This action of forcible entry and detainer originated in the Ellsworth Municipal Court, where defendant pleaded not guilty and filed a brief statement claiming title in himself, and thereupon, under R. S., ch. 96, sec. 6, the cause was removed to the Supreme Judicial Court for Hancock County, where by agreement it was submitted to the determination of the presiding Justice, each party reserving the right to except. After removal and before hearing in the Supreme Judicial Court, the defendant added to his pleadings by filing a claim for improvements, or betterments so called, under R. S., ch. 106, sec. 20. The presiding Justice ordered judgment for the plaintiff and the defendant excepts. The contentions of the defendant, all of which were overruled below, will be considered in their order.

1. That as a matter of law the United States cannot maintain the action of forcible entry and detainer.

Both reason and authority sustain the opposite view. The United States acts, so to speak, in a dual capacity, as a sovereign and as a body politic or corporate. In its sovereign capacity it cannot be sued, following the common law doctrine that no suit can be maintained against the Crown; but in its corporate capacity as a body politic, it is capable of making contracts and of holding property both real and personal. One of the inherent attributes of ownership is the right to preserve and protect the property owned. This is a right which belongs to every individual and corporation and no reason exists why the sovereign alone as a body politic, should be deprived of this power and be at the mercy of every trespasser. As the owner of property its rights and powers are not inferior to the rights and powers of other owners, and it can avail itself of the same remedies and in the same tribunal as they can. As a holder of negotiable paper, it has the right to enforce payment of the same, *United States* v. *Bank of the Metropolis*, 15 Pet. 392, the same as the State of Maine has the right to enforce an official or other bond, *State* v. *Peck*, 53 Maine, 284. This precise question arose in *Cotton in Error* v. *U. S.*, 11 How. 229, where it was contended that the United States could not maintain an action of trespass quare clausum, and the court in sustaining the action dispose of the contention in these words: "It would be a strange anomaly, indeed, if having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. . . . Although, as a sovereign, the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have." This decision has been reaffirmed in many subsequent cases; *U. S.* v. *Cook*, 19 Wall. 591-4; *U. S.* v. *Tygh Valley Co.*, 76 Fed. Rep. 693; *U. S.* v. *Holmes*, 105 Fed. Rep. 41; *Jones* v. *U. S.*, 48 Wis. 409, 4 N. W. 519; and in *U. S.* v. *Bitter Root Devel. Co.*, 200 U. S. 451, a bill in equity was dismissed on the ground that the plaintiff had a full and adequate remedy at law in an action of trespass.

The only authority cited by the defendant in support of his position is a statement in Washburn Real Prop., 5th Ed., Vol. 3, page 203, to the effect that "A State cannot maintain an action of trespass, to try the title to land, or an action of ejectment because a state cannot be disseized. The remedy against a trespasser in such case in favor of the state is by information for intrusion." The only authorities cited to support this doctrine are *State* v. *Arledge*, 1 Bail, (S. C.) 551, which rests upon an early Colonial case never reported, and *Jackson* v. *Winslow*, 2 Johns. (N. Y.) 80, which is not in point.

The reason given by the learned text-writer is entirely illogical. It is true that no title by adverse possession can be acquired against the State, that is disseizin of the State's property cannot ripen into title, but it does not follow that the State cannot be disseized, which requires but a brief time and means "A wrongful entry upon the property of another, accompanied by the removal of the owner from possession," *Worcester* v. *Low*, 56 Maine, 265, or "a wrongful deprivation of the demandant's seizin," *Roberts* v. *Niles*, 95 Maine, 244. The action at bar is brought against the defendant as a disseizor not against him as having title by disseizin. The failure to distinguish between disseizin and title by disseizin led to the paragraph quoted.

In view therefore, of the overwhelming authority against such a doctrine and the lack of reasoning to support it, we are of the opinion that the United States is a proper party to institute and maintain this action of forcible entry and detainer.

2. The second contention is that the defendant had acquired title to the locus by adverse possession.

The only reason given for this contention is that under this form of action the plaintiff admits that the possession of the defendant shall be regarded as adverse and therefore it must abide the legal result of such possession for more than twenty years. Here again the distinction is ignored between a possession that is adverse in fact, that is, without right, and a possession adverse in law, that is, that can ripen into a title. The defendant's possession here was adverse in fact, but it could never ripen into a title because no title

by adverse possession can be acquired except by statute against the sovereign, be it Crown or National Government or State. This is elementary law. Coke Litt. 57; *Oaksmith's Lessee* v. *Johnston*, 92 U. S. 343; *Sparks* v. *Pierce*, 115 U. S. 408; *Ward* v. *Bartholemew*, 6 Pick. 409; *Cary* v. *Whitney*, 48 Maine, 576. Cyc. Vol. 1, page 1111 and 1112, and cases cited.

In making this statement we have not overlooked the case of *Treat* v. *Lord*, 42 Maine, 552, (1856) in which it is said (page 560), that the state may be disseized of its public lands. To the same effect is *Hinckley* v. *Haines*, 69 Maine, 76. But these cases and others to the same effect, rest upon the express statute then existing which provided that "no real or mixed action for the recovery of lands shall be commenced in behalf of the state, unless within twenty years after the time when its title accrues." R. S., 1883, ch. 105, sec. 11; and see R. S., 1841, ch. 147, sec. 12; R. S., 1857, ch. 105, sec. 11. This section, however, was repealed by ch. 368 of the Pub. Laws of 1885. *Roberts* v. *Richards*, 84 Maine, 1.

3. The defendant finally contends that he is entitled to improvements or betterments in this action.

The answers to this are many. In the first place, the statute providing for betterments, R. S., ch. 106, sec. 20, et seq., applies only to real actions. The original statute, ch. 47, of Pub. Laws of 1821, is entitled "An act for the settlement of certain equitable claims arising in real actions." All the proceedings have to do with that class of cases and cannot be made to fit an action of forcible entry and detainer.

In the second place, the action of forcible entry and detainer cannot be maintained at all if the defendant is entitled to betterments. The statute distinctly so states. "Process of forcible entry and detainer may be maintained against a disseizor who has not acquired any claim by possession or improvement." R. S., ch. 96, sec. 1. If therefore, the defendant is entitled to betterments, such claim if established is not to be enforced in this action but it destroys the action itself and leaves both parties to their respective rights and remedies in a real action. *Dunning* v. *Finson*, 46 Maine, 546-552; *John* v. *Sabattus*, 69 Maine, 473; *Folsom* v. *Clark*, 72 Maine, 44.

In the third place the defendant is not entitled to betterments, because that claim can arise only out of an adverse possession and only out of an adverse possession of such a character that it could by lapse of time mature into a title.

"To entitle the tenant to betterments . . . the possession must be such, that if prolonged for a period of twenty years, it would by disseizin give him the fee." *Pratt* v. *Churchill*, 42 Maine, 471.

"Betterment rights are acquired by adverse possession which, continued for twenty years, ripens into a perfect title by disseizin." *Moore* v. *Moore*, 61 Maine, 417, and see *Bent* v. *Weeks*, 46 Maine, 524.

The reason for this is that if an occupation of twenty years would give title to the land which would include the improvements, the legislature deemed it fair that after an occupation of six years by such a tenant, he should be compensated for his improvements if compelled to leave the land. Whoever occupies public land, however, does so at his peril. He gains no title by occupation however long, and therefore no claim for improvements. Occupation without right gives such a tenant in the absence of statute to the contrary, no rights either in the land or the improvements. The one is a corollary upon the other, and as against the sovereign both fail.

Upon all the points raised by the exceptions, the rulings of the presiding Justice were without error and the entry must be,

Exceptions overruled.

MANLEY C. MITCHELL *vs.* ASAHEL D. PAGE et als.

ALLIE MITCHELL *vs.* ASAHEL D. PAGE et als.

Piscataquis. Opinion December 15, 1910.

Logs and Lumber. Liens. Manufactured Lumber. Statute, 1848, chapter 72; 1907, chapter 21; chapter 25; 1909, chapter 96; chapter 97. Revised Statutes, 1857, chapter 91, section 19; 1903, chapter 93, sections 46, 50, 51, 52.

Revised Statutes, chapter 93, section 46, provides that "whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen, or repairing property while thus employed, has a lien on the logs and lumber for the amount due for his personal services and services performed by his team," etc. *Held:* That this statute gives no lien for cutting or hauling manufactured lumber.

Where one suing to enforce a lien for services in cutting and hauling logs given by Revised Statutes, 1903, chapter 93, section 46, so intermixed such services with the nonlien labor of firing a sawmill boiler, cutting up slabs, and hauling and sticking manufactured lumber, that it was impossible for him, at the trial to make any separation or for the court, from the evidence, to make any such distinction as would authorize a judgment for lien for any definite amount, the lien must fail.

Revised Statutes, 1903, chapter 93, section 46, gives to any person laboring at cutting, hauling, or driving lumber, etc., a lien thereon for the amount due for his personal services, which lien shall continue 60 days after the lumber, etc., subject thereto shall have arrived at the place of destination for sale or manufacture. *Held*, that where the place of destination for manufacture of logs was at a sawmill and no labor was performed by one seeking to enforce a lien under the section, in hauling logs to the mill after December 1, 1908, he was not entitled to a lien thereon, where his action was not begun until June 16, 1909.

Hutchins v. *Blaisdell*, 106 Maine, 92, overruled in part.

On report. Lien judgment denied.

Two actions of assumpsit against the principal defendant and the Guilford Manufacturing Company as trustee and also alleging that the plaintiffs had a lien on certain manufactured lumber and seek-

ing to enforce such lien. The Guilford Manufacturing Company appeared as owner of the lumber, pleaded the general issue in each action together with a brief statement alleging that it was the owner of the lumber and denying that "there was or is any lien on said lumber," as set out in the writs. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Note. See *Hutchins* v. *Blaisdell*, 106 Maine, 92, which is overruled in so far as it conflicts with the decision in the case at bar.

J. S. Williams, for plaintiffs.

Hudson & Hudson, for Guilford Manufacturing Company.

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

CORNISH, J. These two actions of assumpsit, both brought by the father Manley C. Mitchell, one in his own name, and the other as next friend of his minor son Allie C. Mitchell, to enforce lien claims under R. S., ch. 93, sec. 46, are reported to this court for final determination.

They squarely raise the question whether under this statute a lien is given for cutting or hauling manufactured lumber. A careful study of the statute and its history leads to the conclusion that such lien is not thereby created.

The original statute, chap. 72 of the Pub. Laws of 1848 reads as follows:

"Sect. 1. Any person who shall labor at cutting, hauling or driving logs, masts, spars or other lumber, shall have a lien on all logs and lumber he may aid in cutting, hauling or driving as aforesaid, for the amount stipulated to be paid for his personal services, and actually due. And such lien shall take precedence of all other claims except liens reserved by the state of Maine or the commonwealth of Massachusetts for their own use, and the lien shall continue sixty days after the logs, masts, spars or other lumber subject thereto shall have arrived at their place of destination, previous to being rafted for sale or manufacture."

In the revision of 1857, without any intervening legislation upon the subject, the first lines of this section were condensed to "Any person who labors at cutting, hauling or driving logs, or lumber, shall have a lien," and the words "previous to being rafted," between "destination" and "for sale or manufacture" were omitted. But this change of phraseology in the revision neither necessarily nor presumptively indicates any change of legislative will or intention. *St. George* v. *Rockland*, 89 Maine, 43; *Taylor* v. *Caribou*, 102 Maine, 401. By chapter 135 of the Pub. Laws of 1868, the word "rafting" was inserted after "hauling" and with some minor additions by subsequent amendments which are not involved in the case under discussion, the language of the Revision of 1857 is the language of the present statute. R. S., 1903, ch. 93, sec. 46, viz:

"Whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen, or repairing property while thus employed, has a lien on the logs and lumber for the amount due for his personal services and the service performed by his team, which takes precedence of all other claims except liens reserved to the state; whoever both shores and runs logs by himself his servants or agents, has a lien thereon for the price of such shoring and running; such liens continue for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture, and may be enforced by attachment."

The word "lumber" in its broadest use includes both the manufactured and the unmanufactured product. We speak of a lumber dealer, meaning a dealer in manufactured lumber, and again of a lumber operator having reference to the man who cuts, fells and hauls the trees, and the verb "to lumber" is usually confined to the latter meaning.

While therefore the term is broad enough in its common acceptance to include the manufactured product as boards, planks and dimension timber, yet it should be construed in the present statute in the light of the original enactment of 1848, and so construed its meaning is plain. "Logs, masts, spars or other lumber," means

other lumber ejusdem generis, in a condition similar to logs, masts and spars, that is felled but not manufactured, whether designed for ultimate manufacture, as are logs, or not to be manufactured as are spars and masts. *Lyndon* v. *Starbridge*, 2 H. & N. 45. An illustration of "other lumber" of the same kind to which the lien attaches is the "cedar shingle rift" cut four feet long and then hauled to the mill, in *Sands* v. *Sands*, 74 Maine, 239, where the court say, "If felled and hauled whole there could be no question about it, and sawing the logs into four feet sticks for convenience in hauling and handling cannot destroy the lien."

That the lien must attach prior to the manufacture is also indicated by the clause limiting the duration of the lien to sixty days after the logs or other lumber "arrive at the place of destination for sale or manufacture," and especially in its original phraseology "shall have arrived at their destination previous to being rafted for sale or manufacture." This would have no application to lumber already manufactured. It necessarily contemplates the wood in bulk.

Consistently with this view the legislature has from time to time created new liens, as necessity required, on manufactured wood products not embraced in the term logs or lumber as here defined. Thus in cutting, peeling, hauling or yarding hemlock bark, and cutting, hauling or yarding cord wood, or pulp wood or any wood used in the manufacture of pulp wood, R. S., ch. 93, sec. 50, Pub. Laws 1907, ch. 21; in manufacturing last blocks or cutting or furnishing wood for the same or furnishing teams for the hauling of the blocks or the lumber from which they are manufactured, R. S., ch. 93, sec. 51; in the manufacture of railroad ties and ship knees; R. S., ch. 93, sec. 52; in the cutting, hauling or sawing of spool timber or manufacture of spool timber into bars, R. S., ch. 93, sec. 53; in cutting, hauling or sawing of shingle, stave, lath or dowel timber or in the manufacture of the same, Pub. L. 1907, ch. 23, Pub. L. 1909, ch. 97; in making shovel handle blocks or in cutting or furnishing wood for shovel handle blocks, Pub. L. 1909, ch. 96.

It remains for the legislature to create a lien for cutting and hauling manufactured lumber as is claimed in the case at bar. The existing statutes do not permit it.

The plaintiff was justified in citing *Hutchins* v. *Blaisdell*, 106 Maine, 92, as an authority in his favor. No other conclusion can be drawn from the opinion in that case. It should be said, however, that the question involved here, of the existence or non-existence of a lien for hauling manufactured lumber was not controverted in that case. Such lien was assumed to exist and was neither contested by counsel nor investigated by the court. The only issues presented and decided were whether the statute also granted a lien for "sticking" lumber and whether the writ could be amended to cover the hauling only, the first of which was decided in the negative and the second in the affirmative. In so far therefore as the decision in the case at bar is in conflict with *Hutchins* v. *Blaisdell*, supra, the latter is distinctly overruled. Applying the statutory construction herein adopted to the facts in the two cases under consideration we reach the following results.

In the case of Manley C. Mitchell, the plaintiff seems to have rendered some service both himself and with his team in hauling the logs from the woods to the portable saw mill for manufacture, a service which carries a lien. But he has so intermixed and interwoven these services with the non-lien labor of firing the boiler, cutting up slabs and hauling and sticking manufactured lumber, that it was impossible for him at the trial to make any separation, and it is equally impossible for the court after a careful examination of the evidence to make any such distinction as would authorize a judgment lien for any definite amount. The lien in this case therefore fails. *Baker* v. *Fessenden*, 71 Maine, 292; *Kelley* v. *Kelley*, 77 Maine, 135. In the case of Allie C. Mitchell, there is sufficient evidence to authorize a judgment lien because the plaintiff testified that one-third of his whole time was spent in hauling logs from the woods to the mill. But this claim, as well as the father's, is met by the further objection that the remedy was sought too late. The lien continues only for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture. The place

of destination for manufacture of logs cut for the portable mill in this case was, so far as the evidence shows, at the mill yard. In case of driven logs, it is far short of that, as on the Penobscot river it is at the Penobscot boom. *Sheridan* v. *Ireland*, 66 Maine, 65. No labor was performed by this plaintiff in hauling logs to the mill after Dec. 1, 1908, while the action was not begun until June 16, 1909, more than four months after the lien expired. For this reason no judgment lien can be ordered in this suit.

The entries must therefore be, in *Manley C. Mitchell* v. *Asahel D. Page et als.*, personal judgment for the plaintiff for $104.57, with interest from the date of the writ and costs; and in *Allie Mitchell* v. *Same*, personal judgment for the plaintiff for $102.20 with interest from date of the writ and costs.

So ordered.

I. F. MCCANN et als. *vs.* INHABITANTS OF TOWN OF MINOT.

Androscoggin. Opinion December 14, 1910.

Taxation. Personal Property. "Landing Place." "Landing." Statute, 1845, chapter, 159, section 10; 1866-68, chapter 105; 1869, chapter 53; 1909, chapter 4. Revised Statutes, 1883, chapter 6, section 14; 1903, chapter 9, sections 1, 12, 13, 22.

The plaintiffs, copartners, having paid, under protest, a tax assessed to them by the assessors of the defendant town, upon lumber, bring this suit to recover it back. Logs had been hauled by the plaintiffs from other towns into Minot and had there been sawed. The lumber was then "stuck up" in a field in Minot for seasoning. It was intended for sale and it was intended to remain there until sold. Remaining there on the ensuing April 1, it was assessed. None of the plaintiffs resided in Minot.

To sustain the assessment, under Revised Statutes, chapter 9, section 22, it must appear:

1. That the plaintiffs were, at the time of the assessment, carrying on business in the town of Minot, and that the property assessed was employed in that business, or
2. If their place of business was in some other town than Minot, that the property so employed was placed, deposited or situated in Minot; also, in either case,
3. That the property assessed was employed in trade, in the erection of buildings or vessels, or in the mechanic arts; and
4. In case the place of business was in some other town than that in which the property was deposited, that the plaintiffs, their servants, sub-contractors or agents, so employing the property, occupied, for the purpose of the employment, a store, shop, mill, wharf, landing place, or shipyard in Minot.
5. The case fails to show that the plaintiffs, at the time of the assessment, were carrying on business in Minot, within the meaning of the statute, or if the property assessed was employed in trade in Minot, that the plaintiffs occupied, for the purposes of such employment, a store, shop, mill, wharf, landing place, or shipyard in Minot.
6. A field, where lumber is "stuck up" for seasoning, there to remain until sold, and then to be hauled to a railroad for transportation, is not a "landing place" within the meaning of the statute.

On exceptions by plaintiffs. Sustained.

Action for money had and received to recover back the sum of $40.60 paid under protest to the tax collector of the defendant town for a nonresident tax assessed upon the personal property of the plaintiffs for the year 1909. Plea, the general issue. Heard by the presiding Justice, without a jury, who ordered judgment for the defendant town, and the plaintiffs excepted.

The case is stated in the opinion.

NOTE. Revised Statutes, chapter 9, section 13, paragraph I, as amended by chapter 4, Public Laws, 1909, was further amended by chapter 140, Public Laws, 1911, so that said paragraph I now reads as follows:

"All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, storehouse, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment. All portable mills, logs, at or in the same town as said portable mills,

to be manufactured at said portable mills, and the lumber manufactured by said portable mills, shall be taxed in the town where said portable mills, logs, and lumber are, on the first day of April each year."

F. O. Purington, George C. Wing, and George C. Wing, Jr., for plaintiffs.

John A. Morrill, for defendants.

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

SAVAGE, J. Two of the plaintiffs reside in Mechanic Falls and one in Casco, in this State. On April 1, 1909, they owned a certain quantity of pine and hemlock boards and plank which were "stuck up" in a field hired by them for that purpose, within the limits of the defendant town, Minot. The assessors of Minot assessed the lumber to the plaintiffs. The tax was subsequently paid under protest, and this suit has been brought to recover it back. The case was heard below by the presiding Justice, without a jury. He ordered judgment for the defendant, and the plaintiffs excepted. The only question is whether the lumber was legally taxable in Minot, under the circumstances of the case.

The facts which are undisputed are these: — The plaintiffs, as copartners, carried on a lumbering operation in the winter of 1908-9. The logs were all cut outside of Minot, in Hebron, Oxford and Mechanic Falls, on lands, or from stumpage, owned by them. For convenience of operation, they were all hauled into Minot, in one place, and there sawed by a portable saw-mill. The lumber was then "stuck up" to season in the field above mentioned. It was intended for sale, and it was intended that it should remain there until sold. When sold it was to be hauled to a railroad siding, half a mile distant, also in Minot, for shipment. All the work "from the tree to the car" was done under contract by another party. The plaintiffs, however, supervised the work so far as to determine from time to time the size and shape of the manufactured product.

The plaintiffs had no office anywhere. Their books were kept by one of the firm at his dwelling house in Mechanic Falls, and there he carried on the correspondence of the firm. But it is in evidence that prospective purchasers were taken by them to the sticking grounds to examine the lumber.

After the assessment of the tax complained of, the pine lumber was sold in a lot to be delivered on the cars at the siding, as ordered out by the purchaser. The sale was made by correspondence, but the purchaser, unaccompanied by the plaintiffs, had visited the sticking ground and examined the stock. He had previously been there while the lumber was being sawed, and when one of the plaintiffs was present. The hemlock lumber was sold to the town of Mechanic Falls, the contract of sale being made at Mechanic Falls.

A similar operation had been carried by the plaintiffs the previous year at the same place, and a tax had been assessed to them in 1908, on lumber then "stuck up" as the lumber in question was. This tax the plaintiffs paid, supposing it to have been properly assessed. In 1909 the same lumber, on which the disputed assessment was made, was taxed to the plaintiffs in Mechanic Falls.

The validity of the assessment depends upon the construction properly to be given to section 22, chapter 9, of the Revised Statutes, taken in connection with paragraph I of section 13 of the same chapter. Both of these sections relate to exceptions from, or modifications of, the general rule of taxation prescribed by section 12, which is that "all personal property within or without the state, ... shall be assessed to the owner in the town where he is an inhabitant on the first day of each April."

Section 22 provides that "partners in business, whether residing in the same or different towns, may be jointly taxed, under their partnership name, in the town where their business is carried on, for all personal property enumerated in paragraph one of section thirteen, employed in such business; . . . . except that if any portion of such property is placed, deposited or situated in a town other than where their place of business is, under the circumstances specified in said paragraph, they shall be taxed therefor in

such other town." And the paragraph one of section thirteen, thus referred to, reads as follows: "All personal property employed in trade, in the erection of buildings and vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; *provided* that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment."

To sustain the assessment in this case under these statutes it must appear,

1. That the plaintiffs were, at the time of the assessment, carrying on business in the town of Minot and that the property assessed was employed in that business, or

2. If their place of business was in some other town than Minot, that the property so employed was placed, deposited or situated in Minot; also, in either case,

3. That the property assessed was employed in trade, in the erection of buildings or vessels, or in the mechanic arts; and

4. In case the place of business was in some other town than that in which the property was deposited, that the plaintiffs, their servants, sub-contractors or agents, so employing the property, occupied, for the purpose of the employment, a store, shop, mill, wharf, landing place, or shipyard in Minot.

It will be noticed that under the first alternative in section 22, "all personal property enumerated in paragraph one of section thirteen, employed in the business" is to be taxed, and this without reference to the conditions of occupation, while under the second alternative only such property is to be taxed as is deposited "under the circumstances specified in said paragraph" which phrase relates to the conditions of occupancy.

The contention of the defendant is, first, that the plaintiffs either were carrying on the business of manufacturing and selling lumber in Minot, and that the lumber taxed was employed in that business, or, in the alternative, if they were not carrying on business there, that the lumber being so employed in a business carried on elsewhere was placed, deposited or situated in Minot; secondly, that it was

employed in trade in Minot; and lastly, that the plaintiffs occupied a "landing place" in Minot for the purpose of such employment. The other statutory limitations need not be considered.

We think the evidence, as to the place of carrying on the business, brings the case within the second of the foregoing alternatives, that is to say, that at the time of the assessment the business of the firm was being carried on in another town.

As to the second proposition, that the lumber was employed in trade in Minot, it is not easy to distinguish this case from *New Limerick* v. *Watson*, 98 Maine, 379. In that case starch had been manufactured in a town other than that in which the owner was an inhabitant, and was stored in the town where manufactured until after the first day of the following April, awaiting shipment by rail out of that town as the same should be sold, no sales being made or intended to be made in that town, and all of the sales and correspondence in relation to sales being made in the town where the owner lived and conducted his business; and it was held that the starch was not employed in trade in the town where stored, within the meaning of the statute above referred to, for the purposes of taxation. Except that these plaintiffs took prospective customers to the sticking ground to inspect the lumber, there seems to be no real distinction between that case and this one. However, we do not find it necessary to decide this question, for it is not shown that the plaintiffs occupied a "landing place" in Minot.

The plaintiffs occupied a "sticking ground," and we do not think that by any fair interpretation of the statute a sticking ground can be called a "landing place."

What is now section 22 was originally enacted in a somewhat different form in the Public Laws of 1845, chap. 159, sect. 10. In that statute the place of occupancy requisite to the lawful assessment of a tax to non-residents in such cases was specified as a "store, shop, mill or wharf therein." By chapter 105 of the Public Laws of 1867 the word "ship yard" was added. And in the amendment by chapter 53 of the Public Laws of 1869 the word "landing" first appears. In the general revision of 1883 the phrase "landing place" was substituted for "landing." R. S., 1883,

ch. 6, sect. 14. But the sense was not changed thereby. No other change was made in the statute in this respect until 1909, when the word "storehouse" was added. Public Laws of 1909, chap. 4.

At the time the term "landing" was first incorporated into the statute, it had two well known significations. It meant a place on a river or other navigable water for lading and unlading goods, or for taking on or letting off passengers. See cases in 5 Words and Phrases, page 3988. "The place where any kind of a craft lands." It also meant "a place for storing logs for the winter." Standard Dictionary. Both of these kinds of places are within the meaning of the statutory term "landing" or "landing place." The word landing is also used to designate the top of a stair case, and the platform of a railway station, etc., Standard Dictionary. But these uses are clearly not within the statute.

The defendant contends that the word "landing" has come to mean a place where lumber is collected preparatory for transportation by water or rail, but the dictionary definitions to which counsel refers do not sustain the contention. As for instance, in the Century Dictionary the definition is, "A place where logs are stored till spring;" or in the Century Supplement, "A place to which logs are hauled or skidded preparatory to transportation by water or rail." The latter definition is more accurate than the former. But in both it is a place for depositing logs, not manufactured lumber.

But it is not necessary in this case to say that a place where even manufactured lumber is *landed* preparatory to transportation, as upon the bank of a stream or beside a railroad, is not a landing place, within the statute, for that is not this case. A landing place is a place where logs, (and it may be other things) are collected and deposited for transportation or shipment from that place, whether it be by water or rail. But in this case the lumber was "stuck up" for seasoning on ground some distance from the railroad. It was not at the "landing place," if so it may be called. After it was sold it still remained to haul it to the "landing place."

The practice of manufacturing lumber by means of portable sawmills, and the consequent practice of "sticking up" the lumber in

fields and pastures, near the mills, was not prevalent, if it existed at all, when the word "landing" was first used in the statute. And we are urged by the defendant to apply the principle of the extension of the language of a statute to new conditions which did not exist and could not have been contemplated by the legislature when it was passed. This may be done "when the act deals with a genus and the thing which afterwards comes into existence is a species of it." *Hurly* v. *So. Thomaston*, 105 Maine, at page 306. But assuming that the term "landing" is a genus, we do not think that a sticking place or lumber yard is a species of it.

If the legislature deems it wise that lumber situated as this was should be taxable in the town where it is deposited, rather than in the town of the owner's residence, it will make the necessary amendment, as it has heretofore done in the cases of "ship yards," "landings," and "store houses." The court would transcend proper judicial limitations if it attempted to do so.

Exceptions sustained.

ARTHUR T. DRUMMOND et als. *vs.* DANA P. FOSTER et al.

Kennebec. Opinion December 15, 1910.

Easements. Extent of Right. Right of Way. Construction of Grant. Rights of Owner of Servient Estate.

1. When the grant of a right of way is silent as to its width, it will be held to be of a width suitable and convenient for the ordinary uses of free passage to and from the grantee's land. If the particular object of the grant is stated, the width must be suitable and convenient with reference to that object.
2. What is suitable and convenient depends upon the circumstances of each case. The presumed intention of the parties is to be found in the instrument itself, read in the light of existing relevant conditions and circumstances, and it may be interpreted, in case of doubt, by the practical construction which the parties themselves have placed upon it.
3. When the grant of a right of way is silent as to width, and the right of way is to be "back" of a store which the grantor contemplated building on the lot, the placing by the grantor of the rear end of the building, subsequently erected, fifteen feet from the rear end of the lot is not of itself alone significant of an intention that the end of the building should mark, or be upon, the side line of the right of way.
4. The owner of the servient estate over which a right of way has been granted may make any lawful use of his land that he chooses, not inconsistent with the right of the owner of the right of way. He cannot narrow the way so as to render it less suitable and convenient than it was before.
5. Upon the record, it is considered that the original grant was intended to be, and was, of a right of way, sufficiently wide for the purpose of a thoroughfare, and not for turning teams upon it, that the plaintiffs are not entitled to the use of the full width between the rear end of the defendants' store and the rear end of the lot, and that the erections made by the defendants, which are complained of, do not in any substantial degree render the way less convenient and suitable for use as a thoroughfare, and have not deprived the plaintiffs of any right.

On report. Judgment for defendants.

Action on the case to recover damages for an alleged obstruction of a right of way. Plea, the general issue. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Harvey D. Eaton, for plaintiffs.

Dana P. Foster, and Carroll N. Perkins, for defendants.

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

SAVAGE, J. Case for obstructing or narrowing the use of a right of way. The case comes up on report. The facts as we gather them from the report of the evidence are as follows:—

On October 4, 1825, one Edward Esty owned a lot of land on Main street in Waterville adjoining on the north a lot owned by George W. Osborne. He also owned a ten foot strip adjoining the easterly end of Osborne's lot. At that time there was a store upon the Osborne lot, but the Esty lot was vacant. On the day mentioned, Estey conveyed to Osborne the ten foot strip in the rear of the latter's store, and "also a free right of way with teams, carriages, etc., on the southerly side of a store to be erected by me, on my land, and back of said contemplated store to the land of said Osborne's in rear of his store." This right of way along the southerly side and across the easterly end of the Esty lot gave Osborne access from Main street to his own land in the rear of his store. Esty subsequently built a store on his own lot, the easterly end of which was fifteen feet westerly from the easterly end of his lot. The Osborne, or dominant estate has come down to the plaintiffs, and the Esty, or servient estate, to the defendants.

It is in evidence, and not denied, that formerly, and until 1888, the passage-way of which the right of way was a part was used as a thoroughfare, and that teams could and did pass through it across the plaintiffs' land to some outlet beyond. But in 1888 the store on the plaintiffs' lot was extended across the passage-way, forming at that point a cul-de-sac.

For many years a narrow stairway led down to the ground from the rear door in the store on the defendants' lot. This stairway was in the fifteen foot strip at the east end of the lot. In 1883 the stairway was taken away, and a shed, thirteen feet long and occupying four and one-half feet of the fifteen foot strip was attached to the store. From the shed, and twelve feet and eight inches from the ground, some kind of a structure was built to the east end of the lot. The easterly end of this structure is now supported by four posts, three feet apart, standing inside, but touching the defendant's line. The largest of these posts is six inches square. The effect of the shed on one side and the posts on the other and the structure overhead is to narrow the passage-way on the fifteen foot strip to ten feet, with a height of twelve feet and eight inches. The general passage-way is not of uniform width. At the entrance at Main street it is bounded on each side by buildings. It is 9.55 feet wide at that point. Further on it is narrowed at one place to 8.1 feet.

The plaintiffs complain of the narrowing of the passage-way by the shed and the posts, and contend that they are entitled to the use of the full width of the fifteen foot strip. The defendants admit that the plaintiffs have now the right of way which Esty granted to Osborne in 1825. They do not claim that it has been limited in width by prescription. But, since the width of the right of way was not defined in the grant of 1825, they say that the grantee obtained a right of way for such width only as was reasonably suitable and convenient for the accomplishment of the purposes of the grant, according to the intention of the parties.

Inasmuch as the passage-way as restricted by the defendants' structures is still nearly two feet wider than it is at another point nearer Main street, we conceive that the gist of the plaintiffs' complaint of injury is, not that the defendants have so narrowed the passage-way that any teams which could get into the passage-way from the street could not pass through it to the defendants' land, but that they have narrowed it so that teams cannot turn around upon the defendants' land. The only testimony in the case on this point is that of one of the plaintiffs who testified that the structures of the defendants had interfered with the plaintiffs' use of the

passage-way. He said that there was "scanty room within that space to get in there with a team and out again, because there is no outlet except at one end, consequently all the room is needed that is there. We have to turn a team at that point."

The rights of these parties must depend upon the interpretation to be given to the grant of 1825. No rights have been acquired since that time, nor have any been lost. The grant itself was silent as to the width of the way. It only said that it was to be a "free right of way with teams, carriages" etc., and that it was at that point to be "back" of a store which the grantor contemplated erecting on his own lot.

It is well settled that when the grant of a right of way is silent as to its width, it will be held to be of a width suitable and convenient for the ordinary uses of free passage to and from the grantee's land. And if the particular object of the grant is stated, the width must be suitable and convenient, with reference to that object. *Atkins* v. *Bordman*, 2 Met. 457. And this is merely construing the grant in accordance with the presumed intentions of the parties. What is suitable and convenient must necessarily depend upon the circumstances of each particular case. The presumed intention of the parties, of course, is to be found in the instrument itself. But the instrument may be read in the light of relevant conditions and circumstances existing at the time. *Proctor* v. *Railroad Co.*, 96 Maine, 458. And the interpretation of it may be aided, in case of doubt, by the practical construction which the parties placed upon it by their conduct, by acts done by one party and acquiesced in by the other, especially when such conduct is proven to have continued for a long time. And the proved conduct of the parties is sometimes of great importance in the case of ancient grants, when other evidence of the situation and circumstances has faded away. *Bannon* v. *Angier*, 2 All. 128.

Now the two practical questions presented by this record are these. After applying the foregoing rules of interpretation, have the plaintiffs, upon whom is the burden, shown (1.) that they are entitled to the use of the full width of fifteen feet, on the defendants' land? or if not, have they shown (2.) that they are entitled

to a width suitable and convenient for the turning of teams thereon? Under the circumstances of the case, we think they must show one or the other, or their suit must fail. We think they have shown neither.

I. The foundation of the plaintiffs' claim of a fifteen foot right of way seems to be based upon the fact that Esty in 1825, or later, placed his contemplated store fifteen feet from the rear end of his lot, and that the space between the store and the lot has remained open ever since, except for the obstructions complained of. There is no evidence of any user of the passage-way as a right of way for its full width at any time. But in support of this claim the plaintiffs cite and rely upon *George* v. *Cox*, 114 Mass. 382. In that case there was a grant of "a right of a free passage-way from Medford road by the easterly side of the meeting house to said lot of land," lying northerly, and granted by the same deed. Prior to the grant, the then owners had erected a fence running east and west on the line between the lot which they subsequently conveyed and the remaining lot which they retained, across which the right of way was located. This fence extended to a point eighteen feet from the easterly side line of the lot, and no further. Horse sheds (for the meeting house) were also erected along the dividing line between the lots, as far as the fence extended, leaving eighteen feet between the sheds and the side line of the lot. After the grant of the right of way, the trustees of the church, to whom the servient lot had been conveyed, erected a fence east of the church, in a line with the east end of the horse sheds, and eighteen feet distant from their east line, the whole length, after which the eighteen foot space was graded and made passable and convenient for travel on foot or with carriages, for its entire width. After the way had remained in that situation for at least eleven years, the trustees of the church caused the fence to be removed towards the east line of the lot, and thus narrowed the passage-way. It was claimed that the parties themselves, by building the fences and the sheds had definitely fixed the limits of the way, making it eighteen feet wide. As to this claim, the court said, "The deed does not fix or define the width of the way granted. But if the grantee, at the time of

the grant, practically located the way of a width of eighteen feet, and the grantors then and for a long time subsequent acquiesced in this location, the parties intending to fix the width, this would operate as an assignment of the way, would show what the parties intended by the deed, and would have the same legal effect as if this width had been fixed by the deed." This is undoubtedly a correct statement.

But the case at bar is different. The building of a fence along an indeterminate right of way, and acquiescence therein may be strongly evidential of the intent of the parties to mark the line of the way. Fences are used to mark lines. They are ordinarily placed upon lines, rather than a few feet distant from them. The stopping of the cross fence and horse sheds in the Massachusetts case eighteen feet from the line of the lot was significant of the understanding of the parties. But we think that the erection of a store building by the owner upon a lot across which there is a right of way is not of itself alone significant of a purpose thereby to assign, or to define the limits of, the right of way. It is rather to be presumed that the dimensions of the building and its location upon the land are determined by the purposes for which it is erected, by the needs of the business to be carried on therein, the uses which the owner himself desires to make of the remaining land, and perhaps by the pecuniary means of the owner. If he can, he will build as long a store as he needs. He will not build it any longer for the sake of having it mark the line of a right of way. There is no other evidence to sustain this claim of the plaintiffs. The case is barren of evidence of any uses made and acquiesced in, at least, until recent years, of the right of way over the defendants' land, except as a thoroughfare, for passing through with teams, one way or the other. And such a use has no tendency to show that the parties intended the right of way to be fifteen feet wide, or to be any wider than was reasonably suitable and convenient for the purposes of the way. On the other hand, it appears that for many years two or three feet of the fifteen was used, without objection by the owner of the servient estate, for a stairway leading down from the back door of his store.

II. The plaintiffs are entitled to a suitable and convenient way. The defendants have the right to use their land in any way they please, not inconsistent with the plaintiffs' right. *Chandler* v. *Goodridge*, 23 Maine, 78; *Morgan* v. *Boyes*, 65 Maine, 124; *Atkins* v. *Bordman*, 2 Met. 457. The defendants cannot narrow the way so as to render it less suitable and convenient than it was before. In view of the fact that the present passage-way is wider on defendants' land than it is at other points, so that any team which can get into it from the street can pass through that part of it which is on the defendants' land, without any difficulty, it is obvious that the way is still suitable and convenient for passage through. And it follows that if the plaintiffs have no greater right than to pass through, they have not been injured, and this action cannot be maintained.

As already stated, at the time this right of way was granted, and for many years after, the passage-way extended across the plaintiffs' open lot to some outlet beyond. The space in the rear of the store on the plaintiffs' land was open and clear. The passage-way was in fact used as a thoroughfare. There is no evidence that it was used in any other manner. No reason has been suggested why at that time the owner of the dominant estate had any occasion to use the servient land as a turning ground, or that it was intended by the parties that the right of way should be wide enough to turn upon. And we are not persuaded that it was so intended. Our views on this point are strengthened by the very narrowness of the full width of the passage,—fifteen feet. While it may not be impossible to turn some kinds of teams on a fifteen foot space, it is very impracticable. It is especially so for such teams as would be expected ordinarily to be driven to the rear ends of stores.

The rights of the plaintiffs are to be determined as of the time the right of way was granted. No change since then in the condition of their property or in their needs has enlarged the grant. When the plaintiffs extended their store across the passage-way in the rear, they cut themselves off from using the way as a thoroughfare. But this did not enlarge the plaintiffs' right to use the right

of way. They had just the same right afterwards as before, and no more. And the evidence fails to satisfy us that that right included the right to a way wide enough for a team to turn round upon it.

The result is that there must be an entry of,

Judgment for the defendants.

JULIUS JENSEN, Administrator,

vs.

MAINE EYE AND EAR INFIRMARY.

CHRISTIAN JULIUS JENSEN *vs.* SAME.

Cumberland. Opinion December 15, 1910.

Charities. Institutions. Negligence. Special Laws, 1897, chapter 519.

A purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants.

The character of an institution as a "public charity" is not affected by charging those able to pay for use of its rooms.

Where the defendant was a corporation organized and existing solely as a public charity, its organization having been ratified, confirmed, and declared to be legal and valid as such by chapter 519 of the Private and Special Laws of Maine, approved March 25, 1897, *held* that it was not liable in damages for the negligence of its servants in permitting an inmate of the defendant institution to fall from a window and which resulted in her death.

On exceptions by plaintiff. Overruled.

Two actions on the case against Maine Eye and Ear Infirmary of Portland, a corporation, to recover damages for the alleged negligence of the servants of the defendant in allowing the plaintiff's wife, Mary J. Jensen, while an inmate of the defendant institution,

to evade the supervision of her attendants and fall through a window to the sidewalk, five stories below, whereby she was fatally injured and died within a few hours after the accident. One of said actions was brought by the plaintiff in his capacity as administrator of the estate of his said wife, and the other was brought by him in his own behalf as husband of the said decedent. Plea, in each action, the general issue, with a brief statement, in each action, as follows:

"1. That defendant is not a corporation for the treatment of sick and injured persons for hire, as the plaintiff in his writ has alleged against it.

"2. That defendant is a corporation organized and existing solely as a public charity, its organization having been ratified, confirmed and declared to be legal and valid as such by Chapter 519 of the Private and Special Laws of the State of Maine, approved March 25, 1897."

The actions were tried together and at the conclusion of the evidence the presiding Justice directed a verdict for the defendant in each action, and the plaintiff excepted.

The case is stated in the opinion.

Dennis A. Meaher, and Michael T. O'Brien, for plaintiff.

Seth L. Larrabee, and Sydney B. Larrabee, for defendant.

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

SPEAR, J. These are actions brought against the Maine Eye and Ear Infirmary by Julius Jensen in his own behalf and as administrator of the estate of Mary J. Jensen, charging the defendant with negligence of its servants in allowing the plaintiff's decedent, while an inmate of the Infirmary, to evade the supervision of her attendants and fall through a window to the sidewalk, the accident resulting in fatal injuries. The case shows that Mary J. Jensen was ill with typhoid fever and that her attending physician had arranged with the defendant for her to occupy a private room in one of the wards of its building. But she was not a patient of the Infirmary. She remained the private patient of Dr. Connellan, who had full charge of her case and attended her daily while she was in the insti-

tution. He directed the nurses and house doctors and says so far as he knows his directions were complied with. He also understood the regulation of the institution, requiring a specific contract for the employment of a constant nurse, but says he considered the attendance of such a nurse unnecessary and employed none. It appears, however, that it was the duty of the nurses connected with the institution, although Mrs. Jensen was in a private room and under the direction of a private physician, to give her such attendance in her room as was necessary for her care and the execution of the physician's orders. Further than this Mrs. Jensen was not under the control of the officers of the corporation. She was put there by her husband by the advice of her physician. The Infirmary did not engage to cure her or take care of her. It undertook to do nothing more than to give her the benefit of one of the rooms and beds and her share of the nursing.

The case also clearly shows that the defendant was not a money making corporation; nor a business corporation organized for profit; but purely a charitable institution, having no stockholders and paying no dividends. All its receipts are consigned to the general fund for the benefit of charity. Upon this state of facts the presiding Justice at the conclusion of the testimony directed a verdict in each case for the defendant. To this ruling the case comes to the Law Court on exceptions.

The defendant in its brief sets up two grounds of defense: 1. That defendant is not a corporation for the treatment of sick and injured persons for hire, as the plaintiff in his writ has alleged against it. 2. The defendant is a corporation organized and existing solely as a public charity, its organization having been ratified, confirmed and declared to be legal and valid as such by chapter 519 of the Private and Special Laws of Maine approved March 25, 1897.

It is the opinion of the court that the order of the presiding Justice can be sustained upon both grounds, but the second being conclusive as a matter of law, the first need not be considered. No principle of law seems to be better established both upon reason and authority than that which declares that a purely charitable

institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness.

The defendant is a charitable institution. It is so declared by a decision of our own court. In *Farrington* v. *Putman*, 90 Maine, 405, it is said referring to this very defendant: "Here is an institution, and the only one of the kind in the state, and virtually a state charitable institution of the most beneficent kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the state suffering from diseases of the eye and ear." The constituent elements which are regarded as characteristic of charitable institutions are defined in *Hospital Association* v. *McKenzie*, 104 Maine, 320, as follows: "It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital and no provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution." The same doctrine is also emphatically established in Massachusetts. In *McDonald* v. *Mass. Gen. Hospital*, 120 Mass. 432, the court say: "The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity."

It is claimed, however, that the defendant charges a compensation for the use of its rooms to those who are able to pay, and

thereby loses one of the essential attributes of a charitable institution. But this in no way changes the character of the institution. In the McKenzie case above cited, the testator provided in his will that part of the income from his estate should be used for the maintenance of a "free hospital." In this case it was contended that it was the purpose of the testator "to establish a hospital absolutely and entirely free," not one which might provide a certain number of free beds to charity patients, and that neither of the hospitals claiming to meet the conditions of the bequest claimed to be free in this sense. But the court in construing the word, say: "Nor is the word 'free' used in the sense of without compensation from any one receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free." It is the opinion of the court that the defendant is a charitable institution in fact and in law.

Exceptions in each case overruled.

MARY A. WHITE

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec. Opinion December 17, 1910.

Common Carriers. Street Railways. Relation of Passenger and Carrier. Injury to Alighting Passenger. Dangerous Condition of Street. Private and Special Laws, 1889, chapter 528, sections 3, 15. Revised Statutes, chapter 53, section 26.

While a passenger upon a street railway car terminates the relation of passenger and carrier upon alighting from the cars when the carrier has no control over the street or place of alighting, it is otherwise where either the general law or the provisions of the carrier's charter cast upon the carrier the duty to keep in repair the portion of the street upon which the passenger alights.

Where a street railway corporation has the duty of keeping in repair that portion of the street upon which it invites passengers to alight, it may become responsible for dangerous conditions therein which it causes or permits.

A street railway corporation having the duty to keep in repair that portion of the street occupied by its tracks, is responsible for dangerous conditions of its own making existing there; and where it stopped its car at such a place, *held* that it was liable for injuries received by a passenger by reason of such dangerous condition after alighting from the car.

Where a street railway company operates an open car with transverse seats, the implied invitation upon the stopping of the car, or the implied representation as to the safety of the points upon the street opposite the seats, is not restricted to one side or the other, in the absence of warning by the company, and a passenger alighting from such car on the side of the car opposite his seat is not guilty of contributory negligence as a matter of law.

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. Plea, the general issue. Verdict for plaintiff for $1941.66. Defendant filed a general motion for a new trial and also excepted to several rulings made by the presiding Justice.

Benedict F. Maher, for plaintiff.

Heath & Andrews, for defendant.

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

The case as stated by Mr. Justice BIRD who prepared the opinion, is as follows: The defendant, successor to the Lewiston, Winthrop & Augusta Street Railway and of the Augusta, Hallowell & Gardiner Railroad Company was on the twelfth day of August, 1907, a common carrier of passengers by its electric railway from Hallowell to Augusta and intermediate points. On that day at about three o'clock in the afternoon the plaintiff, in good health and weighing two hundred and sixty pounds, became at Hallowell a passenger on a north bound open car of defendant of the usual type. She occupied the westerly end of the fourth seat from the rear of the car. Her destination being the third or most northerly gate of the Hallowell Cemetery, she gave a signal to the conductor

to stop the car when she had arrived about opposite the most southerly gate of the cemetery. The conductor, being engaged upon the opposite side of the car in taking fares, did not see her signal and, after a short interval, plaintiff called to the conductor to stop, the bell was rung and the car stopped. In the locality where the car stopped the main track was situated upon the westerly side of the wrought portion of the street which upon the easterly side of the track was macadamized and in good condition, while upon the west of the main track was a siding several hundred feet long extending southerly from Day's driveway, near which it united with the main track where its grade was coincident therewith. The driveway extends westerly from the street and northerly of the Cemetery and is about eighteen feet wide measuring on the westerly main rail. The grade of the siding gradually lowered as it extended southerly until at a distance of fifty feet or more from the southerly side of the driveway the grade of the siding was nearly fourteen inches lower than that of the main track, the surface of the street, gradually sloping from the main track to the siding, forming a shoulder. At a distance of twenty-five feet southerly of the south side of the driveway the difference in grade between the main and spur tracks is six inches and the distance between the westerly main rail and the easterly spur rail thirty-three inches. The spur track was constructed of T rails supported by sleepers which between the rails and westerly of the rails projected above the surface of the street, but their ends, easterly of the easterly rail were covered with earth except that some of those about twenty-five feet southerly of the driveway were exposed in the neighborhood of the rail. The running board of the car overhung or extended out from the westerly rail of the main track about twenty-two inches.

The testimony was sharply contradictory as to the place where the car stopped, that produced by plaintiff tending to show that the front of the car reached the southerly edge of the driveway, that of defendant that it nearly reached the northerly edge of the driveway where the motorman in charge usually stopped his car. If the latter is correct, the place where the plaintiff alighted was between the rails of the spur track; if the former, she alighted between the

easterly rail of the spur track and the westerly rail of the main track about twenty-five feet southerly of the driveway. Here the spur track being seldom used, grass and weeds had grown upon on either side of its easterly rail, more or less, as plaintiff claims, obscuring it from view.

When the car stopped, plaintiff alighted from the westerly side and placed both feet upon the ground. She states that after alighting she took a step to the left to let the car go by her and her right foot caught on the easterly rail of the siding causing her to fall and sustain injuries for which she seeks damages.

BIRD, J. The first exception is to the refusal of certain instructions requested by defendant and to certain instructions given against the objection of defendant. Recital of the instructions refused and given may be avoided by adopting the concise statement of counsel of defendant in his brief: "The gist of our contention was that if the plaintiff had safely alighted in the street, as she admitted, and her fall was due to her stumbling over anything lawfully in the street, the defendant was not liable, on the ground that its duty to the passenger ended with her safe alighting in the street. The gist of the rule given was that it was the duty of the defendant to exercise ordinary care in selecting a reasonably safe stopping place."

The rule asked for has been recognized by this court, at least arguendo, but with a limitation of its application to cases where the railway company has no authority or control over the streets in *Conway* v. *Railroad Co.*, 87 Maine, 283, 286; S. C. 90 Maine, 199, 202-4, see *Call* v. *Street Railway*, 69 N. H. 562, 565; *Creamer* v. *West End Railway*, 156 Mass. 320, 321; *Joslyn* v. *Milford, etc., Railway Co.*, 184 Mass. 65, 67. "In the absence of any authority given the street railway company over the streets, it must be evident that it cannot be held as an insurer of their safety for passengers to alight upon." *Conway* v. *Horse R. R. Co.*, 87 Maine, 286. In *Robertson* v. *West Jersey & S. R. Co.*, 79 N. J. L. 186, the court quoting from *Creamer* v. *Railway Co.*,

ubi supra, says "'The street is in no sense a passenger station for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveller upon the highway and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street or for his safe passage from the car to the sidewalk.' While we might qualify the statement of this case to exclude the setting down of a passenger at an obviously improper point in the highway, the rule enunciated as to the termination of the relation is approved."

But in the present case it is provided in the charter of one of the corporations whose franchises the defendant is now exercising, that "said corporation shall maintain and keep in repair such portions of the streets and roads occupied by the tracks of its railroad, and shall make all other repairs of said streets and roads which may be rendered necessary by the occupation of the same by said railroad; . . . . And said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or of any obstruction placed by them in the streets or roads of said cities or towns, and shall save and hold said cities and towns harmless from any suits for such loss or damage.

"The said railroad shall be constructed and maintained in such form and manner, and with such rails and appliances, that so much of the streets and roads as are occupied thereby shall be safe and convenient for travellers; and said corporation shall be liable in an action on the case for any loss or damage which any person may sustain by reason of any failure to comply with this provision:" §§ 3 and 15 of c. 528 of Priv. and Spec. Laws, 1889.

And so by general statute, it is provided, R. S., c. 53, sec. 26, "Such corporations [all street railroad corporations] shall keep and maintain in repair such portions of the streets, roads or ways, as shall be by them occupied, and shall make all other repairs thereon, rendered necessary by such occupation" . . . .

It is unnecessary to say that having the duty both by special and general law to maintain in repair the portions of the streets occupied,

defendant had the authority and power to make necessary repairs. If grass and weeds obscured and concealed its disused rails, the removal of the same was a matter within its power and to such extent its siding was within the control of defendant. *Milton* v. *Railway Co.*, 103 Maine, 218, 222, 223.

Having control, if not exclusive, of the point where the passenger is impliedly invited to alight, it is responsible for dangerous conditions of its own making. The condition which the jury may have found to exist at the point at which plaintiff claims to have alighted is not unlike that which existed in *Cobb* v. *Standish*, 14 Maine, 198. The rail lawfully located had become "a pitfall to allure and then to injure." See *Bourget* v. *Cambridge*, 156 Mass. 391, 393.

The refusal of the requested instructions without exception or modification in the present case was not error. The instructions given and excepted to were in accordance with the law as laid down in *Conway* v. *Railroad Co.*, 90 Maine, 199, 204.

The second and third exceptions, as matter of law, are abandoned and so far as the second concerns matter of fact it is urged and considered upon the motion.

Upon its motion, defendant urges that the jury erred in finding that the plaintiff alighted at a place about twenty-five feet southerly of the driveway. But assuming the credibility of all the witnesses, the evidence upon this point was conflicting and we can find no cause to hold that the conclusion of the jury was without warrant.

Again the defendant contends that the plaintiff was guilty of contributory negligence in not alighting from the east side of the car. But "the plaintiff was sitting at the end of one of the transverse seats . . . . and would be expected to alight, as she did from the side of the car at the point opposite her seat." *Conway* v. *Railroad Co.*, 90 Maine, 199, 203. We cannot hold that with an open car with transverse seats the invitation to alight implied from the stopping of the car or the implied representation as to the safety of the points upon the street opposite the seats where the car stops is restricted to one side or the other in the absence of warning on part of defendant. See *McKimble* v. *B. & M. R. R.*, 141 Mass. 463, 471; *Richmond City Ry. Co.* v. *Scott*, 86 Va. 902,

908. Whether the plaintiff was guilty of contributory negligence in selecting the west side from which to alight, was a question for the jury, and its finding upon the evidence, we find no occasion to disturb.

Contributory negligence is also urged in that the plaintiff was careless in stumbling over the rail and in not seeing and avoiding it. But upon both these questions the evidence was conflicting. The jury had a view of the locality and we must hold that it is not apparent that the verdict is indisputably wrong.

Exceptions and motion overruled.

ELLEN A. WRIGHT

vs.

THE FRATERNITIES HEALTH AND ACCIDENT ASSOCIATION.

Penobscot. Opinion December 21, 1910.

Insurance. Application. Construction.

Where language, liable to be misunderstood, is employed in the application prepared by an insurance company, all doubts must be resolved in favor of insured.

The insured applied for insurance in a "health and accident association." There was nothing in the application calculated to call attention to life insurance, all the questions relating to the health of the applicant. *Held*, that the question in such application, "Has any company, society or association ever rejected your application, canceled your policy or declined to renew same or refused compensation for disability?" should be construed to mean previous applications for health and accident insurance alone, in an action on the policy so as to prevent a forfeiture on the ground that applicant had answered the question in the negative, though his application for life insurance had previously been rejected by a life insurance company.

On report. Judgment for plaintiff.

Assumpsit brought by the plaintiff as beneficiary of Henry A. Wright to recover the sum of $324.50 as sick benefits under a policy of health and accident insurance issued to the said Henry A. Wright by the defendant company. Plea, the general issue with brief statement as follows: "That by the terms of the contract in suit, if any of the statements, representations, or answers made in the application for said contract were not true, full and complete, all rights to benefits thereunder were null and void; and the defendant says that the answers to the first, second, third and eighth questions contained in the application for said contract were not true, full and complete." At the close of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Matthew Laughlin, for plaintiff.

Harry Manser, for defendant.

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

EMERY, C. J., WHITEHOUSE, PEABODY, JJ., dissenting.

KING, J. The plaintiff was named beneficiary in an accident and health insurance policy issued by the defendant company to her husband, Henry A. Wright, upon his written application and statements. In the application Mr. Wright made answers to various interrogatories therein propounded as to the then present and past condition of his health, and he also stipulated "That if any of the statements, representations, or answers made herein are not true, full and complete, all rights to the benefits named in my policy shall be null and void, and all money paid by me to the Association forfeited."

The interrogatories and answers were as follows:

1. Q. Are you now in good health? A. Yes.

2. Q. Have you been in good health for the last five years? A. Yes.

3. Q. Have you consulted, been prescribed for or required the services of a physician or surgeon during the past five years?

If so, give date and state particulars, name and address of attending physician? A. No.

Q. Have you had fits, vertigo, paralysis, varicose veins, asthma, rheumatism, sciatica, lumbago, cancer, nervous prostration, appendicitis, cystitis, gall stones, gravel, or is your hearing or eyesight impaired? A. No.

5. Q. Have you ever had a rupture or suffered the loss of an eye, hand or foot, or use of either? A. No.

6. Q. Have any of your near relatives died of or been afflicted with consumption, paralysis, insanity, scrofula, cancer, or any hereditary disease? A. No.

7. Have you always been and are you now of sober and temperate habits? A. Yes.

8. Q. Has any Company, Society or Association ever rejected your application, cancelled your policy, or declined to renew same, or refused compensation for disability? If so, give name and date. A. No.

9. Are you insured in any other Company, Society, or Association paying sick and accident benefits? If so, give name and amount of benefit in each. A. No.

The application, including the interrogatories, answers and stipulation constituted, with the policy itself, the contract of insurance. Mr. Wright was ill and died of disease within the terms of the policy, and the beneficiary brings this suit on the contract.

It appears from the evidence that Mr. Wright previous to his application to the defendant company had made written application through an accredited Agent of the North Western Mutual Life Insurance Company for a policy of insurance upon his life and the application was rejected. The main question in the case is whether the fact of such application and rejection is in contravention of Mr. Wright's unconditional negative answer to the eighth interrogatory in his application to the defendant company.

The plaintiff claims that the interrogatory does not call for an answer as to applications to a life insurance company for a life insurance policy, but is limited to applications to Health and Accident Insurance Companies for health insurance policies. The

defendant claims that the interrogatory is more comprehensive and does call for an answer as to applications to life insurance companies as well.

The subject matter under consideration was health and accident insurance. A conspicuous feature of the application is the name of the company, The Fraternities Health and Accident Association. Life insurance is not mentioned. It was not under consideration. There is nothing in the application calculated to call attention to it. No reason can readily be conceived why a person of ordinary prudence and intelligence should think of it by way of association from any statement contained in the application. Interrogatory 8 reads: "Has any company, society or association ever rejected your application," etc.? When the phraseology of this question is construed in connection with the subject matter of the contract it seems evident that the ordinarily prudent person would be authorized to imply the word "health" before the word "company" so that the question would mean, in the mind of the applicant — Has any Health company, etc., rejected your application, etc.

The defendant, however, claims that the language of interrogatory 8 should be interpreted in its most comprehensive sense; that the word "any" should be interpreted to include life insurance, and all other corporations doing a life, health or accident insurance business. But we think there can be little doubt that interrogatory 8 was susceptible of the limited interpretation above given, and warranted the assumed understanding of the question disclosed by the answer. In the employment of language so liable to be misunderstood, as that used in giving expression to interrogatory 8, it seems well settled that all doubts must be resolved in favor of the assured. In other words it is incumbent upon the company which prepares the form of application, containing declarations to be made and questions to be answered, to use language so plain and intelligible that the ordinary person, under the usual circumstances of filling out applications, can readily comprehend it.

In *Wallace* v. *Ins. Co.*, 41 Md. 744, 22 L. R. A., N. S., 966, it is said: "If the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the

subject matter to which they relate, are susceptible of the interpretation given them by the insured, the policy will be construed in favor of the assured. As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him."

In *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 58 Fed. Rep. 945, Judge Taft states the rule as follows: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." See also cases cited.

Dineen v. *General Accident Insurance Company*, 126, Appellate Division, 167 (N. Y.) 110 N. Y. Supp. 344, is a case practically identical in facts with the case at bar. In the application the assured said in answer to a question: "No application ever made by me for insurance has ever been declined," etc. It appears that prior to the date of this answer the plaintiff had applied for a policy on his life which had been refused. The court however say: "There is no question in the application which specifically calls upon the plaintiff to disclose whether he has ever been rejected by a life insurance company." In construing the question with reference to the context, the court also say: "The plaintiff might well have inferred that the inquiries were directed solely to accident or health insurance." It should be observed also that all the statements of the plaintiff were made warranties. It is said in the opinion last referred to, in construing the application: "An insurance company which is making every statement, whether material or otherwise, a warranty must be held to a very strict rule when it is endeavoring

to avoid payment on its insurance contract, because of answers to inquiries or declarations which it has framed. They must be so plain and intelligible that any applicant can readily comprehend them. If any ambiguity exists the construction will obtain most favorable to the insured." Under these decisions it seems clear that it was not incumbent upon the plaintiff to maintain, that the question could not be construed to include life companies, but that it was enough for her to show that it was susceptible of the construction given by the applicant,— that life insurance companies were not embraced in it. If the defendant intended to include life companies it should have left no doubt as to its meaning. A single word would have accomplished the result.

Judgment for the plaintiff for $324.50 and interest to be added from the date of the writ.

Dissenting opinion by EMERY, C. J., WHITEHOUSE and PEABODY, JJ., concurring.

EMERY, C. J. We cannot concur. We see no reason for construing the contract strictly against one party and liberally in favor of the other. The parties were upon equal footing; neither should be favored or penalized. The contract was mutual and entered into voluntarily without constraint upon either party. It should receive the construction its language fairly imports, read in the light of the purpose of the parties and of the contract itself. The assured applied for insurance upon his health. The insurance company desired from him information, and sources of information, as to his health, present and past. Such was the obvious purpose of the questions asked of him. He must be held to have known that such was their purpose,—that his condition and history as to health would determine whether the company would assume the risk.

To enable it to ascertain whether there was any reason why it should not assume the risk, the company propounded to him question 8. "Has any Company, society or association ever rejected your application, cancelled your policy, or declined to renew the same,

or refused compensation for disability." The applicant answered "No," although he had applied to, and been rejected, by a life insurance company because of ill health ; and he then stipulated that if any of the statements, representations, or answers were "not true, full and complete, all rights to the benefits named in my policy shall be null and void and all money paid by me to the association forfeited." His stipulation was, not that his answers should be true according to his knowledge or belief, or recollection, or even according to his understanding of the questions, but that the answers would prove to be "fully and completely" true in fact.

Undoubtedly the company might have framed their questions differently. Also it may be that the answer to Question 8 was not wilfully false. The applicant may have forgotten, or answered as he did inadvertently. All this, however, is beside the real question, which is, taking the question and answer as they were framed, was the answer in fact "true, full and complete?" Inasmuch as life insurance companies, usually at least, accept or reject applications according to the applicant's state of health, and inasmuch as this applicant had applied for a policy in a life insurance company and had been rejected because of ill health, we think it clear the answer was not "true, full and complete." If the applicant, assuming him to have been honest, had remembered the fact of his former application and rejection he would not have answered as he did. No honest man would.

In Equity.

ELIZABETH B. BLISS *vs.* SAMUEL W. JUNKINS et als.

York. Opinion December 22, 1910.

Nuisance. Abatement. Injunction. Remedy at Law.

1. When what is claimed to be a nuisance already exists, the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate, unless for some sufficient reason a remedy at law will not be adequate.
2. When, as in this case, under a bill in equity praying that the defendants be enjoined from entering on, or attempting to take any of the plaintiff's land, and from erecting or maintaining on the land certain structures complained of, it appears that at the time the bill was brought the defendants had already entered upon the land, and a large part, if not all, of the offending structures had already been erected, and it further appears that the plaintiff had allowed the work to go on for many weeks without objection, that a temporary injunction was not asked for, and that, at all events, the work was all completed before a hearing on the bill, the bill will be dismissed, and the plaintiff remitted to a remedy at law.

In equity. On report. Bill dismissed.

Bill in equity praying for an injunction. This case has already been before the Law Court on demurrer, the demurrer was overruled, the defendants excepted and the exceptions were overruled. See *Bliss* v. *Junkins*, 106 Maine, 128.

After the overruling of the demurrer and the exceptions thereto, the case was heard on bill, answer and proof, and at the conclusion of the evidence was reported to the Law Court for determination.

The case is stated in the opinion.

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

William S. Matthews, Fred A. Hobbs, John C. Stewart, Cleaves, Waterhouse & Emery, Frank D. Marshall, James O. Bradbury, and Geo. F. & Leroy Haley, for defendants.

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

SAVAGE, J. Bill in equity praying for an injunction. The bill is dated October 7, 1907. The plaintiff alleges in substance that in 1905 the county commissioners of York county laid out, so far as forms of procedure are concerned, a way across her land in the town of York, and over York river, on which her land borders; that for several reasons specified, the laying out of this way was irregular, illegal and void; that at the date of the bill a way was being constructed and a bridge over the river was being built upon the invalid location, by a contractor, in pursuance of an unauthorized and invalid contract with the town of York; that the contractor "is about to come upon the plaintiff's land within the location, and to her great damage; that she believes it is his intention to cover up her land and put earth, stone and wood thereon," in building an approach to the bridge, thereby "depriving her of the use of her land," and that the bridge and approaches will constitute a public nuisance, from which she will sustain special damage.

The prayer of the bill is that the defendants may be "enjoined from entering on, or attempting to take any of her land" under the judgment of the county commissioners laying out the way, "or from erecting or maintaining in the York river immediately adjacent to the complainant's land, or on the road lying along the northerly bank of said river, or upon the complainant's land adjacent to said road, the erections complained of," that is to say, the bridge and its approaches.

Of the eleven defendants, three are the county commissioners who laid out the way, four are a committee of citizens at one time appointed by the town "to act in conjunction with the selectmen in building the bridge," and who, after the selectmen had declined to act further, made a contract for the building of the bridge and approaches and supervised the work as it was being done; three are the selectmen, who did nothing whatever towards the building of the bridge and way, and the remaining one is the contractor who built them.

The case has already been before this court on demurrer to the bill, and upon the allegations in the bill, it was considered that the plaintiff had stated a cause remediable in equity. *Bliss* v. *Junkins*, 106 Maine, 128. Since then the case has been heard on bill, answer and proof, and it now comes before us on report.

The question arises at the outset whether, upon the proof, the plaintiff is now entitled to equitable relief by injunction, as prayed for. We think she is not.

The record does not disclose when the bill was filed or served on the defendants, nor when the answers and demurrers were filed. But the bill was dated October 7, 1907, and a hearing was had on the demurrers, February 19, 1908. The contractor began his work in the early summer of 1907, and the bridge and way were accepted by the committee as completed, January 29, 1908. A very considerable part of the bridge work had been done before the date of the bill, and although the plaintiff alleges in her bill that the contractor was "about to come upon her land" and do the things which would constitute a nuisance thereon, the weight of the evidence tends strongly to show that a large part, if not all, of the earth work or filling upon her land had been done before the bill was dated, or filed, or served. And it was all completed before any hearing was had. The plaintiff did not ask for a temporary injunction, and, of course, none was issued. The plaintiff, though knowing the situation, allowed the work to go on for weeks, and some of it for months, apparently without objection or protest. Large sums of money, evidently, were expended on the work during this period.

Moreover, the bill seeks to enjoin the defendants from erecting and maintaining the bridge and the approach to it which is on the plaintiff's land. They are already erected. As stated, they were in large part erected before the bill was brought. If the completed structure is a nuisance now, the uncompleted structure was a nuisance, perhaps in a lesser degree, then. The defendants are not maintaining the bridge and the approach. Neither the county commissioners nor the selectmen had anything to do with their erection. The committee and the contractor have now no personal interest in the

bridge and the approach. They have completed their work and left it. It is true that some of the work may have been done after the bill was served. But an injunction to be effective must be so shaped as to remedy the existing evil. Only a mandatory injunction compelling the committee and contractor to remove the offending erections and abate the nuisance would now be of any service to the plaintiff. That has not been prayed for.

We think, under the circumstances of this case, that the same rule should be applied here as is applied to bills brought to enjoin or abate existing nuisances. It is well settled that "when what is claimed to be a nuisance already exists, the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate." *Tracy* v. *LeBlanc*, 89 Maine, 304; *Sterling* v. *Littlefield*, 97 Maine, 479. There are exceptions to the rule, as when there is an imperious necessity, or when irreparable injury is threatened unless relief in equity is afforded, or when for some other sufficient reason a remedy at law will not be adequate. But none of these conditions exist here.

We think the plaintiff must be remitted to her remedy at law, and that she should thus test her legal right, before she invokes so stern a process as a mandatory injunction. Whether these defendants or any of them, in any event, should be compelled under the circumstances of the case to remove the offending structures is not considered.

Bill dismissed without prejudice as to any remedy at law, and with one bill of costs for the defendants, county commissioners, and one bill of costs for the defendants, selectmen.

HERBERT D. PHILBRICK *vs.* ATLANTIC SHORE LINE RAILWAY.

CHARLES LEWIS CASS *vs.* ATLANTIC SHORE LINE RAILWAY.

York. Opinion December 29, 1910.

Street Railways. Crossing Accidents. Negligence. Contributory Negligence. Proximate Cause.

A traveler approaching an electric railroad crossing is bound to exercise a degree of caution commensurate with the situation, and where plaintiff was driving a team and wagon along a road parallel with a car line, knowing that a car going in the same direction was due, and heard it when it was 300 or 400 feet away, and saw it when it was less than 100 feet away approaching at a speed of 10 or 12 miles an hour, and he turned his horses and deliberately drove upon the track to enter a private way on the other side, resulting in a collision, he was negligent.

The driver, not only having negligently put himself in a place of peril, but having continued negligently to move on to the catastrophe until it happened, his negligence was the proximate cause of the injury, and any negligence of the motorman in charge of the electric car was not independent of the driver's contributory negligence, but contemporaneous with it, and the doctrine of discovered peril does not apply.

An electric railroad crossing is a place of known danger, and no one should approach it without senses alert, nor should one attempt to pass over it without considering the safety or peril of the act. Travelers upon the highway should know that upon them as well as upon the motorman rests a duty of anticipating and avoiding collisions, a duty which they owe not only to themselves, but to the railroad company and to the passengers in the car.

On motions for new trials by defendant. Sustained.

Two actions on the case brought to recover damages caused by a collision between a team owned by the plaintiff Philbrick and driven by the plaintiff Cass, and a car of the defendant, as Cass was attempting to drive across the tracks of the defendant in the town of York to reach a private way leading to Dover Bluff. Plea, the general issue in each case. The two actions were tried together. Verdict for the plaintiff Philbrick for $160.75, and for the plaintiff Cass for $236.66. The defendant filed a general motion to have each verdict set aside.

The case is stated in the opinion.

E. P. Spinney, for plaintiffs.

Fred J. Allen, *Cleaves*, *Waterhouse & Emery*, *and John C. Stewart*, for defendant.

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

CORNISH, J. About 11.40 in the forenoon of September 11, 1908, the plaintiff Cass, an employe of the plaintiff Philbrick, was driving the team of said Philbrick along the highway in the town of York and in attempting to cross the tracks of the defendant at the entrance of a private way leading to Dover Bluff, was hit by a car of the defendant, resulting in injuries to both driver and team. These actions of tort were brought to recover damages caused by this collision and are before this court upon defendant's motion to set aside a verdict for the plaintiff in each case as against the evidence.

The situation may be stated briefly. The general direction of the highway was easterly and westerly, the electric railroad track running along the southerly side and the private way leading off at right angles toward the south. The plaintiff's team consisted of a single horse and a canvas covered fish cart, like a butcher's cart, with a tight compartment partition back of the driver's seat. The top of the cart projected over the seat, with curtains at either end which were rolled up on the day of the accident. The horse was gentle, slow and not afraid of electric cars. The driver Cass, was a man of mature years and familiar with this locality, as it was a part of the route over which he regularly travelled in his business of peddling fish. Cass was moving westerly along the highway, parallel with the railroad track, at a rate of five or six miles an hour until he came to the LaBonte house about 71 feet from the crossing. The electric car was moving in the same direction at a rate, as the defendant claims of six or eight miles or as the plaintiff claims of ten or twelve miles an hour. Beginning at a point about 400 feet easterly from the crossing there was a down grade of about

2% to the crossing and for that entire distance a person approaching the crossing had a clear view of the track. It was a straight course and no trees or buildings obstructed the vision. The plaintiff claims that as he was driving along the northerly side of the highway opposite the LaBonte house, which was 71 feet from the crossing, he met a team, which passed him on the wrong side, forced him nearer to the tracks, and brought his horse down to a walk; that at that time and at that spot he first became aware of the approaching car as he then heard the buzzing of the electric wire; that about that time he changed his own position from the northerly to the southerly end of the seat so that he could and did see the car; that after passing the team he veered the horse back somewhat towards the northerly side of the road, and continued on his way; that as he was swinging around to the left to approach the crossing, and when the horse was at a little distance from the first rail, he observed the car a second time, at a distance estimated by him to be between seventy and one hundred feet, and approaching at an estimated speed of ten or twelve miles an hour; that nevertheless he drove upon the track, but, as he says, "when I got on the track I didn't think I could get out of the way quick enough to avoid an accident because they hadn't slowed up any;" that the team had nearly passed over when the car collided with the cart and both the team and the driver were injured.

This simple rehearsal shows the driver's conduct to have been careless even to the verge of recklessness. He knew that the car, which was on time, was due, and he says that he was expecting it. He heard it when it was probably three hundred or four hundred feet away. He saw it distant less than one hundred feet and approaching as he thought at a speed of ten or twelve miles an hour just before he reached the rails. If the speed were ten miles an hour the intervening distance would be covered in seven seconds. And yet knowing the car was in such close proximity he deliberately drove upon the track. Had he stopped where he was, as he could have done and as ordinary prudence would dictate that he should have done, all would have been well. He may have thought that he could cross before the car would reach him. If so, he took his

chances and lost and upon him alone should fall the blame. It was at the most a matter of a few seconds and safety ought not to hang on so narrow a margin.

The defendant contends that the accident did not happen exactly as the plaintiff would have us believe, and introduced evidence to the effect that the plaintiff was driving along parallel with and quite near to the tracks when he suddenly turned his horse upon the crossing and, before he could get clear, was struck. This is the testimony of the motorman and he is corroborated by a passenger in the car and by one Bowden, the plaintiff's own witness, who saw the accident from his premises across the way, at a distance of only 137 feet. Bowden says that when he came out of his barn the horse's head was about the length of the team from the crossing and the plaintiff was still driving parallel with the tracks, that he then began gradually to swing towards the crossing and at that time the car was at the LaBonte house a distance of only 71 feet, so near that he himself thought there must be an accident and he waited for the result. Whether therefore we take the situation as Cass describes it, or as the witness in the car and the spectator on the road saw it, the accident is plainly due to the want of ordinary care on the part of Cass himself. It was incumbent upon him to exercise the care of an ordinarily prudent man in view of all the existing conditions. Seeing the approaching car he should have had some regard for its apparent speed and for his own. If, as he claims, the car was then coming at a rapid rate, that fact was patent to him and should have deterred him the more from crossing. While it is true that it is not negligence per se to drive across an electric railroad track without looking or listening, or even in front of an approaching car although one has misjudged the distance and speed, yet such traveller is bound to exercise a degree of vigilance and caution commensurate with the situation. An electric railroad crossing is a place of known danger and no one should approach it without senses alert, nor should one attempt to pass over it without considering the safety or peril of the act. Travellers upon the highway should know that upon them as well as upon the motormen rests a duty of anticipating and avoiding collisions, a duty which

they owe not only to themselves but to the railroad company and to the passengers in the car. The failure to meet that duty was the cause of the accident under consideration.

The plaintiff relies upon *Marden* v. *Street Railway*, 100 Maine, 41, as justifying his course, but the principles laid down in that case which involved the crossing of a track without looking or listening are not in conflict with this opinion. They are in harmony with it and a verdict for the plaintiff was sustained in that case, not because of the application of other legal rules but because of the facts there existing which were quite unlike the facts of this case. Here the plaintiff's conduct falls little short of gross negligence and brings the case within recent decisions of this court under strikingly similar conditions. *Fairbanks* v. *Railway Co.*, 95 Maine, 78; *Butler* v. *Railway*, 99 Maine, 149; *Denis* v. *Railway Co.*, 104 Maine, 39.

As an excuse for attempting to cross within the very reach of the approaching car, the plaintiff introduced the sudden passing of an automobile as he was about to cross, the alleged effect of which was, first to cause the horse to jump back, and then to start ahead. The evidence is convincing that no such occurrence took place. Plaintiff's witness Bowden was watching the scene a short distance away and says that he saw no automobile whatever. Had there been one he must have seen it. The motorman states the same. But even had an automobile appeared, as the plaintiff claims, it afforded no excuse or reason for his conduct. The road was very wide at that point, in fact was almost an open square and there was ample room for both. It is apparent from the plaintiff's whole evidence that he drove upon the track not involuntarily but voluntarily. On the point of the plaintiff's due care therefore the verdict was clearly wrong.

It is unnecessary to consider the question of the defendant's negligence except to inquire whether, notwithstanding the plaintiff's want of due care in driving upon the track, the motorman then by the exercise of ordinary care and skill might have avoided the injury, that is, whether what is known as the "last chance" doctrine had application, as laid down in a line of cases like *Atwood* v.

Railway Co., 91 Maine, 399; *Conley* v. *Railroad Co.*, 95 Maine, 149; *Ward* v. *Railroad Co.*, 96 Maine, 146. A careful study of the testimony shows that this principle cannot be invoked. The evidence is strong and convincing that the motorman exercised vigilance and skill commensurate with the demands of the situation. The car was not moving at an excessive rate of speed as is shown by the fact that it was stopped in going a length and a half and that too, without any sudden shock to the passengers. The motorman was in perfect control. It is evident that the turn towards and upon the crossing was made by the plaintiff so suddenly that the motorman did not have time to avoid the collision. The language of this court in *Butler* v. *Railway*, 99 Maine, 149-159, meets this situation with peculiar force. "But even if the brakeman, seeing the situation, failed seasonably to take the necessary steps to prevent a collision which was apparently not only likely to happen but all the more likely to happen and which probably would happen, because of the apparent negligence or ignorance of the plaintiff, was his failure the approximate cause of the plaintiff's injury? Was his negligence in that respect subsequent to and independent of the plaintiff's contributory negligence? We are constrained to say that it was not. It was contemporaneous, not subsequent. It operated to produce the result in connection with the plaintiff's negligence and not independently of it. The plaintiff's negligence actively continued from the corner of the house to the point of collision. It was operative to the last moment and contributed to the injury as a proximate cause. It is not like the case of one who by his own prior negligence has merely put himself in a position of danger, as in *Atwood* v. *Railway Co.*, 91 Maine, 399, and *Ward* v. *Railway Co.*, 96 Maine, 145, in which cases the distinction is well illustrated. The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous.

It is the opinion of the court therefore that the plaintiff's want of due care was the proximate cause of the accident and that the verdict is so unmistakably wrong that it should not be allowed to stand.

Motion sustained in each case.
Verdicts set aside.

STATE OF MAINE

vs.

FRED REED, FRED THORNTON AND MORRIS ALPREN.

Androscoggin. Opinion December 29, 1910.

Bail. Scire Facias. Pleading. Demurrer.

In scire facias on a recognizance, the objection that the officer's return on the writ fails to disclose a reason for not serving the precept on all of the defendants cannot be availed of by demurrer going wholly to the declaration, as the officer's return is no part of the declaration.

On exceptions by defendant Alpren. Overruled.

Scire facias on a recognizance in criminal prosecution brought by the State against the defendant Reed as principal and the other defendants as sureties.

The case is stated in the opinion.

The declaration in the writ of scire facias is as follows:

"Whereas, on the 28th day of May A. D. 1908, before the Supreme Judicial Court, sitting at Auburn, within and for the County of Androscoggin, personally appeared Fred Reed, as principal and Fred Thornton and Morris Alpren as sureties of Lewiston and acknowledged themselves to be jointly and severally indebted to the State of Maine in the sum of fifteen hundred dollars, to be levied upon their several goods and chattels, lands and tenements,

and in want thereof upon their bodies, if default should be made in the performance of the condition to which said recognizance was subject; of the following tenor to wit:

"'The condition of this recognizance is such that whereas there is now pending in the Supreme Judicial Court within and for the County of Androscoggin, an indictment in which the said Fred Reed is charged with the crime of keeping and maintaining a common nuisance, in the course of the proceedings upon which questions of law requiring the decision of the Supreme Judicial Court have arisen: Now if the said Fred Reed shall personally appear at the said Supreme Judicial Court to be held at Auburn within and for said County of Androscoggin, from term to term, until and including the term of said court next after the certificate of decision shall be received from said Justices, and shall abide the decision and order of court thereon, and shall not depart without license, then this recognizance shall be void, otherwise to be and remain in full force and virtue.'

"And whereas there was an indictment then pending in the Supreme Judicial Court in the County of Androscoggin in which the said Fred Reed was charged with the crime of keeping and maintaining a common nuisance.

"And whereas F. X. Belleau, Clerk of said Supreme Judicial Court at Auburn within and for the County of Androscoggin on the 14th day of December A. D. 1909 received a certificate of decision from said Justices as follows, viz.: 'Exceptions overruled.'

"And whereas at a term of said Supreme Judicial Court held at said Auburn within and for the County of Androscoggin on the third Tuesday of January A. D. 1910, the said term being the next term thereof after said certificate of decision was received, as appears of record in said Supreme Judicial Court now remaining, to wit, on the 27th day of January A. D. 1910, the said Fred Reed, although solemnly called to come into said Supreme Judicial Court, did not appear, but made default and the said Fred Thornton and Morris Alpren, although solemnly called to bring in the body of the said Fred Reed, did not appear, but made default, which also appears of record; whereby the said sum of fifteen hundred dollars became

forfeited to us by the said defendants, which sum hath not been paid, but still remains to be levied in manner aforesaid, to our use; We, therefore willing to have the said sum so due to us, with speed paid and satisfied as justice requires, command you to attach the goods and estate of the said defendants to the value of fifteen hundred dollars, and make known to the said defendants, if they may be found in your precinct, that they be before our Justices of our said Court, next to be held at Auburn in and for said County of Androscoggin on the third Tuesday of April A. D. 1910, to show cause, if any they have, why we ought not to have judgment, and our writ of execution thereon against them the said defendants, for the sum by them forfeited as aforesaid, and costs; And further to do and receive that which the said court shall then consider. Hereof fail not and have there this writ with your doings therein."

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

Herbert E. Holmes, for defendant Alpren.

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

WHITEHOUSE, J. This is an action of scire facias brought in behalf of the State against the respondents who acknowledged themselves to be jointly and severally indebted to the State on a recognizance in a criminal prosecution in the Supreme Judicial Court against the defendant Reed as principal and the other defendants as sureties. The action was made returnable at the April term, 1910, of that court. The officer's return on the writ shows that March 28, 1910, service of the precept was made on the defendant Alpren only, and states no reason for the failure to make service on the other two defendants. The action was duly entered at the return term and continued to the next September term, when on the 29th day of the term, the death of the defendant Thornton was suggested on the docket and the State discontinued as to him. On the same day the defendant Morris Alpren filed a demurrer, in which it is alleged that "the plaintiff's declaration is insufficient in law in this, that the plaintiff in its writ has declared upon a joint and several indebtedness and its form of action in this suit is a joint action

against Fred Reed, Fred Thornton and this defendant jointly, whereas the record of the officer's return of said writ shows that this defendant alone has been summoned to answer to this writ and no reason is shown why the other two defendants should not be summoned."

The demurrer was overruled by the presiding Justice and the case comes to the Law Court on exceptions to this ruling.

It is the opinion of the court that the ruling was correct. The defendants' demurrer goes wholly to the plaintiff's declaration, and he prays judgment for want of a sufficient declaration. The officer's return is no part of the declaration, and is not reached by the demurrer. *State* v. *Walsh*, 96 Maine, 409. In that case it was held that upon demurrer to the complaint only in a criminal case the court is not authorized to consider alleged defects in the warrant or return. See also *State* v. *Kyer*, 84 Maine, 109.

In the case at bar it is not in controversy that the writ and declaration are in proper form. The defendants only complaint is that the officer's return fails to disclose the reason for not serving the precept on all of the defendants. In *State* v. *Chandler*, 79 Maine, 174, cited by the defendant, it appeared from the face of the declaration that the suit was against two of three joint contractors, and there being no averment of the death of the third one who was not made a defendant, it was held, under the familiar rule, that such non-joinder was ground for demurrer as well as abatement. But in the case at bar there is no claim or suggestion that any defect appears on the face of the plaintiff's declaration.

If the defendant had any legal grievance, his remedy therefor if any, was not by demurrer. 1 Chitty on Pl. (16th Ed.) 51; *Bank* v. *Treat*, 6 Maine, 207; *Sawtelle* v. *Jewell*, 34 Maine, 543; *Nickerson* v. *Nickerson*, 36 Maine, 417; *Richardson* v. *Rich*, 66 Maine, 252.

The certificate must accordingly be,

Exceptions overruled.
Judgment for the State.

FRANK E. TAINTER *vs.* ERNEST WENTWORTH.

SAME *vs.* SAME.

SAME *vs.* SAME.

Androscoggin. Opinion January 6, 1911.

Evidence. Sales. Breach of Warranty. Remedy.

While testimony is inadmissible to vary the terms of a written agreement, yet testimony was admissible in actions on a note for the price of a piano, and which contained the terms of sale, to show a warranty of the quality of the piano; the testimony not varying the contract, and being admissible to prove failure of consideration for the note.

Breach of warranty of a piano sold is available to the buyer, in actions against him on a note for the price, to the extent of the difference between the value of the piano as represented and its actual value, as a partial failure of consideration for the note, or he can rescind by returning the property, and claim in defense of the actions an entire failure of consideration; and he can file in set-off payments previously made.

On exceptions by plaintiff. Overruled.

Three actions of assumpsit brought at different times to recover installments as they became due, on an installment note given to the plaintiff by the defendant, and which said note is of the following tenor:

"$500.— "Lewiston, Maine, June 5, 1908.

"For Value Received, I promise to pay to the order of F. E. Tainter, Five Hundred Dollars as follows, Twenty-Five Dollars cash, balance fifteen dollars each month until paid in full, and interest at six per cent.

"The above note is given in consideration for Sterling Player Piano & bench No. 51353 valued at Five Hundred Dollars, and is payable at the office of F. E. Tainter, Lewiston, Me., and said piano & bench are to remain the property of F. E. Tainter until the above note is paid in full, and are not to be sold, underlet,

misused, or removed without the written consent of said F. E. Tainter; and I hereby promise and agree that all payments made shall be forfeited if not paid according to the above agreement.

"Witness, "ERNEST WENTWORTH, M. D."

"A. W. DREW.

Plea, the general issue in each case with a brief statement alleging in substance an express warranty of the quality of the piano and a breach of the warranty, also a seasonable rescission of the contract by the defendant also that the defendant had paid the plaintiff on the note the sum of $100 and asking "that said sum of one hundred dollars be considered as money paid to the use of said plaintiff, and that said defendant may be allowed to set-off the sum of one hundred dollars, so paid to said plaintiff, and that he may have judgment thereof, and for his costs."

The three actions were tried together. In the first action the verdict was for the defendant on the claim in set-off for $104.93. In each of the other actions the verdict was for the defendant.

The bill of exceptions further states the case as follows: "The defendant introduced evidence in support of the various allegations in his brief statement. Plaintiff introduced evidence tending to show that the Player Piano in question was of good quality and was all it was represented to be by the plaintiff or any of his agents. The evidence shows that the Player Piano was sold to the defendant by one A. W. Drew, the plaintiff's agent and salesman, who drew the Holmes note and witnessed the defendant's signature to the same.

"The plaintiff's counsel seasonably objected to the introduction of the following testimony given by the defendant, and which was admitted by the presiding Justice, subject to objection.

"Direct examination by Mr. Webber, attorney for the defendant.

"Q. When was the next conversation you had with him, i. e. Drew, in relation to it?

"A. The next conversation was at the time of the signing of the note.

"Q. Now what did he (Drew) say to you in regard to it at that time?

"A. He said "If this piano isn't satisfactory, return it."

"Mr. Crockett: Just a moment. I object to that testimony. This is a suit on a written contract, and here is an attempt to introduce oral evidence of a contract inconsistent in its terms with the written contract, and under the decisions of our court it isn't admissible.

"The Court: I will admit it subject to objection."

The plaintiff then filed exceptions to the admission of the aforesaid evidence.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

Geo. C. & Harrie L. Webber, for defendant.

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

PEABODY, J. These were actions brought at different times to recover partial payments on a promissory note as they became due.

The consideration of the note was a Sterling piano and bench, valued at $500, conditionally sold by the payee to the maker of the note.

The terms of the sale are incorporated in the note.

The defendant, in each case, pleaded the general issue with a brief statement alleging an express warranty of the quality of the piano; also in set-off a demand for sums of money previously paid on the note by the defendant, amounting in the aggregate to $100.00.

The three suits were tried together. In the first the jury rendered a verdict for the defendant on the claim in set-off. In each of the others the verdict was for the defendant.

The plaintiff introduced in evidence the note declared on, with endorsements thereon, and the written agreement of the defendant relating to the conditional sale.

The defendant offered evidence in support of the various allegations in his brief statement, which was admitted against the objection of the plaintiff.

The case is before the Law Court on the plaintiff's exceptions to the ruling of the presiding Justice. The plaintiff relies, in support of his exceptions, upon the well established doctrine that oral testimony is not admissible to vary the terms of a written agreement. *Neal* v. *Flint*, 88 Maine, 72; *Am. Gas & Ventilating Machine Co.* v. *Wood*, 90 Maine, 516. The written agreement referred to, executed at the time the note was signed, related solely to certain conditions of the sale of the piano and bench. The oral testimony, which is the subject of the exceptions, does not relate to the terms of the sale, but tends to prove an express warranty of the quality of the musical instrument which was the consideration of the note as an inducement to the defendant for making the purchase.

The alleged warranty was an independent agreement on the part of the payee of the note, and its breach is available to the promissor in defense of the actions on the note. *Herbert* v. *Ford*, 29 Maine, 546; *Chaplin* v. *Gerald*, 104 Maine, 193. He could elect either to keep the property and prove in defense the difference between its value as represented and its actual value as a partial failure of the consideration of the note, or rescind the sale by returning the property and claim in defense of the actions an entire failure of consideration; also he had the right, in order to avoid circuity of the action, to file in set-off the payments previously made by him. *Harrington* v. *Stratton*, 22 Pick. 510; *Hathorn* v. *Wheelwright*, 99 Maine, 351; *Pratt* v. *Johnson*, 100 Maine, 443.

Oral evidence of the warranty, alleged in the defendant's brief statement, did not vary the contract signed by the defendant and was admissible to prove failure of the consideration of the note.

Exceptions overruled.

J. C. PERKINS *vs.* FRED W. BLETHEN.

Somerset. Opinion January 6, 1911.

Husband and Wife. Wife's Power to Contract. Disabilities. Suits. Coverture. Equitable Jurisdiction. Pleadings. Assignment of Wife's Claim Against Husband. Result Following Such Assignment. Statute, 1876, chapter 112. Revised Statutes, 1857, chapter 61, section 3; 1903, chapter 63, section 1.

Revised Statutes, chapter 63, section 1, empowering married women to deal with their separate estate independently of their husbands, permits them to contract with their husbands as well as with strangers.

The common-law doctrine of the marriage relation is in force in Maine, except as modified by statute.

Actions at law do not lie between husband and wife on contracts between them.

A married woman can enforce her legal contract against a stranger as though she were unmarried, and is personally liable thereon, but cannot enforce a contract against her husband at law, nor is the contract enforceable by him against her at law.

Equity has jurisdiction of a suit between husband and wife on their contract, through failure of the courts at law to recognize the parties in their individual capacities.

"Coverture" is the legal condition of a married woman.

Disabilities arising from the marriage relation affect one party as much as the other.

Existence of the marriage relation can be pleaded in bar by a defendant in assumpsit brought by his wife's assignee; the relation not being a mere personal disability to be pleaded in abatement as not going to the merits.

A husband's immunity from a suit at law on a claim by his wife during the marriage cannot be avoided by her assignment of the claim to a third person.

On report. Judgment for defendant.

Assumpsit on an account annexed, brought by the plaintiff as assignee of Abbie M. Blethen, the wife of the defendant. Plea, the general issue with brief statement as follows: "That at the time of the alleged promises contained in plaintiff's declaration

the defendant and the assignor of the claim in suit were and now are husband and wife." The writ was returnable at the March term, 1909, of the Supreme Judicial Court, Somerset County, and the defendant's pleadings were not filed until the following December term of said Court. Counsel for the plaintiff moved to have the brief statement stricken out as the matter contained therein should have been pleaded either in abatement or within the time for such pleas. At the close of the testimony a pro forma nonsuit was entered and it was then agreed between the parties that the case be reported to the Law Court for its determination upon the writ, declaration, and pleadings, and such of the evidence as was legally admissible under the pleadings, all rights of and under the pleadings, being reserved to the plaintiff. It was further agreed that if the action was maintainable on the pleadings and such of the evidence as is legally admissible thereunder judgment was to be entered for the plaintiff in the sum of $700.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Henry E. Coolidge, and Newell & Skelton, for defendant.

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

PEABODY, J. This is an action of assumpsit brought by the plaintiff as assignee of Abbie M. Blethen of a chose in action. The pleadings were the general issue with brief statement "that at the time of the alleged promises contained in the plaintiff's declaration the defendant and the assignor of the claim in suit were and now are husband and wife." Counsel for plaintiff moved to have the brief statement stricken out on the ground that it should have been pleaded within the time for pleas in abatement. The case is reported to the Law Court, all rights of and under the pleadings being reserved to the plaintiff, and it being agreed that in case judgment is entered for the plaintiff, it shall be for the sum of $700.00.

The evidence is undisputed that Abbie M. Blethen, wife of the defendant, loaned her husband during coverture several sums of

money from her own personal funds. The several amounts during the six years prior to the bringing of this action amounted to $700.00. These several sums were put into the house and land which the husband held in his own name. No notes and no security were given for these loans. Subsequently she ceased to live with her husband. Upon ascertaining that she could not sue him to recover the amount of these loans, she assigned her claim to the plaintiff, receiving a valuable consideration for the same.

The defendant offered no testimony to contradict these facts, but he relies solely upon the contention that in the State of Maine a husband or wife cannot sue the other in an action at law on a contract either express or implied, and that an assignee of a chose in action takes the same subject to all equities existing between the original parties.

R. S., chap. 63, sec. 1, gives to a married woman certain powers over her separate estate which cannot be reconciled with the common law status of husband and wife. By a well established line of cases in this State it is held that this statute gives a married woman the power to contract with her husband as well as with strangers in reference to her separate estate. *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177; *Wyman* v. *Whitehouse*, 80 Maine, 257. On the other hand, it is as clearly held that the common law doctrine of the marriage relation is still in full effect except as modified by statute, and this is inconsistent with the maintenance of actions at law between husband and wife. In *Crowther* v. *Crowther*, 55 Maine, 358, it was held that a wife could not maintain an action of assumpsit against her husband even under a statute, R. S., 1857, chap. 61, sec. 3, by which she is authorized to "prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband." The language of this statute was somewhat amplified by act of 1876, chap. 112, but again it was held in *Hobbs* v. *Hobbs*, 70 Maine, 381, that an action of assumpsit could not be maintained, it being distinctly stated in this opinion as follows: "that the wife cannot maintain an action at common law against her husband during the existence of the marriage relation

has always been held to be the law in this state." In *Copp* v. *Copp*, 103 Maine, 51, where the action was brought in the name of the wife for the benefit of an assignee, the present statutes being then in force, it was admitted and held that no judgment could be rendered against the husband.

It is not profitable to look to other courts for a determination of this question, owing to the great divergence of language in the statutes affecting the powers of married women and the different results to which the courts necessarily have been led. The common law with its statutory modifications must be taken as it is in this State, though it falls short of a logical scheme of legislation. The following seems to be the result: a married woman may contract with reference to her separate estate, and this power has been construed to include contracts with her husband. She may enforce her legal contract against a stranger to the same extent as though she were unmarried, with the necessary corollary of personal liability, but she may not enforce such a contract against her husband by an action at law, nor is she on the other hand liable to her husband in an action at law on account of such contract. The courts merely have not found in the words of the statute any intention to extend her powers and liabilities to this point. Therefore this limited statutory right of contract between husband and wife does not place them in the same position with reference to one another as other contracting parties, but it must be considered as an anomalous right, inconsistent in theory with the marriage status and to be made effective only so far as may be done without abrogating the common law doctrine of the oneness of husband and wife, not by overturning this historic idea of marriage, as might be the case if the legislation extending the rights of married women had been carried to its logical conclusion. This statutory right is made effective by increasing the scope of equity jurisdiction, which already recognized certain equitable obligations between husband and wife, so that equity now entertains a suit founded on the statutory contract right as well. The reason for equity jurisdiction remains the same, viz.: The failure of the courts of law to recognize the parties in their individual capacities. As equity courts had already done this prior

to the married women's legislation, they found no difficulty in applying the same remedy under the contract which they had been accustomed to apply to a more limited extent before.

The marriage relation by a confusion of terms is sometimes treated in the cases as identical with coverture, the legal condition of a married woman, and so is sometimes referred to as a personal disability in the plaintiff, *Albee* v. *Cole*, 30 Vt. 319; but it might equally well be said to be a protection to the defendant, for it affects one party to the same extent as the other. It is not a mere personal disability to be pleaded in abatement as not going to the merits of the case. On the contrary, it negatives the cause of action itself, during the continuance of the marital relation, since that relation in the view of the law is inconsistent with the idea of any legal controversy between the parties. Thus it is held that while the circumstance of coverture of the plaintiff in an action by a married woman against a stranger may be pleaded in abatement, the circumstance of marriage or in other words the relation of husband and wife between the parties plaintiff and defendant themselves, which is a very different matter must be pleaded in bar, *Smith* v. *Gorman*, 41 Maine, 405; *Crowther* v. *Crowther*, 55 Maine, 358; *Roseberry* v. *Roseberry*, 27 W. Va. 759.

This is not inconsistent with those cases under the Maine statutes which have held that the wife may sue the husband after the marriage relation has been terminated by divorce, *Webster* v. *Webster*, 58 Maine, 139, or may sue his estate after the marriage relation has been terminated by death, *Wyman* v. *Whitehouse*, 80 Maine, 257. It is held in these instances that the remedy is quickened by the death of one of the parties or their divorce. *Wyman* v. *Whitehouse*, supra; *Morrison* v. *Brown*, 84 Maine, 82. It is not alone the personal disability of the coverture of the plaintiff which is removed by the event of death or divorce, for the same result follows where the husband is plaintiff, *Blake* v. *Blake*, 64 Maine, 177, although the disability of coverture cannot be predicated of him; and in all these cases had the cause of action been with third parties there would have been no disability to the maintenance of an action even during the continuance of the marital

relation. In all these instances it was the oneness of husband and wife in the eyes of the law, a status which affects both to an equal extent which was the hindrance to an action at law between them while such relation continued.

It is then but one step further to say that neither party to this peculiar relation which the law has created can by any individual act nullify the law by depriving the other party of his immunity from legal action which appertains to the relation. The wife may indeed under the statute create new obligations between herself and her assignee relating to the rights which are the subject of her assignment, but she cannot during marriage, and without the consent of her husband, impose upon him with reference to these rights a duty of a different character from that which he owed to her.

Judgment for defendant.

MARSHALL G. WRIGHT *vs.* ARTHUR M. FICKETT.

Cumberland. Opinion January 16, 1911.

Sales. Conditional Sales. Evidence. Officers. Conversion. Damages.

Evidence in an action against a constable for the conversion of a motor boat levied upon and sold by him under an attachment in a suit against one Turner, *held* not sufficient to show a conditional sale of the boat by the plaintiff to Turner.

In an action against a constable for the conversion of a motor boat levied upon and sold by him under an attachment, the evidence showed that the plaintiff purchased the boat for $80, but defendant sold it for $125, and there was no other evidence introduced bearing on the value of the boat. *Held*, that $125 may be taken as the damages to the plaintiff.

On report. Judgment for plaintiff.

Action of trespass against a constable for taking and carrying away and selling a motor boat under an attachment in a suit

against one Percy Turner who then had possession of the boat. Plea, the general issue with brief statement alleging as follows: "That the plaintiff is not the owner of the goods and chattels in his writ described but is the owner of an unrecorded mortgage against said property." At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

Marshall G. Wright, and Ernest E. Noble, for plaintiff.

William H. Gulliver, and Gerry L. Brooks, for defendant.

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

PEABODY, J. This is an action of trespass against a constable of the city of Portland for the conversion of a motor boat levied upon and sold by him under an attachment in a suit against one Percy Turner in whose possession the boat then was.

The amount sued for is $200.00 and the defendant's plea is the general issue with a brief statement alleging that the plaintiff is not the owner of the goods and chattels as in his writ described, but is the owner of an unrecorded mortgage against said property.

The report shows that on May 25th, 1908, the plaintiff purchased the motor boat for the sum of $80.00; that it was thereupon let to Percy Turner at an agreed rental of $3.00 per week while he should use it and in addition to which he was to keep the boat in repair. Turner used the boat in his fishing business during the season of 1908 and late in the fall hauled the boat up for the winter. The evidence is contradictory as to how much rent was paid, but it appears that the plaintiff received the whole amount due for rental of the boat for the season of 1908, and there is no evidence that he has received more than this. While the boat was being put in order by Turner for the season of 1909, it was taken by the officer and sold for the sum of $125.00.

The defendant claimed that the circumstance of the possession and acts of dominion by Turner together with the sum paid for rental indicate that there was a conditional sale of the boat to him

and that the plaintiff retained only a lien for the purchase price, but there is nothing in these facts which would warrant such a conclusion in the absence of more satisfactory evidence of an agreement between the plaintiff and Turner. The only circumstances pointing at all to such a transaction rest upon evidence which falls far short of indicating an agreement between the parties. At some time subsequent to the renting of the boat to Turner, a conversation was had between them, and the plaintiff then intimated that if Turner should pay him a profit of $30.00 or $40.00 on the boat at some time before the end of the year, he would allow the amount of the rent towards the purchase price and sell him the boat. There is no evidence that Turner accepted this offer and he does not appear to have been in a position to pay for the boat at any time during the year, being still in arrears for the rent at the beginning of the following year. It is true that he was paying the plaintiff $3.00 a week for rent of the boat while he had the year before hired the same boat at a rental of $2.50 per week, but this increased rental even with the additional burden of repairs bears no greater proportion to the actual value of the boat as shown by the officer's sale than the rental of the previous season bears to the value placed upon the boat by its owner at that time indicated by the price at which he sold it to the plaintiff; and even if he were paying a higher rent than good business judgment would approve, this may well be attributed to his own lack of foresight and his inability to finance a more favorable arrangement, and it does not change the nature of the contract from a lease to a conditional sale. Turner appears to have had no attachable interest in the boat and the plaintiff seems to have parted with no title in his property as the result of the wholly indefinite proposal which he made to him in regard to its purchase, Williston on Sales, sec. 336. *Thomas* v. *Parsons*, 87 Maine, 203. As it is admitted that the boat was sold for the sum of $125.00 and no other satisfactory evidence is introduced bearing on the value of the boat excepting the purchase price in the first instance, $125.00 may fairly be taken as the damages to the plaintiff.

Judgment for plaintiff for $125.

DAVID L. BARTLETT *vs.* NELLIE E. HARMON.

York. Opinion January 25, 1911.

Dedication. Recording Plots. Parks. Construction.

In the absence of facts showing a contrary intention, the plotting of land, with parcels designated as parks, recording of the plan, and sale of lots with reference thereto ordinarily constitute a dedication of such parcels.

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

A lease of lots belonging to an association owning a large tract of plotted land, subject to the association's right to "use, lay out, and lease all lands not already laid out or designated, as streets or avenues," negatives an intention to dedicate, as a park, land designated on the plot as a park; and permitted the association, as against one claiming under the lease, to lease the park for private purposes, and the holder of the last mentioned lease to make certain improvements therein.

Construction of a reservation in a lease of land as permitting the lessor to lease, for private purposes, neighboring land plotted as a park, is aided by the fact that for several years a cottage was maintained on the land under a lease without objection by the lessee under the first mentioned lease.

On exceptions by plaintiff. Overruled.

Action on the case. The plaintiff's cause of action is stated by the declaration in his writ as follows: "In a plea of the case for that heretofore, to wit, on the second day of October A. D. 1906, and continually thereafter until the day of the purchase of this writ, said plaintiff was seized in his demesne as of fee in a certain tract or parcel of land situated in Old Orchard, in the county of York and State of Maine, and described as follows, viz: All that certain plot, piece or parcel of ground known and designated as lots numbers 16 and 18 on Zion's Avenue on the map of lots on Camp Ground of the Orchard Beach Camp Meeting Association, and an interest and right in and to the premises known and plotted on said

map as Zion's Park, to have said park kept free from buildings and obstructions and to be opened and used as a park with trees then and there thereon standing; yet the said defendant well knowing the same, but contriving and intending to injure and unjustly vex the plaintiff and exclude him from the use and enjoyment of said last described lot of land, to wit, said park, and injure and vex him in the use and enjoyment of said first described lot of land, heretofore, to wit, on the second day of October A. D. 1906, erected on said last mentioned lot a building, and maintained said building thereon from said date until the day of the purchase of this writ; and further unjustly contriving and intending to injure and vex the plaintiff as aforesaid, heretofore, to wit, on said second day of October A. D. 1906, and on divers other days and times between said date and the day of the purchase of this writ cut down and destroyed several large trees then and there standing on said last mentioned lot, to wit, said park; whereby the said plaintiff was greatly injured in the enjoyment and use of said premises, to the damage of the said plaintiff, as he says, the sum of $500." Plea, the general issue with brief statement as follows: "That if the said plaintiff ever did have an easement in premises described in said writ, that he has stood by for a long period of time, to wit, ten years, and allowed without protest and without making any claim to said easement, the defendant and others to make valuable improvements and alterations of property described in his said writ. That on the first day of January, A. D. 1906, he forever abandoned any easement he now claims in said premises and because of his acts and his failure to act said plaintiff is forever estopped to claim or set up any right of action to an easement in said premises in the manner and form as said plaintiff in his writ has declared against said defendant."

At the conclusion of the testimony, the presiding Justice directed a verdict for the defendant and the plaintiff excepted.

The case is stated in the opinion.

Geo. F. & Leroy Haley, for plaintiff.

H. & W. J. Knowlton, and Cleaves, Waterhouse & Emery, for defendant.

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

CORNISH, J. This is an action on the case brought by the plaintiff, the owner of two lots of land, upon which he has a summer cottage, situated in the Camp Meeting Ground so called, at Old Orchard, against the defendant, who claims to be the owner of a lot of land in the same Camp Ground, for erecting a building and making additions thereto and for cutting down trees upon that part of the Camp Ground designated upon the plan as Zion's Park.

The history of the case shows that the Orchard Beach Campmeeting Association, being the owner of a large tract of land, caused the greater part of it to be laid out and plotted in lots, streets, avenues and parks and a plan of the same to be filed in the Registry of Deeds. It then proceeded to give leases of various lots for a term of ninety-nine years, and subsequently deeds were given so that the title was held in fee. On June 18, 1874, the plaintiff's predecessor in title, Francis Meeds, was given a ninety-nine year lease of lots Nos. 16 and 18 on Zion's Avenue "on the Map of Lots of Camp Ground" of said Association, subject to certain restrictions and regulations which were declared in the lease to be assented to by the lessee. Among others was the following: "The Association reserves the right, at all times to use, lay out, and lease, all lands not already laid out or designated, as streets, or avenues." This lease is the source and extent of the plaintiff's title, the plaintiff having obtained his deed on September 28, 1894. A summer cottage had been built upon these lots prior to the plaintiff's purchase.

On the Map of Lots of Camp Ground, according to which this conveyance was made, was an open and unoccupied track marked "Zion's Park" situated directly across Zion's Avenue, which is only about twelve feet wide, from the plaintiff's lots and in the line of, but not obstructing, the view of the sea.

On November 7, 1891, the Association conveyed by a ninety-nine year lease in the same form and with the same restrictions, to one C. W. Stevens, "all that certain plot, piece or parcel of ground known, and designated as Zion's Park on the Map of Lots of Camp Ground,"

and confirmed the same by warranty deed dated March 22, 1894. Stevens conveyed the same to one Robbins August 11, 1896, Robbins to Free, June 5, 1899, and Free to the defendant August 9, 1905. In 1897 or 1898 a story and a half cottage was built by the then owner Robbins upon Zion's Park across Zion's Avenue from the plaintiff's lots, covering his front about 35 feet, and has stood there since. In 1906 or 1907, the defendant made additions to this cottage and cut a few trees on the premises. This suit followed.

The plaintiff bases his right of action upon the alleged dedication of Zion's Park as a public park by the Association, so that the owners or lessees of adjoining lots who purchased according to the plan, have a right to have said parcel of land, designated as a park, kept forever open as such. Were that the only question involved the plaintiff's claim might be readily acknowledged because it is familiar law that in the absence of facts showing a contrary intention, these acts before recited on the part of the Association, the plotting of the land, the laying out and designation of certain parcels as parks, the recording of the plan and the selling of lots with reference thereto, would be sufficient to work a dedication, *Camp Meeting Association* v. *Andrews*, 104 Maine, 332, 20 L. R. A., N. S., 976. Dedication extinguishes title in the dedicator so that none in the Park if dedicated could have been subsequently conveyed by the Association to Stevens, the first lessee in the defendant's chain of title.

But, as the court say in *Camp Meeting Association* v. *Andrews*, supra, at page 346; "Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein, inconsistent with the free exercise and enjoyment of such use." In the case at bar in the leases given by the Association to all the lessees, the plaintiff's predecessor in title among the number, there was an express reservation that negatived any intention to dedicate these parcels designated as parks. The decision of this case therefore depends upon the construction of this clause: "The Association reserves the right at all times, to use, lay out and

lease, all lands not already laid out or designated, as streets or Avenues." What is its fair and natural interpretation?

This plaintiff reads this as meaning that the Association reserved the right to use, lay out, and lease all lands with two exceptions, first, all lands not already laid out or plotted, and second, all lands not designated as streets or avenues; and places Zion's Park in the first exception. The words do not permit this. Nor does the sense. That would leave in the reservation only such land as had neither been laid out in parks, plotted for lots nor designated for streets or avenues, or in other words, waste or unplotted land if any. But why should such a reservation be made? It would be needless, as the Association would have, without it, full right to use or lay out or lease such unplotted lands. Such interpretation violates the dictates of common sense.

The presence of the comma in the last line might authorize the transposition of the last clause so that the sentence would then read "the Association reserves the right, at all times, to use, lay out and lease as streets or avenues, all lands not already laid out or designated." This would be equally meaningless, and proves the truth of the assertion in *State* v. *McNally*, 34 Maine, 210, that punctuation is often an uncertain guide, or as held in *Blood* v. *Beal*, 100 Maine, 30, and *Taylor* v. *Caribou*, 102 Maine, 401, it is entitled to consideration but is not of paramount importance.

We therefore are forced to fall back upon the only reasonable construction, which disregards the comma and places within the reserved rights, all lands not previously designated as streets or avenues. There is then no ambiguity about the sentence. The meaning is obvious and the purpose plain. The streets and avenues were fixed. There was no desire or intention to withdraw or change them. But all other lands including the designated parks could be withdrawn and plotted if at any time the Association should see fit to do so. The parks were placed within the reservation and not within the exception thereto. An inspection of the original plan shows many of these so called parks or unoccupied spaces, and their future disposition was expressly retained by the Association.

It is significant that the parties themselves for many years accepted the construction which we now adopt. The Association expressed its view by conveying Zion's Park as far back as 1891, by lease to Stevens, which was recorded August 9, 1892, two years before the plaintiff purchased and sixteen years before this suit was brought. Moreover in 1896 or 1897, two or three years after the plaintiff purchased his lots, the then owner of Zion's Park constructed a cottage upon it directly in front of and across the narrow street from the plaintiff's house, thus obstructing his view of the sea to a considerable extent. That cottage continued to be occupied for eleven or twelve years without any objection whatever on the part of the plaintiff, until some friction seems to have arisen between the families when this suit was brought. It is apparent that both parties construed the deed in the same way for many years, a fact that it is proper to consider. *Oakland Woolen Mill Co.* v. *Union G. & E. Co.*, 101 Maine, 198.

It is the opinion of the court that upon the whole case it was not the intention of the Association to dedicate Zion's Park to the public or for the benefit of other lot owners in the Camp Ground, and that the ruling of the presiding Justice directing a verdict for the defendant was without error.

Exceptions overruled.

DAVID D. STEWART *vs.* ALBERT F. HURD.

Somerset. Opinion January 25, 1911.

Executors and Administrators. Appointment of Mortgagor as Mortgagee's Legal Representative. Effect. Assets.

The appointment of a mortgagor as executor of the mortgagee and his charging himself with the amount of the debt in his inventory and account, does not ipso facto discharge nor pay the note and mortgage.

The appointment of a mortgagor as the mortgagee's executor discharges or suspends right of action on the debt, since the executor cannot sue himself.

Since a mortgagor appointed as the mortgagee's executor cannot sue himself on the debt, it is regarded as prima facie assets in his hands as personal representative, and he is estopped to deny that fact.

A mortgagor's assignment of the debt as the mortgagee's executor to a legatee with the latter's consent was held valid, making title under foreclosure superior to title under a foreclosed subsequent mortgage.

On report. Judgment for defendant.

Real action to recover a certain farm in St. Albans occupied by the defendant. Plea, the general issue with brief statement as follows: "And for brief statement of special matter of defence to be used under the general issue pleaded, and filed in said court with said plea, the 5th day of October, 1909, being the 13th day of said term, the Court in the exercise of its discretion, permitting the same to be filed at said time, the said defendant further says that he was not at the date of the writ in this case, tenant of the freehold, in the premises described in said writ, but was at the date of said writ and long before and ever since, in possession of the whole of the premises described in said writ, under George A. Nelson, who he avers, was at the date of said writ, and long before and ever since, the owner in fee of the same premises." At the conclusion of the testimony the case was reported to the Law Court for determination.

The case is stated in the opinion.

David D. Stewart, for plaintiff.

Daniel Lewis, and Merrill & Merrill, for defendant.

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

CORNISH, J. This is a real action brought to recover a farm in St. Albans, occupied by the defendant, and is reported to the Law Court for final decision. The plea is the general issue with a brief statement in which the defendant justifies as tenant "under George A. Nelson the owner in fee of the premises."

The history of the defendant's title is as follows:

On December 2, 1875, George L. Nelson, the father of George A. Nelson and the then owner, mortgaged the premises to his mother Lois Rollins to secure the payment of his note for $600, which mortgage was duly recorded January 1, 1877. Lois Rollins died November 4, 1904, testate, and at the time of her decease she still held this note and mortgage, only thirty-seven dollars having been paid thereon from time to time. Under this will Mary Jane Nelson, the wife of George L. Nelson was made sole devisee and legatee of all the real estate and personal property, "including notes and mortgages." George L. Nelson, the son and mortgagor, was nominated by the testatrix, and duly appointed by the Judge of Probate, Executor of the will of Lois Rollins, the mortgagee, on February 14, 1905, and entered upon the discharge of his duties.

On April 10, 1905, he filed an inventory of the estate comprising household furniture and furnishings at the appraisal value of $32.75 and "note of George L. Nelson for $600 dated December 2, 1875, secured by mortgage of same date, $1500," the appraisers certifying that the amount which could be realized from this item exclusive of expenses and risks of collection was in their judgment $1000." On October 5, 1905, the executor made this endorsement upon the note "paid by George L. Nelson, Exr. of last will and testament of Lois Rollins $185.15 by services and disbursements as executor aforesaid," and on the same day duly assigned the mortgage and endorsed the note as executor to Mary J. Nelson, the legatee under the will, and delivered them to her. On the second Tuesday of October, 1905, the executor filed his first and final account which was allowed on the second Tuesday of December, 1905. In this

account the executor charged himself with the amount of the inventory $1532.75 and was allowed the same amount for payments and charges. His charges embraced various small bills paid, his commissions at two per cent on the $1532.75 and this item "Mary Jane Nelson, devisee and legatee under the last will and testament of said Lois Rollins $1346.60," that being the balance of the note after deducting all expenses and charges. Mary Jane Nelson had possession of the premises from the time of the assignment to her and began foreclosure proceedings on March 26, 1906, the right of redemption expiring on March 26, 1909. On April 27, 1907, she assigned the note and mortgage to her son George A. Nelson, foreclosure not being waived, so that as the defendant claims, the title became perfected in George A. Nelson on March 26, 1909, under which title the defendant justifies as tenant. Such is the defendant's chain of title.

The plaintiff's claim is as follows: On July 29, 1889, George L. Nelson gave to the plaintiff a second mortgage on these premises to secure the sum of $320.08 which was recorded July 30, 1889. No payments having been made the plaintiff brought a writ of entry and recovered a conditional judgment at the September term of court, 1906, and was put in alleged technical possession by an officer under an alias execution on June 8, 1909. The defendant refusing to surrender actual possession this real action was brought to recover such possession.

The plaintiff claims under a second mortgage and while he does not contend that the first mortgage was in fact paid either to Lois Rollins in her lifetime or to the legatee Mary J. Nelson, and was thereby discharged, he urges that when George L. Nelson the original mortgagor qualified as executor of the will of Lois Rollins, the mortgagee, and charged himself with the amount of the mortgage debt as assets in his hands as executor, that operated ipso facto as a matter of law as a payment of the debt and a discharge of the mortgage securing the same; that the mortgage thereby became extinguished and, although remaining undischarged of record, was in law discharged and his second mortgage was then and there promoted to the first rank; that the only remedy of the

legatee was then against the executor and his sureties on the executor's bond, one of whom was her tenant, the defendant, and the other was herself. This raises an interesting question of law which has never been decided in this State.

By the English common law the appointment of a debtor as executor seems to have been held in some cases to be an extinguishment of the debt, the appointment being regarded in the light of a specific legacy of the debt to the debtor. *Wankford* v. *Wankford*, 1 Salk. 305. In that case Lord Holt said that it operated as a payment and release, as the same hand was to pay and receive the debt, which was therefore considered as actually paid and extinguished. But the rigor of this common law rule was relaxed in equity and under some circumstances in actions at law.

Thus it was held in *Caweth* v. *Phillips*, 1 Ld. Raym. 605, that where an obligor was appointed executor of the obligee, during the minority of another who was to become executor when he attained majority, the debt was not discharged.

In *Dorchester* v. *Webb*, Cro. Car. 373, the appointment was held not to release co-obligors on the bond.

In *Flud* v. *Rumcey*, Yelv. 160, it was held that the appointment of the debtor as executor did not discharge the debt as against creditors or legatees limited to be paid out of the debt. In *Byrn* v. *Godfrey*, 4 Ves. Jr. 5, the debt was held not to be discharged when the assets were insufficient to pay creditors. The debt was held not to be discharged in equity in *Carey* v. *Goodinge*, 3 Bro. Ch. 111, *Berry* v. *Usher*, 11 Ves. Jr. 88, and in Re Hyslop (1894) 3 Ch. 522.

The English doctrine was very carefully considered and the cases analyzed and reconciled in the early Massachusetts case of *Stevens* v. *Gaylord*, 11 Mass. 256, which is the leading case in this country and the one most frequently cited by the courts when this subject is under consideration. The doctrine of that case is the more logical and equitable one that neither in the case of testate nor intestate estates is the debt itself extinguished or released without payment, but the right of action is discharged or suspended because the executor or administrator cannot maintain an action against himself.

Because of this impossibility of action, the rule was adopted that such indebtedness should be regarded as prima facie assets in the hands of such executor or administrator. The rule of *Stevens* v. *Gaylord*, has become the Massachusetts doctrine as evidenced by a long line of decisions, many of which are cited by the learned plaintiff in his brief. *Winship* v. *Bass*, 12 Mass. 198; *Hobart* v. *Stone*, 10 Pick. 215; *Ipswich Manufacturing Co.* v. *Story*, 5 Met. 310; *Chenery* v. *Davis*, 16 Gray, 90; *Leland* v. *Felton*, 1 Allen, 534; *Tarbell* v. *Parker*, 101 Mass. 165; *Bassett* v. *Fidelity & Dep. Co.*, 184 Mass. 210. The same rule has been adopted in Maine, *Hodge* v. *Hodge*, 90 Maine, 509. To same effect are *Robinson Estate* v. *Hodgkin*, 99 Wis. 327, 74 N. W. 791; *Griffith* v. *Chew*, 8 Serg & R. 31. It is true that in some cases language has been used to the effect that the debt itself has been extinguished by the appointment of the debtor as executor or administrator but such is not a correct statement. As between the legal representative, who is also the debtor, and the creditors or those interested in the estate, the representative will not be permitted to say that his obligations form no part of the assets of the estate. Having voluntarily accepted the duties pertaining to an executor or administrator, he is estopped from treating his own indebtedness other than as an asset of the estate. "To allow him to accept the office and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office but had allowed some disinterested person to be appointed to enforce these rights, would not be doing justice to those whose rights the law undertakes to preserve." *Bassett* v. *Fidelity and Deposit Co.*, 184 Mass. supra, at page 212.

This last sentence suggests the reason for the rule, which is the preservation of the rights of those interested in the estate. Since there was no one having the legal capacity to sue a debt due from the executor or administrator, the rule was adopted from the very necessity of the case, in order to protect creditors, legatees and next of kin. For their security this equitable rule has been established which has sometimes been called a legal fiction. But it is an ancient legal maxim that "in fictione juris semper aequitas existit." This

fiction was created, if fiction it be, to protect the estate not to injure it, it was designed to work justice not injustice and to serve as a shield and not as a sword.

The question in the case at bar does not arise between the legal representative and the legatee. The executor is not attempting to avoid his liability either by failing to include his note and mortgage in the inventory or by refusing to treat them as assets belonging to the estate. On the contrary he embraced them in his inventory and account and acknowledged their validity by endorsing on the note as a partial payment the debts and expenses that he paid in behalf of the estate and his charges for administration and then duly endorsed and transferred the note and assigned the mortgage as a subsisting asset of the estate to the legatee to whom it was given under the will. The rule does not require that such indebtedness be treated as cash assets. To hold that would be to force a payment in money and to extinguish the note as a form of indebtedness. If the personal representative and those interested in the estate choose to treat the indebtedness as still existing in its original form, they have the power to so treat it. No one is injured thereby and therefore no one can complain. Just here lies the fallacy of the plaintiff's position. He contends that the appointment worked a constructive payment ipso facto, and that therefore the note ceased to exist, the mortgage securing it was discharged and his own second mortgage became the first. The plaintiff claims that not only was the debt extinguished but also the mortgage securing it. The rule should not and does not go so far. It should not, because its effect would be inequitable and unjust. This case furnishes a good example of such injustice. If the note and mortgage have been constructively paid and discharged, the legatee has received, not a note secured by a first mortgage as the testatrix intended, and as the executor received to be transmitted, but an unsecured claim against a party who was adjudged insolvent some years ago and who is financially worthless. But the plaintiff replies that the legatee's remedy is against the sureties on the executor's bond. In some cases the legatee may have and exercise that right, but she is not compelled to, to the exclusion of her original right. In this case

the remedy on the bond would be entirely inadequate because the legatee is herself one of the sureties, and in cases where the executor is not required to give bond, the suggested remedy would fail utterly.

It is the opinion of the court that the note and mortgage, though assets in the estate, were not paid either actually or constructively, and that their transfer by the executor to the legatee was valid, it being for the interest of the legatee to consider the indebtedness as existing in its original form. Authorities are not lacking to support this result.

In *Kinney* v. *Ensign*, 18 Pick. 232, land was twice mortgaged, the mortgagor was appointed administrator of the second mortgagee and returned an inventory in which the debt from himself was included, and brought a bill in equity to redeem from the first mortgagee. It was contended in defense that when the plaintiff mortgagor became administrator of the estate of his creditor, he became liable to account for this debt in the administration account, that the sureties on his bond would thereby become responsible for such debt and therefore the debt was to be considered as absolutely paid and extinguished and the mortgage thereby discharged.

The court sustained the bill and in the course of the opinion Chief Justice Shaw said: "But in equity this ground cannot be maintained. It may be remarked, in passing, that if these circumstances must be construed to amount to constructive payment, it would not necessarily follow, that the mortgage would be thereby absolutely discharged. Payment after condition broken does not of itself revest the mortgaged estate in the mortgagor. But the true and substantial ground is, that the taking of administration by the debtor, is not in fact or in law, to all purposes, payment of the debt; as between the administrator himself, and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show, that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well

settled rule of strict law, that although a party is bound by an estoppel, as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred. The holding of the fact of a debtor taking administration upon the estate of his creditor, to be a payment, may be deemed a legal fiction, adopted for purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice; but such a legal fiction will never be allowed to go so far as to work wrong and injustice."

In *Pettee* v. *Peppard*, 120 Mass. 522, the grantee in a deed had assumed and agreed to pay as his own debt an outstanding mortgage to a third party, and afterwards was appointed executor of the mortgagee, included the mortgage among the assets of the estate, and assigned it for valuable consideration to the defendant in this suit. The plaintiff contended that the mortgage was thereby discharged as a matter of law, but the court declined to so hold, on the ground that there was no privity between the executor and the mortgagee, and added "The rule of constructive payment relied on, where it works substantial injustice will not be applied unless the case is brought strictly within it, as illustrated by the case of *Kinney* v. *Ensign*, 18 Pick. 232, where this court refused to apply it in favor of the purchaser of an equity of redemption." In *Pettee* v. *Peppard*, the attempt was made in order to let in a subsequent attaching creditor, in the case at bar, a subsequent mortgagee. Other cases to the effect that a lien given to secure a debt due from a personal representative to the testator or intestate is not discharged as against creditors, legatees, or next of kin are, *Chick* v. *Farr*, 31 S. C. 463, 10 S. E. 176; *Murray* v. *Luna*, 86 Tenn. 326, 6 S. W. 603; *Utterback* v. *Cooper*, 28 Gratt. 233; *Crow* v. *Conant*, 90 Mich. 247, 30 Am. St. Rep. 427, 51 N. W. 450. For a general discussion of the subject see note to *Wachsmuth* v. *Penn. Mut. Life Ins. Co.*, (241 Ill. 409) 26 L. R. A., N. S., pages 411-416, and note to *United Brethren First Church* v. *Akin*, (45 Oregon, 247) 2 Am. and Eng. Ann. Cas. 353.

In many of the States, as in New Hampshire, New York and Pennsylvania, the doctrine that the mere appointment of a legal

representative does not extinguish and discharge the debt itself but makes it assets in his hands, has been phrased in statutory form, but it is still the Massachusetts doctrine which was reached without a statute. *Judge of Probate* v. *Sulloway*, 68 N. H. 511. Under similar statutes it has been held that all liens by which the debt was secured remain in force until the executor or administrator in the performance of his trust has paid the amount of his debt and discharged it. *Soverhill* v. *Suydam*, 59 N. Y. 140; *Anderson* v. *Anderson*, 183 Pa. St. 480, 38 At. 1007. As the statutes were declaratory of the true equitable rule as generally accepted in this country, these decisions are directly in point.

It is unnecessary to multiply authorities further. The doctrine which we adopt commends itself by the force of its own logic and equity. It preserves the rights of all parties in interest, brings hardship to none, and a rule that is followed by such results is usually a safe rule to follow.

Our attention has not been called to nor have we been able to find a direct authority for the plaintiff's claim in this case, the extinguishment of the mortgage security by operation of law. It is true that in some of the cases cited in the plaintiff's brief, broad and general expressions to that effect may here and there be found but the cases themselves do not warrant them, and they are clearly distinguishable in the facts from the case at bar.

In *Ipswich Mfg. Co.* v. *Story*, 5 Met. 310, the executor entered the debt in his inventory but not the mortgage, charged himself with it in his first account, and with the balance in a second account and assented to a decree in which it was ordered to be distributed as money. "When thus actually treated as assets and distributed as such it is of course a legal satisfaction and extinguishment of the debt and in legal effect, payment." But the court in that case was very careful to recognize and approve of the doctrine of *Kinney* v. *Ensign*, 18 Pick. 232, supra, and added, page 315, "We do not question the authority of the administrator, duly qualified, to assign and transfer a bond and mortgage; and we cannot perceive that it would make any difference, that it happened to be his own debt."

In *Leland* v. *Fulton*, 1 Allen, 531, the question of mortgage security was not involved, and again the doctrine of *Kinney* v. *Ensign*, is affirmed as fully recognizing the principles of the earlier cases as to the right of those interested in the estate, to charge the executor in his administration account for a debt due from him to his testator while it further holds "that they would not, under the circumstances of that case make it compulsory that the same should be charged in the account as payment, where the debt was secured by a mortgage which would thereby be discharged."

In *Tarbell* v. *Parker*, 101 Mass. 165, the court held that the note and mortgage had been so treated by the parties that they must be considered paid, but the right of the parties in interest to have treated them as a valid and subsisting security and their transfer as such were clearly recognized and stated in the opinion.

Martin v. *Smith*, 124 Mass. 111, simply decided that a bequest of a mortgagee's interest in land is a bequest of personal property and does not pass such title to the mortgaged land as will enable one to defend against a writ of entry. The opinion states that when the executor charged himself with the amount of the mortgaged note as assets in his hands, "this operated as payment of the note and discharged the mortgage." This statement was in the nature of dictum and was broader than the authorities warrant.

In the other cases cited in the plaintiff's learned and exhaustive brief the question of mortgage security was not involved.

Our conclusion therefore is that the transfer of the note and mortgage by the executor to the legatee was valid, and the plaintiff's title under the second mortgage is inferior to that of the defendant under the first.

Judgment for defendant.

In Equity.

LOREN E. KIMBALL *vs.* NORTH EAST HARBOR WATER COMPANY et al.

Hancock. Opinion January 26, 1911.

Waters and Watercourses. Waterworks. Domestic Use. Regulations. Private and Special Laws, 1883, chapter 168; 1907, chapter 187.

Private and Special Laws, 1883, chapter 168, chartering a water company to supply water for "domestic" purposes, requires the company to furnish water to operate an elevator in a summer hotel; such use not being a development of power for commercial or industrial purposes.

"Domestic" derived from "domus," a house, means "belonging to the house or household, concerning or relating to the house or family." The term has a widely varying meaning, though primarily it relates to the house or home. Its significance must be determined with reference to the subject matter and the relation in which it appears.

A water company must supply water to a consumer for a purpose contemplated by the company's charter at reasonable rates, and subject to reasonable rules and regulations.

A water company can require a consumer to so apply water as not to menace the safety, stability, or usefulness of the system, nor injuriously affect other consumers.

Evidence *held* to show that the method of a consumer's use of water in operating a passenger elevator injuriously affected the system and other consumers, warranting a discontinuance of the service on the consumer refusing to change the method.

In equity. On report. Bill dismissed.

Bill in equity brought by the plaintiff who was the owner of the Kimball House, a summer hotel at Northeast Harbor, wherein it was alleged, among other things, that the defendant water company and its superintendent had threatened to discontinue the supply of water for use in the operation of the elevator in said hotel unless certain changes were made in the method of applying the water, and praying for an injunction against their discontinuing the supply of water as threatened. The defendants filed an answer with a

demurrer therein inserted, and the plaintiff filed the usual replication. The cause was then heard on bill, answer, replication and evidence, and at the conclusion of the testimony the case was reported to the Law Court for determination.

The case is stated in the opinion.

Hale & Hamlin, for plaintiff.

Deasy & Lyman, for defendants.

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

CORNISH, J. The Northeast Harbor Water Company was chartered by special act of the legislature in 1883 "for the purpose of supplying the village of Northeast Harbor in the town of Mount Desert in Hancock county and the vicinity of said village, with pure water for domestic, sanitary and municipal purposes," and for said purposes was given the power to detain and take water from Hadlock Lower Pond in Mount Desert and from any streams flowing out of the same, Priv. L. 1883, c. 168. Under that charter a water system was constructed in 1884 and has been in operation since, supplying water now to about two hundred and fifty takers.

By Private Laws 1907, ch. 187, additional powers and rights were conferred upon the company and, to quote the words of the act, "in addition to the powers now possessed by it, it is hereby authorized and empowered . . . . . to supply water for shipping and for the development of power, to erect dams and other structures for the purpose," etc., and certain rights of flowage on Lower Hadlock pond were also granted.

The plaintiff is the owner of the Kimball House, a summer hotel at Northeast Harbor and one of the parties supplied by the defendant. In 1898 he installed in the hotel an elevator which has since been run by water power by direct pressure, the water being taken from an eight inch main in the street through a four inch pipe directly to the elevator. In December, 1908, the company notified the plaintiff that in view of the effect during the preceding years upon the water pressure in the pipes of other consumers in the

vicinity of the Kimball House, it would discontinue the supply for use in the operation of the elevator on and after April 1, 1909, unless certain changes were made in the method of applying the water, by means of a tank, so as to obviate the difficulties experienced. The plaintiff made no reply to this communication. On March 16, 1909, the defendant by letter extended the time to June 1, 1909. But the plaintiff took no steps toward making the suggested change and brought this bill in equity against the company and its superintendent asking for an injunction against their discontinuing the supply of water as threatened.

Two questions are raised:

First; the obligation of the company to furnish water under the facts of this case.

Second; the reasonableness of the company's requirements.

The first proposition has been argued only with reference to the additional act of 1907 which gave the company the right to supply water for the "development of power," and were that act under consideration, as in the eminent domain clause, serious doubts might arise under the decision of this court in *Brown* v. *Gerald*, 100 Maine, 351. We do not, however, deem it necessary in this case to consider the force or validity of that act. We think the language and spirit of the original charter are sufficiently broad to cover this case, for in that charter the company was empowered to supply water for all domestic purposes and it requires no wrenching of terms to hold that the use of water for operating an elevator in a private dwelling or in a hotel comes within the term domestic purpose in its broad and liberal sense. For what purpose is this used if not domestic? It certainly is neither a trade nor an industrial purpose. The power is not employed in manufacturing or in producing any article for sale upon the market. "Domestic" is used as the direct antithesis of commercial or industrial. The word itself, in its derivation from "domus" a house, suggests its inherent purport. It is defined as "belonging to the home or household, concerning or relating to the home or family," Standard Dic; or as Webster has it "of pertaining to one's house or home, or one's household or family." As water is furnished by a public service

corporation to private consumers it may be used in various ways, but the purpose, whatever the method, comes within these definitions of domestic. Thus it may be used for drinking, cooking, bathing, washing, toilet, heating or sprinkling. It is not the manner of the use but its purpose which is the determining test. Is it to be used for the necessity, cleanliness, health, comfort or convenience of the house and its appurtenances or of the household? If so it is a domestic purpose. And it can make no difference whether it be a private home or a hotel, which in this sense is but a larger household, a temporary home for a greater number of people. An elevator in a private house is a convenience, in a hotel is almost, if not quite, a necessity. It promotes the personal comfort of the proprietor, his family, servants and guests. It is a domestic labor saving device and the use of water in propelling such elevator would certainly seem to be embraced in the term domestic. This term has been enlarging as the wants and the needs of people have increased. Drinking, bathing and washing must at first have marked the limit; flushing came with bath rooms and steam and hot water heating and lawn sprinkling are also of a later date. In the same category belongs the elevator, which is made to do another kind of domestic work. Simply because the water is used in the form of power does not differentiate it. The purpose remains the same. Originally gas was used only for lighting. Because of inventions it is now used for heating and cooking. Can we say that the latter is not as much a domestic use as the former? So electricity was originally used in the home for lighting; now there are many additional uses, some of them employing the agency in the form of power to operate small motors for domestic purposes but all tending to the comfort and convenience of the family.

If, however, power is developed for commercial and industrial purposes, the realm of the household has been left behind. Then it is made to operate factories, to drive machinery, to manufacture products for the market. Then it is coined into money. Comfort and convenience are forgotten. Earnings and dividends are alone considered. Then the charter of 1883 would be inadequate, and the broader powers conferred by the act of 1907 would be invoked.

The interpretation which we give to the words "domestic uses," is strengthened by the fact that it is the same as that adopted by the parties themselves, because the operation of this elevator by water furnished by the defendant began in 1898, nine years before the Act of 1907 was passed. It required no additional act to authorize the supply of water for any domestic use although incidentally it might be converted into power and used in that form and the parties were correct in so viewing it.

Authorities on this subject are not numerous because the question has not often arisen.

Domestic use was held to include water in a stable for washing a private carriage and watering a private carriage horse, in *Busby* v. *Chesterfield Water Works Co.*, Ell. Bl. & Ell. 176; for watering a pleasure garden in *Bristol Water Works Co.* v. *Uren*, L. R. 15 Q. B. Div. 637, and running a church motor was held to come within the terms of a contract for furnishing all water needed for use in the churches in *M. E. Church* v. *Ashtabula Water Co.*, 20 Ohio, Cir. Ct. R. 578. In *City of Erie* v. *Erie Gas & Mineral Co.*, 78 Kan. 348, 97 Pac. 468, a contract was made between the city and the gas company by which the company was to pay to the city annually one-fifth of its net profits from the sale of gas to the inhabitants for domestic purposes, and in reply to the contention that a sale of gas to churches, stores, offices and opera house was not a sale for domestic purposes, the court say: "The term was probably used with reference to the ordinary distinction usually made in the sale of gas for light and heat, for the comfort and convenience of individuals in their homes, offices, stores, churches and the like, and sales made to manufacturers to generate power. Usually reductions are made for the latter purpose from the schedule of prices for the former. The term "domestic" has a widely varying meaning, and, while its primary significance relates to the house or home, it is often used in a vastly broader sense. Its significance must always be determined with reference to the subject-matter and the relation in which it appears. In this contract and with reference to this subject the more reasonable view is that it applies, not only to the homes of the city, but to other places

named, where its principal use is for heating and lighting, and not for power." In *Watson* v. *Needham*, 161 Mass. 404, an action to recover damages for failure to supply water to a steam heating plant in a greenhouse as per agreement, the defendant contended that it had no constitutional authority to take and furnish water for this purpose and that the contract was therefore void. The language of the court on this point is this: "It may be a matter of some difficulty to determine precisely what uses are included within the public purposes for which water lawfully may be taken. In regard to uses strictly domestic there can be no doubt. We are of opinion that other uses are included, such as are fairly incidental to the ordinary modes of living in cities and large towns, and as involve the operation of motors requiring but a small quantity of water which may reasonably be supplied from an aqueduct of such capacity as would be needed to meet the ordinary requirements of the inhabitants for domestic and other similar purposes. We are of opinion that the use in the present case was one for which the town might legally furnish water."

The definition given by the Supreme Court of Alabama in *Crosby* v. *City Council of Montgomery*, 108 Ala. 498, 18 So. 723, is this: "Domestic uses or purposes, of water for a family occupying a dwelling house, include all uses which contribute to the health, comfort and convenience of the family in the enjoyment of their dwelling as a home." This definition is sufficiently comprehensive to cover the case under consideration.

On this branch of the case the court is of opinion that the use of the water by the plaintiff for operating his elevator was within the term "domestic purposes" in the charter of 1883. It follows therefore, as a well established principle of law that the defendant is bound to supply water to the plaintiff at reasonable rates and subject to reasonable rules and regulations in the conduct of its business. Such rules and regulations must be neither oppressive nor vexatious. *Lumbard* v. *Stevens*, 4 Cush. 60; *Turner* v. *Revere Water Co.*, 171 Mass. 329; *Water Co.* v. *Adams*, 84 Maine, 472; *Wood* v. *Auburn*, 87 Maine, 287; *Robbins* v. *Railway Co.*, 100 Maine, 496.

This brings us to the second point involved, the reasonableness of the condition imposed by the defendant company. This condition does not concern the question of rate nor of payment nor of discrimination but the method of applying the water in operating the elevator. The company asks the plaintiff to build and maintain a tank or tanks of sufficient capacity so that the water may be taken indirectly, from the tanks, instead of directly from the main. The reason given for this is that the present method menaces the safety, stability and usefulness of the system and injuriously affects the service of other consumers in the vicinity, while the proposed plan would obviate the troubles incident upon the direct pressure including water hammer technically so called. A careful study of the evidence, which it would be unprofitable to rehearse, leads to the conclusion that the company's contention is clearly established, and, if so, no one can successfully maintain that its obligation as a public service corporation to other consumers, as well as a proper regard for the protection of its own property, does not justify it in its request.

Upon the whole case, therefore, our conclusion is that the entry should be,

Bill dismissed with a single bill of costs for defendants.

JOSEPH GALEO, Plaintiff in Error, *vs.* STATE OF MAINE.

York. Opinion January 28, 1911.

Indictment. Averments. Intent. Criminal Law. Plea of Guilty. Effect. Writ of Error. Revised Statutes, chapter 119, section 5.

1. When a particular intent is made by statute a part of the definition of an offense, that intent must be alleged in the indictment and proved, or confessed, to warrant a conviction and sentence under the statute.
2. To authorize a sentence of imprisonment in the state prison under Revised Statutes, chapter 119, section 5, for placing obstructions on a railroad track, it must be alleged in the indictment and proved, or confessed, that the obstructions were placed on the track "with the intent that any person or property passing on the same should thereby be injured," that intent being specified in the statute as a part of the definition of the offense.
3. A plea of guilty to an indictment for placing the obstruction on a railroad track, not containing any allegation of the specific intent named in the statute, is not a confession of such intent, and does not authorize a sentence of imprisonment in the state prison.
4. A respondent after plea of guilty and sentence may raise the question of the legality of the sentence by writ of error.
5. It appearing in this case that the plaintiff in error was unlawfully sentenced to the state prison and was committed in execution of sentence and has suffered all the punishment that could have been lawfully imposed upon him, if any, the judgment and sentence must be reversed and the plaintiff in error discharged from the imprisonment to go without day.

On report. Plaintiff discharged from imprisonment.

At the May term, 1908, Supreme Judicial Court, York County, the grand jury returned an indictment against the plaintiff of the following tenor: "The Grand Jurors for said State upon their oath present that Joseph Galeo of Wells in the County of York, laborer, on the eighteenth day of April, in the year of our Lord one thousand nine hundred and eight, at York, in said County of York, with

force and arms did wilfully, maliciously and feloniously place upon the track of the Atlantic Shore Line Railway Railroad, seven large stones, to the obstruction of said railroad track, whereby the lives of many and sundry persons traveling on said railroad, whose names are to the jurors unknown, were then and there endangered, against the peace of said State, and contrary to the form of the statute in such case made and provided." To this indictment the plaintiff pleaded guilty, and he was sentenced to imprisonment in state prison for the term of eleven years. The State claimed the necessary authority for this sentence under Revised Statutes, chapter 119, section 5, which reads as follows: "Sec. 5. Whoever wilfully and maliciously displaces a switch or rail, disturbs, injures or destroys any part of an engine, car, signal, track or bridge of any railroad, or places an obstruction thereon with intent that any person or property passing on the same should be thereby injured, and human life is thereby destroyed, is guilty of murder and shall be punished accordingly. If human life is thereby endangered and not destroyed, or if property is injured, he shall be punished by imprisonment for not less than ten years."

Revised Statutes, chapter 104, sections 11 and 12, provide as follows:

"Sec. 11. No writ of error upon a judgment for an offense punishable by imprisonment for life shall issue, unless allowed by one of the justices of the supreme judicial court, after notice to the attorney general or other attorney for the state.

"Sec. 12. Writs of error shall issue of course upon all other judgments in criminal cases, but not to stay or delay execution of sentence or judgment, unless allowed by a justice of the supreme judicial court, with an express order to stay all proceedings thereon; and in that case the justice may make such order as the case requires, for the custody of the plaintiff in error or for letting him to bail; or, upon a writ of habeas corpus, if entitled thereto, he may procure his enlargement by giving bail."

July 30, 1910, the plaintiff brought a writ of error to reverse or annul the aforesaid sentence, and which said writ is in form and tenor as follows:

"STATE OF MAINE.

(L. S.)

York, ss.

To the Sheriffs of Our Respective Counties or Either of Their Deputies,

GREETING:

We command you that you make known unto the State of Maine, that it may appear if it see cause before our Supreme Judicial Court to be holden at Alfred within and for our said County of York on the third Tuesday of September, 1910, to answer to Joseph Galeo of Wells in said county in a plea of error, wherein the said Galeo alleges that in the indictment, proceeding and judgment had before the Supreme Judicial Court within and for said county at the term thereof held at Alfred on the first Tuesday of May, 1908, wherein the State of Maine proceeded by indictment against said Joseph Galeo, and in which judgment was rendered against said Galeo and in behalf of said State as follows, to wit: Said Galeo was adjudged guilty upon his plea of guilty, and was considered and ordered by the court that said Galeo be punished by imprisonment for the term of eleven years at hard labor in the state prison; there occurred the errors hereinafter specified by which the present plaintiff was injured and for which he therefore seeks that said judgment and sentence may be reversed, recalled or corrected, as law and justice may require, that is to say the following errors:

First: That if said indictment is founded upon the provisions of section twenty-eight of chapter fifty-three of the Revised Statutes the sentence of said court is for a longer term of imprisonment than is authorized by said statute.

Second: That if said indictment is founded upon the provisions of section five of chapter one hundred and nineteen of the Revised Statutes,

(a) It contains no allegation of an intent on the part of said Joseph Galeo that any person or property passing on the Atlantic Shore Line Railway Railroad should be injured;

(b) It contains no allegation of any specific intent on the part of said Joseph Galeo whatsoever;

(c) That said Atlantic Shore Line Railway Railroad is not therein alleged to be a railroad and is not in fact a railroad within the meaning of that term as used in said statute, but is a street railroad, to which said statute is not applicable.

And hereof fail not. And have you there this writ, with your doings therein.

Witness, LUCILIUS A. EMERY, Chief Justice of our said court, at Augusta, this thirtieth day of July, in the year of our Lord one thousand nine hundred and ten.

C. W. JONES, Clerk."

On this writ the following order was made:

"STATE OF MAINE.

Sup. Jud. Court in Vacation,
August 4, 1910.

Upon the within writ it is hereby ordered that notice thereof be given to the State of Maine by giving in hand to the Attorney General of said State an attested copy of said writ and of this order thereon at least thirty days prior to the third Tuesday of September 1910, in order that said state may appear at the term of the Supreme Judicial Court then to be held at Alfred in the County of York and answer unto said process if it see fit.

Dated this 4th day of August, 1910.

LESLIE C. CORNISH,
Justice S. J. C."

Service of the writ was made on the Attorney General, in accordance with this order, by a deputy sheriff.

After the entry of the writ, the following pleadings were filed by the State:

"STATE OF MAINE.

York, ss. Supreme Judicial Court.
September Term, 1910.

JOSEPH GALEO, Plaintiff in Error,

vs.

STATE OF MAINE.

And hereupon, afterwards, to wit, on the first day of said term the said State of Maine freely comes here into court and says: that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid; and the said state prays that this Honorable Court may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may in all things be affirmed.

STATE OF MAINE.
By
WARREN C. PHILBROOK.
Its Attorney General."

When the cause came on for hearing an agreed statement of facts was filed and the case was reported to the Law Court for determination. Among other things, it was "agreed that the Atlantic Shore Line Railway mentioned in the indictment was on the eighteenth day of April A. D. 1908, operating by electricity as a motive power and not by steam as a motive power, and that said Railway Company was incorporated under the provisions of Chapter 53 of the Revised Statutes."

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Warren C. Philbrook, Attorney General, for the State.

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

EMERY, C. J. The plaintiff in error pleaded guilty to an indictment charging that he "did wilfully, maliciously and feloniously place upon the track of the Atlantic Shore Line Railway Railroad

seven large stones to the obstruction of said railroad track, whereby the lives of many and sundry persons whose names are unknown were then and there endangered," etc. Upon this indictment and plea he was sentenced to imprisonment in the state prison for the term of eleven years. He now brings this writ of error to reverse or annul that sentence. Inasmuch as the sentence was imposed at the May term, 1908, of this court in York County, and the writ of error was not brought till July, 1910, it may be assumed, though not expressly stated in the record, that the plaintiff was committed in execution of the sentence and is now in prison under it.

Among the assignment of errors is the want of authority to impose the sentence of imprisonment in the state prison for the offense to which the plaintiff pleaded guilty. The state claims the necessary authority solely under R. S., ch. 119, sec. 5, which authorizes the imposition of such a sentence upon conviction of the offense of placing obstructions on railroad tracks "with intent that any person or property passing on the same should thereby be injured." But that intent, being specifically made by the statute a part of the definition of the offense, must be alleged and proved, or confessed, to warrant a conviction and sentence under that statute. It is only when the obstructions are placed on the track with that intent, that the offense defined in that statute is committed. The case is well within the settled rule that when a specific intent is a part of the definition of an offense, that specific intent must be alleged and proved, or confessed, to warrant conviction and sentence for that offense. *Smith* v. *State*, 33 Maine, 48; *State* v. *Gurney*, 33 Maine, 527; *State* v. *Robinson*, 33 Maine, 564; *Barnett* v. *State*, 36 Maine, 198. The indictment to which the plaintiff pleaded guilty, and upon which he was sentenced, did not contain any allegation of the intent specified in the statute to be a part of the offense therein defined. It follows that the sentence imposed was not authorized by law.

The cases cited by the State do not seem to us applicable to this case. There is a difference between doing an act intentionally and doing it with a specific intent. The case *Com.* v. *McLaughlin*,

105 Mass. 460, upon which much stress is laid, was the case of an indictment for an attempt to commit an offense. The decision was only that the intent of the attempt was sufficiently alleged.

The State further claims, however, that the plaintiff having pleaded guilty to the indictment instead of pleading in abatement, or demurring, the question of the sufficiency of the indictment is not open to him on writ of error after sentence. The answer is that it is not the indictment but the sentence that the plaintiff attacks. He only confessed the allegations in the indictment. He now raises the question that those allegations did not describe or make out an offense for which the court could lawfully impose sentence of imprisonment for eleven years in the state prison. We think he is entitled to raise that question after sentence and by writ of error. *Smith* v. *State*, 33 Maine, 48.

The judgment of the court upon the plaintiff's plea must be reversed, and as the plaintiff by his imprisonment under the sentence has expiated the offense, if any, of which he could be convicted under the indictment, he must be discharged from his imprisonment and go without day.

So ordered.

ELLEN E. MOTT *vs.* CHARLES W. MOTT and certain logs.

Penobscot. Opinion February 6, 1911.

Logs and Lumber. Liens for Labor. Revised Statutes, chapter 93, sections 46, 61, 64.

1. The lien imposed on logs and lumber by Revised Statutes, chapter 93, section 46, is for the benefit of those only who labor thereon for wages, and can be enforced only by a personal action against the person or corporation contracting to pay such wages, and by an attachment of the logs and lumber on the writ in that action.
2. A married woman cannot maintain an action against her husband for wages or services in cooking for him and persons employed by him in laboring on logs and lumber under Revised Statutes, chapter 93, section 46, and hence has no lien on the logs and lumber for such services.

On exceptions by plaintiff. Overruled.

Action of assumpsit brought by the plaintiff against the defendant Charles W. Mott, to recover for her services "at cooking for said defendant and persons employed by him and engaged at cutting and hauling" certain logs and lumber. The plaintiff claimed a lien on the logs and lumber, the same were attached on the writ, notice thereof was given to the log owners and they duly appeared in answer thereto.

When the action came on for trial, the plaintiff discontinued as to the defendant Mott and proposed to proceed only against the logs and lumber attached. Thereupon it appearing that the plaintiff and the defendant Mott, at the time the services sued for were rendered, were husband and wife and were such at the time of the hearing, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

Clarence Scott, and G. Willard Johnson, for plaintiff.

Charles W. Mott, pro se.

F. W. Knowlton, for log owners.

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

EMERY, C. J. The plaintiff brought against her husband an action of assumpsit upon account annexed. In the declaration she alleged that she "at the special instance and request of the said defendant labored for him, the said defendant, at cooking for the said defendant and persons employed by him and engaged at cutting and hauling" certain specified logs and lumber. The logs and lumber were attached upon the writ, and notice thereof given the owner of the logs. The owner appeared in answer thereto.

At the time set for trial the plaintiff discontinued as to the personal defendant, who then and at the time of rendering the services sued for was her husband, and she proposed to proceed only against the logs and lumber attached. The presiding Justice ruled, in effect, that upon the allegations in her declaration and the admitted fact of coverture, the plaintiff would not be entitled to judgment against the logs and lumber, and ordered a nonsuit. The plaintiff excepted.

The plaintiff relies upon the comprehensiveness of the language of the lien statute, R. S., ch. 93, sec. 46, which is as follows:—

"Sec. 46. Whoever labors at cutting, hauling, rafting or hauling logs or lumber, or at cooking for persons engaged in such labor, . . . has a lien on the logs and lumber for the amount due for his personal services. . . . Such liens . . . . may be enforced by attachment."

"Whoever" is, as claimed by the plaintiff, a very comprehensive term but it has been held that as used in the statute it does not include a contractor, though he labors personally at the cutting, or hauling, etc., *Littlefield* v. *Morrill*, 97 Maine, 505. It is evident, also, that it cannot reasonably be held to include trespassers, or persons employed by trespassers, or persons cooking for such laborers. We think it evident also, from the whole statute providing for such liens and their enforcement, that the lien is only annexed to such labor as creates an enforceable claim against some personal or corporate defendant "for the amount due for his (the

laborer's) personal services." There is no provision for the enforcement of the lien claim by simple process in rem. The only provision is by suit against the employer of the laborer, upon the writ in which suit the logs or lumber may be attached. (R. S., ch. 93, secs. 61 and 64 inclusive). There is no provision that they can be attached upon any other process or in any other way. True, after bringing suit against his employer or employers "the plaintiff may discontinue as to any defendant" and recover judgment against the property (sec. 64), but it is apparent from the whole statute that the suit must have been begun against a defendant against whom the plaintiff had a right of action to recover his wages. As said by this court in the case of a lien upon buildings imposed by the same chapter, (*Farnham* v. *Davis*, 79 Maine, at page 285). "There must be a suit against the party promising, upon which the property benefitted may be attached. The contract, whether expressed or implied, is the principal. The lien is the incident. The lien must be enforced along with the contract."

Did the plaintiff have a right of action against her husband for her personal services in cooking for him and the men employed by him? She urges that she had under the statute R. S., ch. 63, sec. 3, as construed in *Tunks* v. *Grover*, 57 Maine, 586. The statute is to the effect that a married woman "may receive the wages of her personal labor, not performed in her own family, maintain an action therefor in her own name, and hold them in her own right against her husband or any other person." The decision in the case cited was that in such a suit for her personal labor against a third party she could attach by trustee process property of the defendant in the possession of her husband. Neither the statute nor the decision goes to the extent of authorizing a suit by a wife directly against her husband for services performed by her for him. The question, however has been settled in the late case *Perkins* v. *Blethen*, 107 Maine, 443, where it was held that not even an assignee of a claim of a wife against her husband could maintain an action against the husband. As stated in the opinion in that case, the husband is immune from actions at law to enforce any contractual claim of the wife against him, at least during coverture.

It follows that there was no enforceable contract for the plaintiff's services, and hence that she had no enforceable lien on the logs.

Exceptions overruled.

FRED L. KNOWLTON, Plaintiff in Review, *vs.* GEORGE C. WING.

Androscoggin. Opinion February 9, 1911.

Costs. Review. Right to Costs. Reduction of Judgment. Revised Statutes, chapter 91, sections 12, 15.

In the absence of any imposition of terms respecting costs on granting a review, as authorized by Revised Statutes, chapter 91, section 15, the mandatory provision of section 12, of said chapter that, when a sum first recovered is reduced, defendant shall have judgment for the difference with costs on review, governs.

On exceptions by defendant. Overruled.

The defendant appealed from a taxation of costs by the clerk of courts and upon hearing the presiding Justice affirmed the "clerk's last taxation as a matter of law," allowing costs to the plaintiff in the sum of $86.33. To this ruling the defendant excepted.

The case is stated in the opinion.

Frank W. Butler, and Newell & Skelton, for plaintiff.

George C. Wing, pro se.

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

SPEAR, J. The presiding Justice who ruled states this case as follows: "This is an appeal from a taxation of costs by the clerk. The history of the case is as follows: Mr. Wing brought an action against Mr. Knowlton for a breach of warranty in the sale of a horse, by Knowlton to Wing. The writ was served personally upon Mr. Knowlton. He employed counsel to defend. The writ was entered at the September term of the S. J. Court for Androscoggin

County. No appearance was made for Mr. Knowlton, and he was defaulted. Hearing in damages was ordered to be heard by the clerk. The clerk heard Mr. Wing and his witnesses and assessed damages in the sum of $90. Judgment was entered for Mr. Wing for $90 debt or damage, and $14.31, cost of court. Execution therefor issued, but has not been paid.

"Afterwards, Mr. Knowlton filed a petition for review, and a supersedeas was issued. The petition was served and entered at the January 1910 term of court. Mr. Wing appeared, a hearing was had, and a review granted. The writ of review was entered at the April 1910 term of court, and a trial thereon was heard at the following September term, before a jury. The jury found for Mr. Wing that there was a breach of warranty, and assessed his damages at $83.09.

"During the term, Mr. Wing asked the clerk to tax his costs, which was done to Mr. Wing's satisfaction, giving him full costs as the prevailing party. A copy was sent to Mr. Knowlton's attorney, who, by letter, called the clerk's attention to R. S., chap. 91, section 12, and to several decided cases. Thereupon the clerk revised his taxation, giving Mr. Knowlton full costs in the writ of review, including witness fees at the trial. Mr. Wing appealed in writing. He claims that Mr. Knowlton has not complied with Rule 31, and that he is entitled to have the original taxation in his favor stand. He also claims that R. S., chap. 91, section 12, is not controlling, and further, that if Knowlton is entitled to costs on review, he is entitled to only quarter costs. No question is raised as to items. I affirm the clerk's last taxation as a matter of law."

The case comes up on exceptions to this finding. The defendant in his argument raises but a single objection to the ruling of the presiding Justice in sustaining the taxation of cost by the clerk, which is found in his contention "that a fair interpretation of the statutes and the decisions in this state is, that when an action for review comes to judgment, it is by order of the court and that he has control of costs when ordering judgment, and that it is not a matter of law, but a matter of discretion of the court ordering judgment and that it should be considered by the judge

whether such party ought in justice to have costs, etc." This contention is based upon the language of R. S., chapter 91, section 15, which provides: "But the court granting a review may impose terms respecting costs." It is claimed that the phrase, "'the court' has the broad meaning of the entire Supreme Judicial Court or any member thereof who orders the judgment in the matter of review." We think, however, that the statute must be construed to mean precisely what it says and cannot be held to define "the court" in a jurisdictional sense, but "the court" adjudicating the particular act of "granting a review," which involves an entirely different judicial determination from that of entering a judgment in review. When a review is granted a writ is issued and must be entered in court, and attested copies of the former proceedings must be produced. It is only after these proceedings that the case is in order for trial and subsequent judgment. It is therefore apparent that "the granting a review" is the initial step in the various proceedings ending in a judgment and that this step is the point at which the court may impose terms respecting costs. But no terms were imposed in this case, consequently section 15 does not apply.

The question of costs upon judgment is then determined by section 12 alone, which provides: "When the sum first recovered is reduced, the original defendant shall have judgment for the difference with costs on review." This statute applies directly to this case and seems to be conclusive of it. It is evident, therefore, that the plaintiff in review was entitled to his costs as a matter of law and not as a matter of discretion. In other words, in the absence of any imposition of terms respecting costs under section 15, section 12 becomes imperative as a matter of law upon this question.

This conclusion is fully sustained in *Williams* v. *Hodge*, 11 Metcalf, 266, in which the facts are on all fours with those in the case at bar, and the statute under consideration is identical in meaning. The Massachusetts statute reads: "If any sum is recovered by the plaintiff in the original suit for the debt or damage and that sum is reduced on review, the original defendant shall have judgment and execution for the difference with costs." There was

also a provision similar to section 15 of our statute authorizing the court to impose on the petitioner for review, when granting his petition, "such terms as to costs as they shall think reasonable." The court in construing these statutes, discussing the provision relating to discretionary power first, say: The defendant in review insists that the court may now exercise this power and withhold the allowance of costs to the plaintiff in review. We have considered this point, and are of opinion that the authority to impose terms as to costs must be exercised at the time of granting review, and not after verdict in the action of review. The provisions of the statutes requiring us to allow costs to the plaintiff in review when the sum recovered in the original suit is reduced on the review, seem, therefore, to leave no discretion in the court in a case like the present." As the court, upon the hearing for review, is apprised of all the facts upon which a review may or may not be granted, and upon which costs should be allowed or denied, it would seem to have been the necessary intention of the legislature in enacting section 15 to limit the discretion of the court respecting terms of costs to the time of granting the review, thereby informing both parties in advance of their situation upon this question.

It was only necessary for either party at the proper time to have called attention to section 15 to have prevented any possible error in the case at bar and to have secured all the protection the statute was intended to afford.

Exceptions overruled.

Judgment below affirmed with additional costs.

S. MERRITT FARNUM, Appellant from Decree of Judge of Probate, in re Fees and Disbursements in Estate of MARY M. LEIGHTON.

Cumberland. Opinion February 13, 1911.

Exceptions. Appeal. Reasons for Appeal. Sufficiency. Guardian and Ward. Statutes. Revised Statutes, chapter 69, sections 4, 7, 8.

Exceptions will not be sustained when it appears that the excepting party was not injured or prejudiced by the ruling complained of.

A reason for appeal from dismissal of a petition for an allowance in a guardianship matter under Revised Statutes, chapter 69, section 8, that the ruling "was contrary to the law and the facts," is sufficient where the appeal proper shows the nature of the matter and the decision.

An appeal from a dismissal of a petition for an allowance, in a guardianship matter, under Revised Statutes, chapter 69, section 8, is triable de novo.

A statute will be given the construction that appears most reasonable and best suited to accomplish its object.

Revised Statutes, chapter 69, section 8, authorizing an allowance from a ward's estate for reasonable expense in defending guardianship proceedings, includes all expenses reasonably incurred and extends to expenditures by a third person, permitting him to invoke the statute on his own behalf, and not requiring him to enforce his demand as an ordinary creditor.

A claim under Revised Statutes, chapter 69, section 8, for expenses in defending a ward against guardianship proceedings, is properly presented by petition in the name of the claimant.

On exceptions both by appellant and by appellee. Overruled.

Appeal from the decree of the Judge of Probate, Cumberland County, dismissing the petition of the appellant, brought under the provisions of Revised Statutes, chapter 69, section 8, for the allowance of his disbursements and counsel fees in defending Mary M. Leighton in proceedings instituted under the provisions of Revised Statutes, chapter 69, section 4, for the appointment of a guardian to her.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for appellant.

Howard & A. B. Davies, for appellee.

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

KING J, Proceedings were instituted in the probate court for Cumberland County, Maine, under the provisions of chap. 69, sec. 4, et seq, for the appointment of a guardian to Mary M. Leighton. There was no appearance and consequently no contest over the proceedings in the probate court, and a guardian was appointed as applied for, but from that decree an appeal was taken in behalf of the ward to the Supreme Court of Probate, where after hearing the decree of the probate court was affirmed. Thereafter, the following petition was presented to the judge of the probate court:

"In the estate of Mary M. Leighton.

Respectfully Represents, S. Merritt Farnum, of Auburn, Maine, that he was employed as an attorney-at-law by Mary M. Leighton, ward, to defend her in connection with the Guardianship proceedings instituted against her, and that the annexed account includes a true and just statement of the cash expenses incurred by him, and that he believes the amount therein charged for services to be reasonable and proper: Wherefore, he prays that the said annexed account may be allowed, and that the court will order the same to be paid by the Guardian from the estate of said ward, as the first charge upon the estate."

The petition was brought under chap. 69, sec. 8, R. S., which reads as follows: "When a guardian is thus appointed, the judge shall make an allowance, to be paid by the guardian from the ward's estate, for all his reasonable expenses in defending himself against complaint."

After hearing the judge of probate decided adversely to the petition and endorsed thereon "Petition dismissed." From that decision the petitioner took an appeal to the Supreme Court of Probate, assigning three reasons of appeal. In the appellate court the guardian filed a motion to dismiss the appeal because the reasons of appeal were insufficient. The presiding Justice ruled that the first and second reasons of appeal were insufficient, but that the third reason was sufficient, and overruled the motion to dismiss. Both parties excepted to that ruling.

1. Appellant's exceptions.

It is well settled that exceptions will not be sustained when it appears that the excepting party was not injured or prejudiced by the ruling complained of. *State* v. *Bennett*, 75 Maine, 590. The only effective ruling of the court in this case was in favor of the appellant. His appeal was not dismissed. It is still pending in the appellate court as if no motion to dismiss it had been made. The appellant has not been injured by the ruling. His exceptions must, therefore, be overruled.

2. Appellee's exceptions.

The third reason of appeal, which the presiding Justice held sufficient, was "Because the said ruling of court was contrary to law and the facts." The appellee contends that this reason of appeal "is so incomprehensive and vague that no proper cause of appeal is presented therein, entirely failing as it does to inform interested parties as to what issue is involved in the appeal."

In his appeal proper, preceding the reasons of appeal, the appellant sets out with clearness and precision the matter of his petition before the probate court, and the decision of the court thereon, and states that he is aggrieved by the decree of the court whereby his petition "was dismissed." We think the third reason of appeal is not vague, but sufficiently comprehensive under the circumstances.

The decree appealed from "dismissed" the petition, thereby denying the petitioner's entire claim. He appealed from that decree because it "was contrary to law and the facts." What more should, or could, he have said to inform interested parties of the issue involved in his appeal? It was not incumbent upon him to state the evidence which he presented to the court below. But he does say in this reason of appeal, in effect, that his claim was established below, both in law and in fact, and therefore that the decree denying it was erroneous. The matter is to be heard de novo in the appellate court. He will not be limited there to the evidence produced in the probate court. The appellate court will determine upon the evidence presented to it whether the petitioner's claim should be allowed in whole or in part. The appellee's exceptions must also be overruled.

3. The question of the jurisdiction of the court is suggested. It is urged that the provisions of sec. 8, supra, are for the exclusive benefit of the ward, under which he only may be reimbursed for "his reasonable expenses" in defending himself against the guardianship proceedings; that a third party who has incurred expenses and performed services, although for the same purpose, cannot in his own behalf, and upon his own petition, invoke the provisions of that statute; that such a claim should be presented and enforced against the ward's estate in the usual way, like that of any other creditor.

At first it might seem that there is merit in the suggestion, but upon a more careful consideration of the statute and the apparent reason for its enactment it is, we think, obvious that such is not the construction it should receive. "In construing a statute like this the court must consider the nature and reason of the remedy, and, from the language used, give effect to the intention of the legislature if that can be ascertained. . . . This intention is to be sought for by a careful examination and consideration of all its parts, and not from any particular word or phrase that may be contained in it." *Berry* v. *Clary*, 77 Maine, 482-485.

Proceedings under sec. 4, c. 69, R. S., for the appointment of a guardian to a person over twenty-one years of age, involve, not only the proposed ward's right to manage his own estate, but also the custody of his person. It needs no argument, therefore, to emphasize the necessity that such person should have the fullest opportunity to defend himself against such proceedings. A person in the shadow of an application that he be put under guardianship because incompetent to manage his own estate, would necessarily find it difficult, if not quite impossible, to procure the prompt and valuable services of others necessary to protect and defend him, unless there was some provision for the payment of the reasonable expenses thus incurred, other than that applicable to the general creditors of his estate. But the provisions of our statute, enacted to be sure for the protection of the ward's estate from improvident contracts, will, if enforced, render the ward utterly helpless to defend himself, and powerless to procure the assistance of others.

It is provided in section 7 of the same chapter that when an application for a guardian is made, and notice thereon ordered, the applicants may cause a copy thereof to be filed in the registry of deeds in the county, and, if a guardian is appointed, all contracts, except for necessaries, made by the ward after said filing, are void. In a word, then, a person against whom an application for a guardian has been made is thereby necessarily hindered and impeded in defending himself against it, and he may be, under the provisions of the statute, rendered utterly helpless and defenseless in the premises. It was to afford a remedy for such condition that the statute was enacted, and it should be construed, if permissible, to effectuate such remedy.

Where a particular construction of a statute would lead to an absurd consequence, it will be presumed that such was not the intention of the legislature, and "such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute." *Com.* v. *Kimball*, 24 Pick. page 370. It would certainly lead to an absurd consequence to give to the statute in question a construction that the phrase "his reasonable expenses in defending himself against complaint" refers only to such expenses as the ward had paid, and that the guardian should be ordered to pay them, from the ward's estate, back to the ward himself. And it would be equally absurd to hold that the statute means that the guardian is to pay to the ward, who is incompetent, such expenses as he had reasonably incurred for his defense, but had not paid.

On the other hand, we think, the construction most reasonable, and best suited to accomplish the manifest object of the statute, is, that the "reasonable expenses," which the judge of probate may allow, include all the expenses that have been reasonably incurred in defending the ward against the application for guardianship, and that such expenses, if allowed, are to be paid by the guardian from the ward's estate to the person found entitled to them. If such construction is not within the strict literal interpretation of the statute, it is, we believe, clearly within the intention of the statute, and fully effectuates the essential remedy which must have been the purpose of its framers to provide.

It only remains to consider if the procedure adopted in this case is permissible. We think it is. The statute is silent as to the procedure by which a claim for such an allowance may be presented to the judge of probate. Evidently it may be done through the petition of some one. But it is not to be expected that the ward would present such a petition, for his *incompetency* is the reason for the guardianship. Neither does it seem reasonable that the guardian only should have authority to petition that such an allowance be made from the ward's estate. His trust rather requires that he should appear to defend the ward's estate against such a claim, at least, to ensure its fullest investigation and proof.

What objection, then, can there be to the method of procedure adopted in this case, the petition of the person who claims to be entitled to the allowance? We are unable to discover any. His petition presents the whole matter to the judge of the probate court who will then deal with it, as to notice of time and place of hearing, and other proceedings, as justice and equity seem to him to require. "Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure." *Ela* v. *Ela*, 84 Maine, 423-429.

It is the opinion of the court that the exceptions of both the appellant and the appellee should be overruled, but without costs for either, and that the case stand for further proceedings in the supreme court of probate.

So ordered.

AMERICAN ICE COMPANY *vs.* SOUTH GARDINER LUMBER COMPANY.

Kennebec. Opinion February, 1911.

Negligence. Fires. Evidence. Ordinary Care. Burden of Proof.

The mere fact that a plaintiff's loss by fire was caused by a spark or cinder from a defendant's smoke-stack is insufficient to establish the defendant's liability.

The owner of a manufacturing plant is not an insurer against communication of fire therefrom, his duty being to use ordinary care in constructing and operating the plant.

"Ordinary care" is such care as an ordinarily prudent man, mindful of himself and of the rights of others, would exercise under the same circumstances.

One suing for loss by fire communicated from another's smoke-stack has the burden of showing negligence in maintaining the stack under all the existing circumstances.

Evidence in an action for loss by fire communicated from a defendant's smoke-stack held insufficient to show that the defendant was negligent.

On motion and exceptions by defendant. Motion sustained. Verdict set aside.

Action on the case to recover damages for the loss of the plaintiff's ice-houses and other property by a fire alleged to have been caused by the defendant's negligence. Plea, the general issue. Verdict for plaintiff for $7000. Defendant filed a general motion for a new trial also took exceptions to several rulings. Exceptions not considered.

The case is stated in the opinion.

Charles F. Johnson, and W. C. Atkins, for plaintiff.

Heath & Andrews, and George W. Hesselton, for defendant.

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

KING, J. Action on the case to recover damages for the destruction of property by fire alleged to have been caused by the defend-

ant's negligence. Verdict for $7000. The case is before this court on motion and exceptions by defendant.

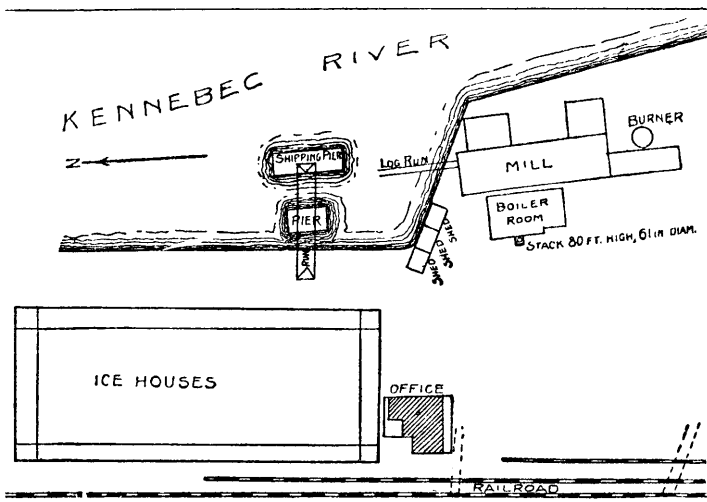
MOTION. The plaintiff was the owner of an ice plant situated at South Gardiner, Maine, on the west side of the Kennebec River. The defendant owned a lumber mill and plant immediately adjoining the plaintiff's plant on the south, and in the operation of its mill maintained and used steam boilers and a smoke-stack for the escape of smoke and cinders from the fires under the boilers. It also maintained and operated a large "burner" for burning waste material. On the 22nd of June, 1907, certain large ice-houses and other property of the plaintiff's plant were destroyed by fire.

The plaintiff alleged in its declaration "that said burners and stacks were so negligently located, constructed, maintained, used and guarded on said twenty-second day of June last, and long prior thereto, that on said day hot cinders, sparks and flame, negligently permitted by said defendant to escape therefrom, set fire to the shipping-runs and houses of the plaintiff and caused a total destruction thereof" etc.

It is apparent that the plaintiff at the trial practically abandoned its claim that the fire was caused by sparks from the "burner," presumably because of its location and the evidence as to the direction of the wind at the time of the fire. The jury found specially, in answer to questions submitted to them by the presiding Justice, that the fire was caused by sparks or cinders from the defendant's smoke-stack, and that the defendant was negligent in the construction, maintenance or operation of the stack connected with its boilers.

The fire started in or upon the "shipping-run" so called. This was a long, narrow, low structure with shingled gable roof, lapped-boarded sides, and extended from the outer shipping pier nearly to the ice houses, and through which the ice passed from the houses to the vessels. The run was open at each end and people were accustomed to pass and repass through it going to and fro from the river to the town way and to the little railway waiting room situated not far distant from the south west corner of the ice-houses. It is 215 feet from the base of the stack to the point in or upon the

run where the fire started. The stack is 80 feet high. The following sketch shows the relative situations of the plants and the location of the defendant's smoke-stack in relation to the shipping-run and the other property of defendant.



Whether the fire started inside or outside of the run was an issue sharply contested at the trial. No one saw sparks in the air or upon the roof. The testimony of the witnesses, on the one side and the other, who were early at the fire, was conflicting upon this issue. If the fire started inside of the run, then, manifestly, no sparks or cinders from the smoke-stack caused it; on the other hand if the fire started on the roof of the run, the jury might properly have found that it was caused by sparks or cinders from the stack. The special finding of the jury shows that such was their conclusion.

In the brief of the learned counsel for the defendant it is said: "The defendant will not contend in this court that the finding that the fire was caused by sparks from the stack was so clearly and manifestly wrong as to authorize the Law Court to set it aside. . . . It rests so largely upon questions of credibility that, for the purposes of this hearing, it must be allowed to stand." But it is confidently

contended in behalf of the defendant that the finding of the jury that it was negligent in the construction, maintenance or operation of its smoke-stack connected with its boilers is so manifestly against the weight of the evidence as to require this court to order a new trial.

The principles of law applicable to the question of the defendant's negligence are not in controversy. They are too well settled to require the citation of authorities. The mere fact that the fire was caused by a spark or cinder from the defendant's stack is not alone sufficient to establish its liability. The defendant was not an insurer of the plaintiff's property. Its duty was to exercise ordinary care in the construction, maintenance and operation of its plant to prevent injury to the plaintiff's property. And the question now presented is whether the evidence justifies the finding that it did not exercise ordinary care in the construction, maintenance and operation of its smoke-stack. Ordinary care has been so frequently, recently, and explicitly defined by this court that no misapprehension can exist as to its meaning. It is "such care as reasonable and prudent men use under like circumstances," *Caven* v. *Granite Co.*, 99 Maine, 278; "such care as persons of ordinary prudence would have exercised under like circumstances," *Sawyer* v. *Shoe Co.*, 90 Maine, 369; "such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances," *Raymond* v. *Railroad Co.*, 100 Maine, 529. In the case at bar ordinary care was defined to the jury as "such care as the ordinarily prudent man, mindful of himself and of the rights of others, would have exercised under the same conditions and circumstances," a definition fully in accord with the decisions of this court.

The plaintiff contended at the trial, and still contends, that the defendant failed to exercise ordinary care in respect to its smoke-stack in two particulars, first, that the stack was not high enough; and, second, that it was not provided with a spark arrester on its top.

Fundamental to both of these propositions set up by the plaintiff is the inquiry as to the kind and character of the system used of

which the smoke-stack was a part. That system and its working was thus described by Mr. A. R. Artz, an insurance inspector of 19 years' experience in examining and inspecting steam lumber mills for insurance companies and rating the risks: "The front of the boiler has what is called a dutch oven that is really an extension of the grates of the boiler so as to give a larger burning space. On to this the sawdust drops through holes in the top—slabs are put in the doors in front. Here the refuse is burned. Back of this, under the boiler proper is what is called a combustion chamber; here the gases which are roasted out of the fuel are burned. About a third back from the front they have an arch across, which is an obstruction to this, the object of that is to confine the flames and heat underneath the box so it don't escape too rapidly. This also acts to make the fuel burn more completely. After it passes this arch it goes under the rest of the boiler, then up somewhere about four feet and then it passes back through the tubes of the boiler around which is the water of the boiler to make the steam. Coming to the front of the boiler it goes up the uptake into the smoke flue or breech. Now, this uptake is about 787 square inches, cross section, but the flue is 2200 in size, cross section; the result is that when the smoke enters that large chamber the velocity is checked just like steam out in the open air—it is checked and slows down and that produces an eddy in the stream of smoke which has a tendency to make the sparks settle and burn. Here it is somewhat different from the flues in the boiler. The stack, instead of going up directly in front of the boiler is placed on a base outside so the horizontal flue goes into that base and then up the stack, but this base is hollow and a cross section is almost twice as large as the flue which enters into it,—to be exact it is practically three-quarters in excess. When the smoke enters this chamber, the chamber being larger, the velocity is checked and it slows down—sparks or anything burning that goes in there, the velocity being checked they slow down, and being heavier than the air or smoke they drop a little, and the result is that they get out of the direct current of the smoke and drop to the bottom of this chamber and burn up and don't go up the stack at all."

It was not contended that the boilers and smoke-stack were not of an approved and standard pattern. They were installed in 1890 by the Bradstreet Lumber Co., of which company the defendant bought the property in 1895, and accordingly had been in use for 17 years.

The burden was on the plaintiff to establish by a fair preponderance of the evidence, that the defendant in maintaining and using that smoke-stack, at its height of 80 feet and without a spark arrester, was negligent,—in other words, that an ordinarily prudent man under the same circumstances and conditions would not have so maintained and used it. We cannot here analyze in detail all the evidence which the plaintiff claims tends to sustain that burden, but it may be thus grouped and summarized: The information which the jury acquired from a view of the premises as they were at the time of the trial; the fact that the fire was caused by a spark from the stack as found by the jury; the opinion of Mr. Toppan, called by the plaintiff as an expert; the falling of cinders and burned out sparks all about the property which came from the stack; and certain acts and conduct of the defendant, and other facts and circumstances, tending to show its knowledge and appreciation of a danger that sparks from its stack might cause fire to plaintiff's property.

Information as to the relative situations of the properties, and of the size, height and location of the stack may have been quickly and readily acquired by the jury from a view of the premises, but we do not think the information so acquired can be more accurate and trustworthy than that, relating to the same facts, which can be acquired from the plans and surveys and the testimony in explanation thereof as disclosed in the record. There is no dispute as to the relative situations of the properties, or as to any of the measurements and distances disclosed in the record.

The fact that the fire was caused by a spark from the stack is a circumstance to be considered on the question of the defendant's negligence, but it really has but little probative force on that issue, which should be determined, and can only be rightly determined, with reference to the danger that was actually created by the operation of the stack prior to the fire, and the knowledge which the defendant had or by the exercise of reasonable care would have had of that danger.

Mr. Toppan, whose business is steam engineering, and who had examined the defendant's plant the day before he testified, gave his opinion that the stack was not high enough, and that it should have been provided with a spark arrester. He did not support his opinion by any comparison of the height of this stack with those used commonly at similar mills with like surroundings, nor did he state that spark arresters are commonly and usually used on smoke-stacks at steam mills similarly situated. He admitted that this stack more than satisfies the scientific rule by which the size or area of the stack is determined with relation to the area of all the boiler tubes and flues, but he claimed that the rule was not applicable to the question whether a smoke-stack is so constructed that it will not emit live sparks. In this particular he differs materially from Mr. Artz, the insurance inspector, called by the defendant as an expert. The latter claims that the rule, which is well recognized among boiler makers, commissioners of boilers, and insurance men, is the test by which it can be determined if a smoke-stack will "spark;" that experience has shown that the modern steam plant, constructed according to the well recognized rule as to the size and area of the stack compared with the areas of all the other tubes and flues, does not emit live or burning sparks from its smoke-stack.

Mr. Artz testified that he had inspected the defendant's plant since 1896, "not a year and a half apart at any time," and that the construction of the plant was in accordance with, and well within, the recognized rule for the construction of such steam plants. His opinion, as to the sufficiency of the height of the stack, and the need of a spark arrester, is shown by the following excerpt from his testimony; "Q. From what you have observed and studied, would you expect that live sparks would be emitted from the top of the stack? A. Not at all. Q. Your duty in inspecting this plant from time to time from 1896 down was to recommend and require such construction there as would reduce the dangers of fire, was it not? A. Yes, sir. Q. Whether in your judgment as an insurance proposition there, and applying my question wholly to the property of the South Gardiner Lumber Co., any spark arrester was needed? A. Not at all." He also testified that the want of a

spark arrester was never included as an element of risk in fixing the insurance rate and that "We have never charged them one cent for danger from sparks." The fact that this witness had special experience in inspecting steam mills with reference to the danger and risk from fire, and had for so many years prior to this fire inspected and observed the defendant's plant, and his detailed explanation of its construction and operation, adds force and weight, we think, to his opinion.

But of more importance, we think, than all else as bearing on the issue whether this defendant was negligent in using that smoke-stack, is the history of the use of it for 17 years, and the knowledge the defendant had, or ought to have had, of its capacity in operation to emit sparks capable of setting fire or otherwise.

From a careful and painstaking examination of the evidence contained in the voluminous record in this case we are unable to find any proof that, during the 17 years this stack was used prior to the fire involved in this case, a fire large or small was set from a spark or cinder that came from this stack. This is not a mere absence of evidence as to that point; the witnesses were inquired of in reference to it, and no witness testified that he ever saw or knew of a fire that was set from a spark or cinder that came from this stack. Charles W. Coss, called by the plaintiff, testified that he was superintendent of the ice plant from 1894 to 1897, and that while he was there a fire caught on the roof of the ice house and was put out. He was unable to state on what part of the roof the fire caught, or when it was, or even that the mill was in operation at the time. That testimony certainly does not show that a spark from this stack caused that fire. To appreciate fully the weight that should be given to this fact that during the constant use of this stack through all of that period no fire is known to have been communicated by a spark from it, it must be borne in mind that all about the stack and in the mill yard there was material of a highly inflammable character — chips, sawdust, shavings, and lumber dried and drying. It is also abundantly proved that during all this time cinders, charred sawdust and shavings, fell all over the property, upon the chips, the shavings, the lumber, the roofs of the buildings, and upon the

canvas and rigging of the vessels at the piers, and yet no fire had been known to start from a spark that came from the stack.

James W. Parker, the largest stockholder and president of the defendant company, testified that he had been connected with the company since May 1, 1896, and that during the first four or five years he spent the greater part of his time at the mill when it was running, and since then, and until the last season, he had visited the mill as often as once a week; that he knew of the inspections of the plant made by Mr. Artz, and that the property was also inspected for other insurance companies; that he had made a personal study of the property with reference to the risks of fires, and had observed the smoke-stack when the mill was operating, both by day and by night, and that he never saw a live spark come from the top of the stack, and never knew or heard of a fire being started by a spark from the stack. Mr. Longfellow, treasurer of defendant company, who had been connected with the plant since 1877, testified that he never had any knowledge, either from personal observation or from reports made to him, that a fire had ever started from a spark from the stack.

What more could a man have to justify him in believing that this smoke-stack was suitable and safe to use, so far as any risk that sparks would come from it and cause fires to adjoining property is concerned, than the fact that it had been in constant use for 17 years and no fire had ever started from it? Would an ordinarily prudent man require any other test of its safety? In *Lafflin* v. *B. & S. R. R. Co.*, 106 N. Y., page 141, it is well said: "No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine, or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

To hold that the defendant in the use of its smoke-stack, with knowledge that for 17 years it had been in constant use and no fire had been known to originate from sparks coming from it, was negligent — did what the ordinarily prudent person under the same cir-

cumstances would not have done — requires stronger evidence, we think, than the opinion of an expert that the stack should have been higher and had a spark arrester on its top.

But the plaintiff claims that there is evidence in the case which shows that the defendant knew and appreciated that there was a danger of fire from the stack, notwithstanding the history of its use with immunity from fire.

Mr. Ballard, general manager of the plaintiff company, testified that in 1894 he had a conversation with Mr. Parker, the defendant's president, in which he told Mr. Parker that he had great fears that his company would burn the ice-houses down and that "I wished that he would put a spark arrester on the smoke-stack." With reference to whether Mr. Parker made any reply to that he said: "Not any; he talked about renting the property, the shore." Mr. Parker denies that anything was said in the conversation as to a spark arrester on the stack.

May 22, 1905 Mr. Longfellow wrote Mr. Ballard as follows:

"Dear Sir: — We very kindly call your attention to the Great Falls property here at So. Gardiner, joining our lot. You are aware that we are running our refuse burner, consequently there is great danger from the sparks coming from it catching on the roofs. We have had our mill roof afire two or three times, and the small rigging shed on our premises caught twice in one day, the shingles being old and dry. Now is not there the same danger with the roof of the ice building? We are covering all of our roofs with rubberoid at quite an expense. We would suggest that you look into the matter in the very near future, and ascertain if anything can be done to make the danger less."

To this letter Mr. Ballard replied declining to act according to the suggestion, and stating in substance that the defendant was required to so use its property as not to endanger the plaintiff's from fire, and that the plaintiff would hold the defendant responsible for any damage that might occur from such cause. To this Mr. Longfellow replied: "We were a little surprised at your reply to our letter relative to fire risk at the mill. We thought you understood the conditions, or we should have been more explicit. There

is no more danger of fire being set by our burner than by our smoke-stack, or by the chimney of the pulp mill. It is all with the covering of the surrounding buildings. Our mill buildings have cedar shingles, and have not been reshingled for some time. The shingles are curled, and become somewhat decayed, which creates the risk. We have been removing them, placing on iron on the main mill, and rubberoid on the other buildings. We very kindly called your attention to this, thinking it possible that you would want to look after the shingles on the roof of the ice buildings. We were hardly prepared for such a letter. It is certainly a poor return for a neighborly kindness. We have a great deal more property here than the American Ice Co., and are making every effort to protect it, and in protecting it, we have been to considerable expense in furnishing hose, very much more than would be required if it was not for your ice building. . . . We would be very much pleased if you would come here and look the situation over. We think you would be convinced that we were not maintaining a fire trap at the expense of our neighbors. Our refuse burner has been in use for twenty-five years, is now in as good condition as when first built, and there is no more danger of fire from it."

The plaintiff argues that these letters written by Mr. Longfellow in 1905 show that he at that time was of opinion that there was danger of fire from the smoke-stack. We do not understand what the writer of the letter meant by the words used "There is no more danger of fire being set by our burner than by our smoke-stack, or by the chimney of the pulp mill." It is not the statement of a truth, for there is no controversy but that the burner did emit sparks that caused fires about it, and upon the roofs of the mill and buildings, and it appears from the evidence, as we have noted above, that no one had ever known of a fire being set from a spark from the smoke-stack. The pulp mill was situated further south on the river. If it was the opinion of Mr. Longfellow when he wrote that letter, that there was as much danger of fire from the smoke-stack as from the burner, that opinion could not have been founded in fact, for it is plainly contrary to the fact; and we do not think the

expression of such an opinion, if it can be so considered, in the letter should have much probative weight upon the question of whether it was negligence for the defendant to use the smoke-stack which 17 years of use had shown to be safe and suitable, and from which during all that use no spark had been emitted that caused a fire so far as was known.

After a painstaking consideration of all the evidence in this case the court is constrained to hold that the finding of the jury that the defendant was not in the exercise of ordinary care in the maintenance and use of its smoke-stack is so manifestly contrary to the weight of the evidence that a new trial must be granted.

Motion sustained.

In Equity.

LEWIS CLARK et als. *vs.* ANDREW CLARK et als.

Washington. Opinion February 16, 1911.

Quieting Title. Bill to Remove Cloud on Title. Allegations. Possession.

One suing to remove a cloud on title, caused by a deed fraudulently obtained, under which legal title is vested, must plead and prove his possession.

In equity. On appeal by plaintiffs. Bill dismissed.

Bill in equity brought to set aside a conveyance of real estate upon the ground of fraud and undue influence practiced upon the grantor, Lewis D. Clark, who died May 19, 1909, intestate, leaving a widow and seven children. Answers and replications were duly filed, a hearing had, at the conclusion of which a decree was filed dismissing the bill, and the plaintiffs appealed.

The pith of the case is stated in the opinion.

John H. Lynch, and H. H. Gray, for plaintiffs.

William R. Pattangall, and John H. McFaul, for defendant.

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

SPEAR, J. This is a bill in equity which seeks to set aside a conveyance of real estate upon the ground of fraud and undue influence practiced upon the grantor. Andrew Clark, the grantee of the deed, was a son of Lewis D. Clark, the grantor. The plaintiffs are children of Lewis D. Clark, deceased intestate, and brother and sisters of Andrew Clark and Judson Clark, two of the defendants, while Bertha L. Clark, the other defendant, is the widow of Lewis D. Clark. Judson Clark and Bertha L. Clark are made defendants only for the purpose of making them parties to the bill. The real defendant against whom the fraud is charged is Andrew Clark.

The bill sets forth the relation of the parties, the seizin and possession of Lewis D. Clark of the real estate conveyed, the fact of the conveyance, and the fourth item alleges fraud as follows: "On said first day of December A. D. 1908, when said deed of conveyance was executed, the said Lewis D. Clark was an old man and much enfeebled by age and disease; that at that date and some time prior thereto the said Lewis D. Clark was suffering from a deadly and incurable disease that had greatly impaired, weakened and deranged his mind; that on said first day of December A. D. 1908, the said Lewis D. Clark had not sufficient mental capacity to execute a legal conveyance of his property; that the said Lewis D. Clark was unduly influenced by the said Andrew Clark to make said conveyance; that said conveyance was given without sufficient and valid consideration and procured by the said Andrew Clark in fraud of said complainants." Item fifth alleges: "That said conveyance is a cloud upon the title of said complainants as heirs of the said Lewis D. Clark." The first prayer of the bill is: "That said deed of conveyance be declared null and void and that the same be cancelled upon the record." The bill nowhere sets out either directly or by necessary implication that the plaintiffs or any of them at the time of bringing the bill were in possession of the property from which they seek to remove the cloud.

The allegations in the bill do not present a cause for the equity side of the court. The absence of the allegation that the plaintiffs were in possession, while admitting the legal title to be in another, negatives any color of title in themselves to remove which a bill in equity can be maintained.

This rule of law has so often been declared in this State that only a reference to the cases seems to be necessary. It was stated in the headnote of *Annis* v. *Butterfield*, 99 Maine, 181, as follows: "But if the plaintiff obtained title, he cannot maintain proceedings in equity to have the cloud of the fraudulent conveyances removed, without alleging and proving that he is in possession. If not in possession, he must resort to his remedy at law." See also cases cited. To the same effect are the following cases: *Frost* v. *Walls*, 93 Maine, 405; *Gamage* v. *Harris*, 79 Maine, 531; *Robinson* v. *Robinson*, 73 Maine, 170; *Spofford* v. *Railroad*, 66 Maine, 51.

Bill dismissed without prejudice and without costs.

WILLIAM G. ALDEN

vs.

CAMDEN ANCHOR-ROCKLAND MACHINE COMPANY.

Knox. Opinion February 16, 1911.

Bills and Notes. Renewal. Payment. Contracts. Construction. Pleading. Amendment.

A provision endorsed on a corporate note that it would be renewed unless stock was sold to pay it is part of the contract, and, as construed by the parties, operated to renew the note for a year on the maker's failure to sell such stock, execution of a new note not being essential to a renewal.

A memorandum endorsed on a contract does not affect it if collateral to and independent of the contract, but when a unilateral contract fails to express the agreement between the parties, a memorandum made upon the same paper and delivered as a part of the contract constitutes as much a part of it as if written in the body.

Different instruments should be construed together as parts of the same contract where it is necessary to effectuate the agreement and the parties' intention.

A declaration on a note which fails to plead a provision endorsed on the note can be amended on terms so as to set out a new count pleading the entire contract.

The maker of a note is entitled to a credit for the value of collateral converted by the payee to his own use.

On report. Action to stand for trial.

Assumpsit on a promissory note. Plea, the general issue. Case reported to the Law Court for determination.

The case is stated in the opinion.

White & Carter, for plaintiff.

J. H. Montgomery, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit on a promissory note of the following tenor.

$5,000. Rockland, Maine. July 13, 1904.

Twelve months after date we promise to pay to the order of W. G. Alden five thousand dollars with interest at five per cent payable semi-annually.

Value received

CAMDEN ANCHOR-ROCKLAND MACHINE CO.
By W. G. ALDEN, President.
A. D. BIRD, Treasurer.

The writ is dated January 27, 1910. On the back of the note is the following endorsement.

"This note is secured by fifty shares of the Camden Anchor-Rockland Machine Co., preferred stock, par value One Hundred ($100.00) per share. And it is agreed that this note will not be called for payment at maturity, but will be renewed unless preferred stock of the corporation is sold to pay this note."

Pay to the order of Georgianna Alden.

W. G. ALDEN,
GEORGIANNA ALDEN.

The declaration on the note is in the usual form, but it contains no reference to the agreement respecting the payment of the note at maturity.

The defendant objected to the admission of the note under this declaration on the ground that the note offered does not correspond with the allegations in the writ and is not a promissory note as declared on in the writ because the writing on the back of it is a part of the contract. The defendant offered to prove;

First. That it was always ready to renew the note in accordance with the terms of the agreement on the back of said note.

Second. That the collateral mentioned in said endorsement has been converted by the plaintiff to his own use, and the value of it should be appropriated in payment of the note." Thereupon the case was reported to the Law Court in order that it might be determined;

First. If said note marked Plaintiff's Exhibit No. 1, is admissible in evidence under the declaration in plaintiff's writ.

Second. Whether, if it be found that said note is not admissible under said declaration, said declaration may be amended by setting forth the matter contained in the endorsement on said note.

Third. To determine whether either or both of said defences are open to the defendant to the action upon the declaration as it now stands, or as it may be amended.

Plaintiff claims the right to amend his writ if the same shall be declared to be necessary and amendable by the Law Court.

The Law Court to make such orders or render such judgment as the rights of the parties require."

It is contended in behalf of the plaintiff that this memorandum on the back of the note was an independent collateral agreement which is no part of the note itself. It is contended that this does not have the effect to change any of the terms of the note but is only a stipulation as to what the parties shall do in certain contingencies after the maturity of the note.

It is undoubtedly true that if the memorandum is collateral to and independent of the contract or promise, it does not become an essential part of it and will not have the effect to change the contract, but it is immaterial if the memorandum is on the same paper or not. On the other hand it is equally well settled that when a unilateral contract fails to express the agreement between the parties and a memorandum is made upon the same paper either upon the face of it or endorsed upon the back of it and delivered as a part of the contract, the whole agreement constitutes a full contract and the memorandum is as much a part of it as if written in the body of it. Thus in *Hill* v. *Huntress*, 43 N. H. 480, an agreement made at the same time as a promissory note contained a stipulation that the promissor would pay the amount of the note in tanning hides for the payee and it was held as between the parties notwithstanding its form, that this instrument was only a part of a special contract, the other part of which as it was made was contained in the written agreement of the same date and purporting to be executed at the same time. Different instruments are to be construed together as parts of the same contract where it is necessary to carry into effect the agreement and intention of the parties.

In *Barnard* v. *Cushing*, 4 Met. 230, the payee of the note at the time it was signed by the maker endorsed on it a promise not to compel payment but to receive the amount when convenient for the maker to pay it, and it was held that the endorsement must be taken as a part of the instrument. So in *Wheelock* v. *Freeman*, 13 Pick. 168, it was held "that any words written on the instrument which qualify and restrain its operation constitute a part of the contract." See also *Gas Co.* v. *Wood*, 90 Maine, 516; *Davlin* v. *Hill*, 11 Maine, 434.

It is not in controversy that the last part of the endorsement on the note, stipulating that it will not be "called for payment at maturity, but will be renewed" unless preferred stock is sold to pay it, was written on the back of it at its inception and before delivery. It must accordingly be deemed a material part of the contract made by the parties. The legal effect of it might be to change the time for the payment of the note. With this endorsement incorporated into the contract the entire instrument may not be technically a negotiable promissory note, but it constituted a valid contract between the parties and may be conveniently designated as a note. The agreement respecting the time of payment must be interpreted according to the intention of the parties as disclosed by the language employed and the object to be accomplished. The obvious purpose of the agreement on the back of the note was to give the defendant an opportunity to raise the amount required to pay it by the sale of the preferred stock of the corporation. If the company succeeded in selling sufficient stock for that purpose within a year, the plaintiff was entitled to "call the note for payment at maturity." If the stock was not thus sold, the plaintiff was not to call for the payment of the note at the expiration of the twelve months therein named but agreed to extend the time, at the option of the defendant, for another term of twelve months, or accept a new note on the same terms as the one in question. The intention manifestly was to give the company a maximum period of two years to pay the note by the sale of the stock. It is not claimed that any preferred stock was actually sold by the defendant for that purpose at any time before the commencement of this action. But the plaintiff appears to have

waived his right to have a new note made and delivered to him at the maturity of the note in suit. Under the practical construction put upon the agreement by the conduct of the parties, it appears to have been deemed immaterial whether a new note was actually made and delivered to the plaintiff or not at the maturity of the note in suit. The agreement was evidently understood to be equivalent to a final agreement for an extension of the time for one year in the event that the stock was not sold by the defendant. It was in fact treated by the parties as a self executing agreement for that purpose, and not simply as an executory agreement which could only be made effective by the execution and delivery of a new contract. Accordingly the plaintiff not only omitted either to exact payment or to require a new note at the maturity of the note in suit, but forbore to bring suit even at the expiration of the second year, when by the terms of the agreement, the note was undoubtedly due and payable, and waited three years and a half longer for the defendant to raise money from the sale of the stock.

But the entire contract made by the parties is not set out in the plaintiff's declaration, and the instrument offered in evidence is not admissible under it. The declaration is amendable, however, and a new count may be introduced in the court below setting out the entire contract made by the parties, as above described, upon terms to be prescribed by the sitting Justice.

II. It appears from the first paragraph of the endorsement on the note that fifty shares of the defendant's preferred stock was delivered to the plaintiff as collateral security for the payment of the note. If the plaintiff converted the stock to his own use, the defendant is entitled to have the value of it appropriated in payment of the note. It was held by the plaintiff under an implied agreement that it might be made available to him for that purpose by observing certain legal formalities. The fact that the stock may have been converted by the plaintiff without regard to the requirements of the law, does not deprive the defendant of the right to have it accounted for in this action. It would be manifestly unjust and contrary to the principles of law governing the rights of the parties respecting collateral security, to compel the company to pay

the full amount of the note in cash, and then rely solely upon the personal responsibility of the plaintiff for the value of the stock thus converted by him.

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

Case remanded.
Action to stand for trial.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE NOVEMBER 16, 1910, WITH THE ANSWERS OF THE JUSTICES THEREON.

The requirement of Revised Statutes, chapter 6, section 10, that general ballots specify the offices for which candidates have been severally nominated, is designed to give electors a convenient and reliable method of voting, and an immaterial error in describing an office will not defeat a ballot.

Under Revised Statutes, chapter 6, section 10, providing that general ballots shall specify the offices for which candidates have been severally nominated, the terms employed in designating an office should be interpreted with reference to the general provisions of the statute relating to that office, of which a voter is presumed to know.

Electors being presumed to know that clerks of judicial courts, provided for by Revised Statutes, chapter 81, section 1, are also the county clerks, provided for by Public Laws 1909, chapter 155, the fact that the names of the nominees for clerks of judicial courts were placed under the designation "county clerks" did not defeat their election as clerks of judicial courts, and they should be notified that they have been so elected.

STATE OF MAINE.

Executive Chamber, Augusta, Me., Nov. 16, 1910.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT.

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and believing that the questions of law are important and that it is a solemn occasion, I, Bert M. Fernald, Governor of the State of Maine, respectfully submit the following statement of fact and questions, and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT. R. S., chapter 81, section 1, provides as follows: "Clerks of the Judicial Courts, shall be elected and notified, their elections determined and vacancies filled in the same manner, and they shall enter upon the discharge of their duties at the same time as is provided respecting County Commissioners, but they shall hold their offices for four years."

R. S., chapter 6, section 59, provides, among other things, that the Governor and Council, by the first day of December in each year in which an election is held, shall open and compare the votes returned as being thrown for certain public officers, among those public officers being clerks of judicial courts. Said chapter 6, section 59, further provides that the persons having the highest number of votes, not exceeding the number to be chosen, shall be declared elected; and they shall be notified thereof by the Secretary of State, and enter upon the discharge of official duties on the first day of January thereafter; and said section 59 explicitly states that it, the said section, shall be applied in determining the election of all county officers.

Chapter 155 of the Public Laws of 1909 amended section 6 of chapter 80 by adding thereto the words "the clerk of the county commissioners shall be known as the county clerk."

At the general election held in September, 1910, certain persons were to be elected who had been nominated in county conventions to the office of clerks of judicial courts. In the printing of the official ballot the names of those persons instead of being printed under a designation "clerks of judicial courts" were printed under a designation "county clerks." The ballots were cast for county clerk and not for clerk of the judicial courts.

Question 1. Was the election of a candidate to the office of county clerk equivalent to the election of the same candidate to the office of clerk of judicial courts?

Question 2. Was there a failure to elect clerks of the judicial courts when the ballots were cast for county clerks?

Question 3. Will a vacancy occur January first, 1911, in the office of clerk of judicial courts in those counties where candidates were voted for under the title "county clerk?"

Question 4. Should a new election for the clerks of judicial courts be ordered in those counties where the vote was thrown for county clerk?

Question 5. Should an appointment be made in those counties instead of an election and if so by whom and for what term?

Question 6. Shall the persons who received the highest number of votes for county clerks be notified that they are elected clerks of judicial courts, or shall they be notified that they have been elected county clerks?

Very respectfully,

BERT M. FERNALD,
Governor.

TO THE HONORABLE BERT M. FERNALD,
GOVERNOR OF MAINE.

In obedience to the Constitution of the State, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions proposed.

The statutes respecting the regulation and conduct of elections in this State provide that "all ballots cast in elections for national, state, district and county officers . . . shall be printed and distributed at public expense," R. S., ch. 6, sec. 1; and that "every general ballot, or ballot intended for the use of voters . . . . shall contain the names and residences . . . of all candidates whose nominations for any office specified in the ballot have been duly made, . . . and the office for which they have been severally nominated." R. S., ch. 6, sec. 10.

The provision of the statute that the ballot prepared and distributed by the secretary of State shall contain a specification of the office for which the candidates have been severally nominated, must be reasonably construed with reference to the obvious purpose for which it is prepared and for which it is to be used. It is designed to afford the elector a convenient and reliable method of exercising the privilege of indicating his choice of the candidates for the office designated on the ballot. It is designed when cast to be an expres-

sion of the will of the voter, and his purpose should not be defeated by an immaterial error in the description of the office. The terms employed in the designation of it, should be interpreted with reference to the general provisions of the statute, of which the voter must be presumed to have knowledge, relating to that office. But it is not indispensable that in all cases it should be described upon the ballot with technical accuracy or in the precise language of the statute. If the terms used upon the ballot, read in the light of the general statutes upon the subject, are apt and sufficient to identify the office and express the will of the voter with reasonable certainty, he is not to be disfranchised for want of legal formality in the designation of the office on the official ballot.

It appears from an examination of the law that in 1831, a statute was enacted providing for the appointment of a board of county commissioners, and declaring that "the clerks of the judicial courts, within the several counties, shall be the clerks of the county commissioners." (Laws of 1831, ch. 500.) This language was preserved in the Revision of 1842 (ch. 99, sec. 9); but in 1857, for the apparent purpose of emphasizing the fact that there were two distinct positions to be held and filled by one person, the phraseology was changed, and in the Revision of that year the statute declares that "the clerk of the judicial courts in each county is clerk of the commissioners," and this has continued to be the language of the statute to the present time.

It is worthy of observation in the first place that at many if not all of the elections for county officers during these years, as shown by the archives of the State, the designation of this office on the ballots cast was simply "clerk of courts" and not "clerk of the judicial courts," and that this variation from the precise terms of the statute has never been deemed such a misdescription as would invalidate the ballot.

It is undoubtedly true that during all of these years the ballots cast for county officers contained no express designation of the office of clerk of the county commissioners, but only that of clerk of courts, and by operation of law the same ballots elected a clerk of the county commissioners. But chapter 155 of the Public Laws of

1909 declares that "the clerk of the county commissioners shall be known as the county clerk." If prior to the passage of this act the ballots used in those counties in which clerks of the judicial courts were to be elected, had contained the names of candidates for an office designated as "clerk of the county commissioner" there would have been stronger reasons for questioning the sufficiency of a description which, by the express mention of the minor office, might possibly have suggested the exclusion of the more important one of clerk of judicial courts. But the new name of "county clerk" created by the act of 1909, has a broader significance in the popular mind. The electors in certain counties of the State are presumed to have known that at the last general election certain persons were to be elected who had been nominated to the office of "clerk of the judicial courts." They are presumed to know that the clerk of the judicial courts is "the county clerk" and that no other person can be "county clerk." They are presumed to have known that under the law there was no other "clerk" to be elected in those counties except a clerk of the judicial court who is also "clerk of the county commissioners" and to be known as "county clerk." They found upon the ballots the designation of "county clerk" over the names of the candidates nominated for "clerk of courts." All the official ballots used by all the political parties contain the same designation.

Under these circumstances it is the opinion of the undersigned Justices that the voters were not misled by the use of the term county clerks instead of the more appropriate one of "clerk of judicial courts" on the official ballot, and that their purpose in casting these ballots can be ascertained with reasonable certainty.

Many analogous questions have arisen in other jurisdictions and the following authorities in which the decisions of the courts have been in substantial conformity with the views above expressed, may be cited in support of our conclusions. *People* v. *Matteson*, 17 Ill. 167; *McKinon* v. *The People*, 110 Ill. 305; *Merrill* v. *Reed*, 75 Conn. 12; *Wilds* v. *Board of Canvassers*, 50 Kans. 144; *Inglis* v. *Shepherd*, 67 Cal. 469; *Clark* v. *Com. of Montgomery Co.*, 33 Kans. 202, 6 Pacific, 211; *In re Prothonotary of Clifton Co.*, 1 Clark, (Pa.) 489; *State* v. *Howe*, 28 Neb. 618.

It is accordingly the opinion of the undersigned Justices that the first question proposed must be answered in the affirmative; and in answer to the last question it is our opinion that the person in each county who received the highest number of votes for "county clerk" should be notified that he has been elected "clerk of the judicial courts."

This conclusion renders it unnecessary to answer the other questions proposed.

Very respectfully,

November 26, 1910.

LUCILIUS A. EMERY
WM. P. WHITEHOUSE
ALBERT R. SAVAGE
HENRY C. PEABODY
ALBERT M. SPEAR
LESLIE C. CORNISH
ARNO W. KING
GEO. E. BIRD

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

MARY A. DUNN *vs.* JOSEPH LEBLANC.

Androscoggin County. Decided December 15, 1910. Action on the case to recover damages for personal injuries resulting from the plaintiff being struck by an automobile owned by the defendant and driven by his son. Verdict for plaintiff for $400. Defendant filed a general motion for a new trial. The rescript says: "There being in this case a subsisting verdict and a majority of the Justices after mature consideration and consultation not concurring in granting a new trial, the motion in the case is overruled and judgment ordered on the verdict." *Newell & Skelton*, for plaintiff. *McGillicuddy & Morey*, for defendant.

ELLEN M. SARGENT, Petitioner
for Annulment of Marriage.

Hancock County. Reported to the Law Court. Under date of December 16, 1910, a per curiam rescript was issued which reads as follows: "Upon the motion of the petitioner's counsel in this case, it is ordered that the report be discharged and the case remanded for further hearing in the court below." *Jonathan P. Cilley*, for petitioner.

GEO. S. MEHAYLO, Admr.,

vs.

THE GREAT NORTHERN PAPER COMPANY.

Androscoggin County. Decided December 17, 1910. Action by the plaintiff as administrator of the estate of John Hreha, deceased intestate, to recover damage for an injury received by the deceased November 26, 1907, while employed by the defendant company in its pulp mill at Madison, Maine, resulting in his death three days later. Verdict for plaintiff for $4750. Defendant excepted to several rulings and also filed a general motion for a new trial. Exceptions overruled. Motion sustained. *McGillicuddy & Morey*, for plaintiff. *Oakes, Pulsifer & Ludden*, for defendant.

SAMUEL FRENCH *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin County. Decided December 28, 1910. Action on the case to recover damages for personal injuries sustained by the plaintiff while unloading coal from the defendant's car. Verdict for $2912. Defendant filed a general motion for a new trial. It was the opinion of the court that the jury were authorized in finding that the defendant was negligent, but the damages awarded were excessive. New trial ordered unless plaintiff remit all of the verdict above $1800 within thirty days after the receipt of the rescript by the clerk of courts. *McGillicuddy & Morey*, for plaintiff. *White & Carter*, for defendant.

RALPH E. O'CONNOR, by next friend,

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Kennebec County. Decided December 28, 1910. (No record received by the reporter.) Apparently an action on the case to recover damages for injuries sustained and caused by the alleged negligence of the defendant, a nonsuit ordered, and exceptions taken. The rescript says: "Though the plaintiff's mother testified that she saw the street car collide with the plaintiff the undisputed situation and events clearly show that she was mistaken, and that there was no collision. The evidence fails to show that the defendant company caused the plaintiff's injury. The nonsuit was properly ordered." Exceptions overruled. *Williamson & Burleigh*, for plaintiff. *Heath & Andrews*, for defendant.

EUGENIA GALLANT, Admx., *vs.* AMERICAN SHOE FINDING COMPANY.

Somerset County. Decided December 28, 1910. (No record received by the reporter.) The rescript says: "Giving the plaintiff the most favorable inferences possible from the evidence it fails to show that her intestate was in the exercise of due care, or that the defendant failed in any duty it owed him in the premises. Motion sustained. Verdict set aside." *Merrill & Merrill*, for plaintiff. *John E. Nelson*, for defendant.

E. P. LANGLEY et al., In Equity,

vs.

LOUIS T. CHABOT et als.

Androscoggin County. Decided December 29, 1910. The rescript is as follows: "In an equity cause the decision of the sitting Justice upon matters of fact should not be reversed on appeal unless it appears that such decision is manifestly wrong. *Hartley* v. *Richardson*, 91 Maine, page 428, and cases cited.

"In the case at bar no questions of law were in dispute, and all the issues of fact were found by a jury in favor of the plaintiffs. Thereafter, upon hearing, the sitting Justice, in confirmation of the jury's findings, decided all matters of fact in the plaintiffs' favor, and made his decree accordingly. It is the opinion of the court that the decision of the sitting Justice is justified by the evidence and should be affirmed with costs. Decree of sitting Justice affirmed with additional costs." *Newell & Skelton*, for plaintiffs. *McGillicuddy & Morey*, for defendants.

GEORGE M. CURRIER *vs.* B. G. & C. M. MARCH.

Franklin County. Decided December, 1910. Assumpsit to recover the sum of $36.28 alleged by the plaintiff to be due him by the defendants for commissions on renewal premiums collected for the Penn Mutual Life Insurance Company for the year 1908. At the conclusion of the evidence the case was reported to the Law Court for determination. The rescript says: "The court being evenly divided upon the testimony, upon the question whether the plaintiff actively represented the defendants during the year 1908, the report is discharged and the case is remitted to nisi prius for further hearing." *Joseph C. Holman*, for plaintiff. *Wilford G. Chapman*, for defendants.

CLARENCE W. PEABODY, Petitioner for writ of Prohibition,

vs.

REPUBLICAN CITY COMMITTEE OF PORTLAND et als.

Cumberland County. Decided January 16, 1911. The rescript is as follows: "This case came to the Law Court upon exceptions to the order of a single Justice for a writ of prohibition to issue to the Republican City Committee of Portland and others, prohibiting them from proceeding to canvass and recount the votes for member of such committee in one of the wards of the city. The term of office of such member expires with the year 1910. Several important questions of jurisdiction as well as of procedure, have been mooted requiring extended consideration. It has been impossible for the court to come to an agreement upon them before the expiration of the year when their determination would become merely academic and useless to the parties. Hence it is adjudged that the occasion for the court's action having passed, the case should be dismissed from further consideration by the Law Court." *Peabody & Peabody, and Fred V. Matthews*, for plaintiff. *Augustus F. Moulton*, for defendants.

LEONARD E. PORTER *vs.* LEWIS M. THOMPSON.

Penobscot County. Decided January 26, 1911. Action on the case for an alleged malicious prosecution. Verdict for plaintiff for $485. The rescript states as follows: "The defendant held a mortgage of the plaintiff's farm to secure the payment of notes amounting to $600, on which $500 was still due. One of those notes for $250 was not paid at maturity and the defendant proceeded to foreclose by taking possession in the presence of witnesses. The mortgagor had not finished gathering his crop of potatoes and continued harvesting them after the entry for foreclosure, against the protest of the defendant, who finally caused the plaintiff's arrest

for larceny acting, as he claims, under legal advice. The criminal proceedings were dismissed and this suit followed.

"The propositions which the jury must have found sustained by the evidence are:

"1. That the criminal process was terminated in favor of the plaintiff before this suit was commenced.

"2. That the defendant instigated the process maliciously.

"3. That he acted without probable cause.

"The first proposition is conceded. Upon the second proposition it was not necessary for the plaintiff to prove express malice in the popular signification of the term, that is, to prove that the defendant acted from motives of ill will, resentment, hatred or revenge. In a legal sense any unlawful act done wilfully and purposely to the injury of another, as against that person, is malicious, and in actions of malicious prosecution it is sufficient for the plaintiff to prove malice in this enlarged legal sense. It may even be inferred from want of probable cause.

"Upon the third proposition, it is settled that the advice of counsel is not per se a defense against the charge of want of probable cause. The questions whether the defendant submitted to reputable and disinterested counsel all the facts known to him, or that he would have known by careful inquiry, whether counsel advised that those facts made out a defense, and whether the defendant in all respects acted in good faith, were questions of fact for the jury.

"A careful study of the evidence, which it would not be profitable to discuss in detail, fails to convince the court that the verdict is clearly wrong upon the question of malice or want of probable cause. The case was perhaps close, but the jury's finding should stand.

"The damages awarded, however, are clearly excessive. Taking into account all the legal elements involved it is the opinion of the court that a verdict of one hundred dollars would have been ample. Motion sustained and verdict set aside unless the plaintiff files a remittitur of all the verdict above one hundred dollars within thirty days after the filing of this certificate of decision." *L. B. Waldron*, for plaintiff. *W. S. Brown, and J. H. Haley*, for defendant.

CHARLES L. CRAWFORD *vs.* WILBER GRANT.

Penobscot County. Decided January 31, 1911. Assumpsit brought by the plaintiff to recover the sum of two thousand dollars for the use of the plaintiff's figures and estimates of the amount of lumber of various kinds upon Township 7, Range 9, Piscataquis County, Maine, in making and closing up sale of said township of land to Joseph G. Ray, — one per cent of the selling price, — and interest. There was also in the declaration the usual common counts. At the conclusion of the evidence the presiding Justice ordered a verdict for the plaintiff for $1974, and the defendant excepted. Exceptions overruled. *B. L. Fletcher*, for plaintiff. *Allen E. Rogers*, for defendant.

MARY O. LANGTON, In Equity, *vs.* HATTIE M. LANGTON.

York County. Decided February 9, 1911. Bill in equity in which the plaintiff prayed for a decree directing the defendant, her blind daughter, to reconvey to her, the plaintiff, a one-half interest in a lot of land with the buildings thereon in the town of Kittery, and which had previously been conveyed by the plaintiff to the defendant. Reported to the Law Court for determination. Bill dismissed with costs. *John G. Smith*, for plaintiff. *Geo. F. & Leroy Haley*, for defendant.

HECTOR S. BOURGEOIS *vs.* PENOBSCOT SAVINGS BANK.

Penobscot County. Decided February 14, 1911. Action for money had and received brought by plaintiff to recover moneys

deposited by him in defendant bank which the latter refused to pay to him on demand, alleging previous payments of $115 Sept. 1, 1908 and $65 Sept. 5, 1908, to another who presented the book of and impersonated the plaintiff. Verdict for plaintiff for $194.25. Defendant filed a general motion for a new trial. Motion overruled. *E. P. Murray*, for plaintiff. *Charles Hamlin, and John Wilson*, for defendant.

STATE OF MAINE *vs.* ELMER BRIDGES.

Hancock County. Decided February 14, 1911. Complaint against the defendant in the Western Hancock Municipal Court for violation of the provisions of Private and Special Laws, 1905, chapter 181, entitled an act to prohibit scallop fishing in Bluehill Bay from the first day of April to the first day of November of each year. The defendant was found guilty in the Municipal Court, appealed to the Supreme Judicial Court where an agreed statement of facts was filed and the case then reported to the Law Court. Judgment for the State. *Wiley C. Conary*, County Attorney, for the State. *L. B. Deasy*, for defendant.

STATE OF MAINE *vs.* ARTHUR L. HERSEY.

Androscoggin County. Decided February 14, 1911. The rescript states as follows: "The defendant was indicted for violation of Revised Statutes, chapter 127, section 1. A trial by jury resulted in a verdict of guilty, whereupon defendant filed a motion for a new trial which was denied by the Justice presiding at the trial. The papers before this court are an attested copy of the indictment, an

attested copy of a bill of exceptions and a printed record comprising the evidence and the charge of the presiding Justice. No copy of the motion for new trial is found.

"The bill of exceptions alleges a denial by the court of the motion for new trial and excepts thereto.

"For many years prior to the year 1883, motions for new trial in criminal cases were addressed to the presiding Justice whose decision, as at common law, was final: *State* v. *Hill*, 48 Maine, 241; *State* v. *Gilman*, 70 Maine, 329, 333. In that year an appeal from the denial of a motion for new trial by the Justice before whom the motion is heard was given to respondent in cases where conviction had been had of an offense punishable by imprisonment for life and the concurrence of but three Justices is necessary to grant such motion. Revised Statutes, chapter 135, section 27. In 1909 section 27 was amended by adding the following: "But in all other criminal cases amounting to a felony, where like motion is filed and appeal taken to the law court the concurrence of a majority of the justices shall be necessary to grant such motion" . . . . Public Laws, 1909, chapter 184. It is thus seen that whatever the right of defendant to review the action of the presiding Justice it must be sought by appeal, that the case is not properly before this court and must be dismissed from its docket.

"It may be said that assuming the motion to have been a general motion for new trial and to be properly before this court on exceptions, an examination of the evidence and the instructions to the jury reveals no error in the action of the Justice hearing the motion. Case dismissed from the law docket." *Frank A. Morey*, County Attorney, for the State. *George C. Wing*, for defendant.

LESLIE R. CURTIS, pro ami, *vs.* AUBURN PAPER BOX COMPANY.

Androscoggin County. Decided February 16, 1911. 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. Verdict for plaintiff for $1202.91. Defendant filed a general motion for a new trial and also excepted to several rulings. Exceptions not considered. Motion sustained. New trial granted. *McGillicuddy & Morey*, for plaintiff. *Oakes, Pulsifer & Ludden*, for defendant.

WILLIAM HUGHES *vs.* ANN HUGHES AND THOMAS HUGHES.

Androscoggin County. Decided February 16, 1911. Assumpsit for money had and received to recover the sum of $1800, alleged to have been taken from the plaintiff by the defendants. Verdict for plaintiff for the full amount. Defendants filed a general motion for a new trial. The rescript states as follows: "The facts, as substantially stated by the plaintiff show that he had the sum of $1800 in an old coat in the cellar under his mother's house, in which he occupied a room. It is claimed by him that $1500, in one hundred dollar packages, was in one pocket of the old coat, and $300, in one hundred dollar packages, was in another pocket of the coat; that this coat among other old coats and other articles of wearing apparel was hung on the wall in the cellar of the building, where the plaintiff was accustomed to do cobbling and where he had many different articles of second-hand merchandise; that the last time he saw the coat was on Thursday before the Fourth of July, 1909; that he went to the cellar for the purpose of fixing his shoes; and that he first discovered that the coat was gone on Wednesday following the Fourth of July. He claimed that his mother had taken the money and she claimed to him that she had sold the coat to a Jew.

"A careful reading of the testimony discloses no motive whatever on the part of the mother inducing her to take the money, no evidence whatever that the brother was concerned in taking it, and only

a suspicion against the mother, which is based upon the fact that when charged she made some conversation with a witness with reference to a compromise with the plaintiff and did some acts with reference to executing it. But whatever the force of this testimony, it is utterly insufficient to overcome the lack of motive on the part of the mother and brother, their relation to the plaintiff which is inconsistent with such an act, and the overwhelming improbability of the plaintiff's own story. The plaintiff's claim of having left $1800 in the pockets of an old coat hanging upon the wall of a cellar exposed to entrance not only to the inmates of the house but to people from outside, is so inconsistent with the experience of human events that we are unable to believe that such a state of affairs could have existed. The situation described is so repugnant to the claim of probability that it is beyond conception. Motion sustained." *Newell & Skelton*, for plaintiff. *McGillicuddy & Morey*, for defendants.

ALBERT O. DAVIDSON et als., Trustees,

vs.

LINN WOOLEN COMPANY.

Somerset County. Decided February 16, 1911. Complaint for flowage returnable at the September term, 1907, of the Supreme Judicial Court, Somerset County. At the return term, the defendant company failing to plead or show any legal objection to the proceedings, commissioners were appointed to make an appraisement of the damages in accordance with the provisions of section 9 of chapter 94, R. S. At the December term, 1909, the commissioners filed their report and a motion to recommit the report was filed both by the plaintiffs and the defendant. Motion overruled. *David D. Stewart*, for plaintiffs. *Hudson & Hudson, and Manson & Coolidge*, for defendant.

THE PHILADELPHIA TRUST, SAFE DEPOSIT COMPANY, Trustee et als., In Equity,

vs.

WILLIAM C. ALLISON.

Hancock County. Decided February 21, 1911. The rescript says: "This case is reported on bill and demurrer, with a stipulation that the Law Court shall direct final judgment. The plaintiffs' claim, if sustainable, necessarily rests upon the jurisdiction of the Court of Common Pleas of Philadelphia to adjudge a woman an habitual drunkard, and to appoint a committee of her person and property, and further, upon the jurisdiction of that court to authorize her committee to consent for her to the sale of real estate as set out in the bill. Upon inspection of the bill, the court finds that while it is alleged that the woman was "duly" declared an habitual drunkard, there is no allegation expressly, or by legal implication that the Court of Common Pleas of Philadelphia had jurisdiction either to appoint a committee of the person and estate, or to make such a decree as the one described in the bill. This omission is apparently an inadvertance, and ought not to preclude the plaintiffs. Demurrer sustained. Report discharged. Bill retained for amendment." *Symonds, Snow, Cook & Hutchinson*, for plaintiffs. *E. B. Mears, and L. B. Deasy*, for defendant.

ALPHONSE TREMBLAY *vs.* A. M. GARCELON AND L. P. DUCHARME.

Androscoggin County. Decided February, 1911. Action on the case against the defendants, physicians and surgeons, for alleged malpractice. Verdict for defendant Garcelon and verdict for plaintiff against defendant Ducharme. Motion for new trial by defendant Ducharme. Motion sustained. *George S. McCarty, and Newell & Skelton*, for plaintiff. *McGillicuddy & Morey*, for defendant Garcelon. *Merrill & Merrill*, for defendant Ducharme.

INHABITANTS OF MONROE *vs.* WILLIAM A. CONDON.

Waldo County. Decided February 24, 1911. Action of debt to recover a tax assessed on certain horses, neat cattle, sheep and swine in the plaintiff town on the first day of April, 1909. At the conclusion of the evidence a verdict was ordered for the plaintiff town and the defendant excepted. The rescript states: "The defendant, an inhabitant of Dixmont, admits that the domestic animals which he owned and for which he was taxed in Monroe were in that town on the first day of April. They were therefore taxable in that town unless it be shown they were there for some temporary purpose. Revised Statutes, chapter 9, section 13, paragraph 4. This the evidence fails to show. The defendant further invokes that part of Revised Statutes, chapter 9, section 13, paragraph 4 providing that "if a town line so divides a farm that the dwelling house is in one town and the barn or outbuildings or any part of them is in another, such animals kept for the use of said farm shall be taxed in the town where the house is." The evidence however fails to show a case within that statute. Exceptions overruled." *Dunton & Morse*, for plaintiffs. *U. G. Mudgett*, for defendant.

WILBUR F. STEVENS et al. *vs.* GEORGE W. PARSONS.

Kennebec County. Decided February 24, 1911. Action for breach of covenant in a warranty deed. (See *Parsons* v. *Stevens et al.*, 107 Maine, 65.) The rescript is as follows: "In an equity suit between the same parties, a final decree was made which removes the basis of this action at law; but upon the suggestion that proceedings may be brought to obtain a reversal of that decree and a restoration of the cause of action, this case and exceptions are dismissed this docket for disposition of the case at nisi prius." *L. T. Carleton*, for plaintiffs. *Williamson & Burleigh*, for defendant.

CHAS. C. LADD *vs.* SAMUEL O. RICHARDSON.

Hancock County. Decided March 18, 1911. Trespass quare clausum for tearing down a fence built by the plaintiff. The question involved was the location of the dividing line between the plaintiff's lot and a lot owned by the defendant's wife—and more specifically the location of the corner bound between those lots. Verdict for defendant. Plaintiff moved for a new trial. Motion overruled. *Deasy & Lynam*, for plaintiff. *Edward S. Clark*, for defendant.

LEONARD GRIFFITH *vs.* WILLIAM C. BROWN.

MARY E. GRIFFITH *vs.* WILLIAM C. BROWN.

Aroostook County. Decided April 3, 1911. Two actions on the case to recover damages for loss and injuries caused by the alleged negligence of the defendant in the management of his automobile. The first entitled action was brought by the husband to recover for the loss of the wife's services, expenses, etc., and the other was brought by the wife to recover for the personal injuries sustained by her. The two actions were tried together. Verdict for plaintiff in each action—$725 in the first entitled action and $1729.16 in the other action. Defendant filed a general motion for a new trial in each action, and also a motion for a new trial on the ground of newly discovered evidence. Motions sustained. New trial granted in each action. *Willis B. Hall, William R. Roix, and Powers & Guild*, for plaintiffs. *Ira G. Hersey, and Wallace R. Lumbert*, for defendant.

BOSTON ART METAL COMPANY

vs.

F. W. CUNNINGHAM & SONS, and Trustee.

Cumberland County. Decided April 4, 1911. Assumpsit upon account annexed to recover the sum of $5,437.42 for metal ceiling lights claimed by plaintiff to have been sold by it to defendant corporation, and used by the defendant in the erection of the Cumberland County Court House, Portland, Maine. Delivery of the lights to the defendant was admitted but the defendant contended that the lights were included in a certain contract between it and the plaintiff, while the plaintiff contended that the lights were "extras." Reported to the Law Court with the stipulation "that, in the event that the defendant is held liable on the account annexed to the plaintiff's writ, the value of the material, work and labor is to be submitted to a justice presiding at nisi prius after the rescript shall have been received from the Law Court." *Held*, that the plaintiff was entitled to recover for the ceiling lights over two certain toilet rooms and the filing room of the registry of deeds. Case remanded as stipulated. *Symonds, Snow, Cook & Hutchinson*, for plaintiff. *William C. Eaton, and Charles G. Keene*, for defendant.

ABBIE C. BICKNELL

vs.

MAINE CENTRAL RAILROAD COMPANY, and Trustee.

Androscoggin County. Decided April 13, 1911. Action on the case to recover damages for personal injuries sustained by the plaintiff while crossing an approach to a station of the defendant where she intended to take a train, and caused by the alleged

defective condition of the approach. Verdict for plaintiff for $883. Defendant moved for a new trial. The rescript says: The jury apparently overlooked the question of the plaintiff's own want of care, and for that reason their verdict is so manifestly erroneous that it should not be permitted to stand. Motion for a new trial sustained." *McGillicuddy & Morey*, for plaintiff. *White & Carter*, for defendant.

ALBERTENA ROBINSON *vs.* DANIEL A. ROBINSON.

Penobscot County. Decided May 11, 1911. The rescript is as follows: "This action charges the defendant with malpractice in treating the injuries of the defendant received by a fall, wherein with other injuries she received a fracture of the hip, which was not discovered in time for proper treatment owing to the alleged inattention or neglect of the defendant. The only issues involved were the defendant's neglect and the amount of damages. The jury rendered a verdict in favor of the plaintiff for $6140. The first issue presents the usual question raised upon motion, not necessarily whether the defendant was guilty as charged, but whether there was sufficient evidence in support of the plaintiff's contention to authorize the jury in finding in favor of the plaintiff upon the question of liability. A careful reading of the case convinces the court that whatever its personal opinion might have been upon this question, there is sufficient evidence, if believed by the jury, to sustain their verdict under the well settled rules of law. Upon the second issue it is the opinion of the court that the verdict is clearly excessive. As it serves no purpose whatever to analyze the testimony upon this issue, it is clear to the court that a new trial should be granted unless the plaintiff within thirty days from the certification to this decision remit all of said verdict in excess of $3000." *Wm. R. Pattangall, and Frank Plumstead*, for plaintiff. *Martin & Cook, and Stearns & Stearns*, for defendant.

JOHN W. BARRETT

vs.

LEWISTON, BRUNSWICK & BATH STREET RAILWAY COMPANY.

Sagadahoc County. Decided June 6, 1911. The rescript says: "This case was before this court in 104 Maine, 479. The sole question before the court now, as then is the mental capacity of the plaintiff to comprehend the settlement pleaded by the defendant as a bar to his right to recover, as no allegation of fraud appears in the plaintiff's declaration. The new evidence produced at the second trial did not so change the aspect of the case as to warrant the jury in finding that the plaintiff did not possess the mental capacity to understand the nature of the settlement. Motion sustained. Verdict set aside." *Oakes, Pulsifer & Ludden*, for plaintiffs. *Newell & Skelton*, for defendant.

STATE OF MAINE *vs.* CHARLES R. FRIEL.

Aroostook County. Decided June 8, 1911. The defendant was indicted for the crime of murder and on trial the jury found him guilty of murder. Before judgment he moved the presiding Justice to set aside the verdict because it was against the law, the evidence and the weight of evidence. This motion was overruled and the defendant appealed to the Law Court as provided by Revised Statutes, chapter 135, section 27. In relation to this appeal the rescript says: "After a careful examination and consideration of all the evidence it is the unanimous opinion of the court that the jury was justified by the evidence in returning a verdict of guilty of murder against the defendant."

After hearing the evidence, arguments of counsel and the charge of the presiding Justice, the jury retired to consider the case and

after being out for several hours, returned into court for additional instructions. After the presiding Justice had given a part of the instructions called for by the jury, he discovered that the defendant was not present. Thereupon he said: "Mr. Sheriff, it has occurred to me I can't say a word without the respondent present. I shall have to repeat what I have said, and have him sent for. Strike it all out Mr. Reporter. You will have to wait for the respondent to be brought in, gentlemen." After the defendant had been brought into court, and the reporter ordered to strike out the instructions already given, the presiding Justice, in the presence of the defendant, proceeded to give the instructions called for by the jury. The defendant then excepted to the instructions given in his absence. During the entire proceedings the counsel for the defendant was present and offered no objections.

In relation to the exceptions, the rescript says: "The defendant also presented a bill of exceptions, but inasmuch as a majority of the Justices hearing the cause do not concur in sustaining the exceptions they are overruled."

Decision of the presiding Justice overruling the motion for a new trial affirmed. Exceptions overruled. Judgment for the State. *Eugene A. Holmes*, County Attorney, *and Warren C. Philbrook*, Attorney General, for the State. *Don A. H. Powers*, for the defendant.

ARTHUR C. DYER et al. *vs.* JESSIE E. VAUGHN et als.

Piscataquis County. Decided June 8, 1911. (No record received by the reporter.) The rescript says: "The evidence does not so clearly establish fraud in the assignment to the claimant as to require the court to reverse the decision of the presiding Justice that the assignment was valid. Exceptions overruled."

DELPHOS SOUTHARD, In Equity,

vs.

DELLA J. SOUTHARD, Executrix.

Piscataquis County. Decided June 8, 1911. The rescript states as follows: "Bill in equity to declare a resulting trust in favor of the plaintiff of certain real estate described in her bill. The presiding Justice who tried the cause below entered a decree that the bill be dismissed for want of equity in the plaintiff, from which decree an appeal was taken to this court. To establish a resulting trust the proof should be full, clear and convincing. After a careful examination and consideration of the evidence in this case it is the opinion of the court that it is not sufficient to establish a resulting trust in the plaintiff's favor." Bill dismissed. *J. S. Williams*, for plaintiff. *Wm. A. Burgess, and C. W. Hayes*, for defendant.

RALPH E. CARTER et al. *vs.* JOHN WHITE.

Penobscot County. Decided June 8, 1911. Assumpsit upon an account annexed to recover the sum of $72.22 for materials furnished and labor performed by the plaintiffs as plumbers, upon certain houses owned by the defendant. Verdict for plaintiffs for $73.59. Defendant moved for a new trial. Motion overruled. *B. W. Blanchard*, for plaintiffs. *Thompson & Blanchard*, for defendant.

CHARLES W. FALL *vs.* OSCAR E. FALL et al.

York County. Decided June 27, 1911. The rescript says: "An appeal from a decree in equity. The bill prayed the declaration and enforcement of an alleged constructive trust in a parcel of land. The sitting Justice, after hearing, made full findings of fact supporting the allegations of the bill and decree accordingly.

"Constructive trusts, or trusts ex maleficio, are based upon fraud or deceit and can be sustained only upon evidence that is full, clear and convincing. We can conceive of no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contracts to subvert the muniments of title.

"'No class is more susceptible to the temptation of fraud and none in which it can be more easily practiced.' *Liberty* v. *Haines*, 103 Maine, 182, 193.

"Ordinarily the findings of fact of the sitting Justice will not be reversed unless it clearly appears that such decision is erroneous and this upon the ground that he has seen and heard the witnesses.

"In the application of the rule circumstances and conditions are to be considered. *Leighton* v. *Leighton*, 91 Maine, 593, 603. The complainant to sustain the allegations of his bill offered as witnesses himself, his wife and his son—all interested—and, in alleged corroboration, four depositions.

"Upon a careful reading of all the evidence, including the record in the action at law between the plaintiff and his brother (*Fall* v. *Fall*, 100 Maine, 98), we are of the opinion that complainant does not support his bill of complaint by full, clear and convincing evidence. The conscience of the court is not satisfied that its allegations are sustained and the decree of the sitting Justice must be reversed. A decree will be entered dismissing the bill with costs." *Orren R. Fairfield, Samuel W. Emery, and Greenleaf K. Bartlett*, for plaintiff. *Mathews & Stevens, and George C. Yeaton*, for defendants.

WILLIAM G. ALDEN

vs.

CAMDEN ANCHOR-ROCKLAND MACHINE COMPANY.

Knox County. Decided July 14, 1911. See *Alden* v. *Camden Anchor-Rockland Machine Company*, 107 Maine, 508. In that case it was held (1) that the note declared on was not admissible under the declaration as drawn and (2) that the declaration was amendable by filing a new count "setting out the entire contract made by the parties." At a subsequent term of court, the plaintiff filed a new count to his writ as follows, and asked to have it allowed: "Also for that the said defendant at said Rockland, on the 13th day of July A. D. 1904, for a valuable consideration promised the plaintiff to pay him or his order the sum of five thousand dollars, ($5,000) according to the terms of a written contract by it signed and delivered to the said plaintiff on said date, of the following tenor, to wit: (Here follows a copy of the note and indorsement, as the same appear in 107 Maine, supra.) "And the plaintiff avers that said preferred stock referred to in said contract was not sold within said twelve months to pay said note at its maturity and that said note was not called for payment at its maturity but that the time for payment thereof was extended for twelve months thereafter, and the plaintiff further says that said preferred stock was not sold to pay said note within said further time of twelve months after its maturity, and that said twelve months and said further time of twelve months after the maturity of said note have long since elapsed, yet the defendant, though requested, has not paid the same."

The amendment was allowed and the defendant excepted. The rescript says: "An examination of the new count indicates that it is drawn strictly in accordance with the opinion of this court already referred to. The action of this court in the premises was taken by reason of the express agreement of the parties submitting the question of amendment to its consideration. It is unnecessary for us to repeat that that amendment is allowable.

"The amendment introduces no new parties, nor is there any other objection to the new count open upon these exceptions. In answer to defendant's criticism, we may add that if the note, as now declared on, was not transferable by indorsement, the signatures of the plaintiff and Georgianna Alden endorsed upon the note are mere surplusage. If, on the other hand, it could be so transferred, the indorsee has indorsed the note in blank and presumably to the present holder, the plaintiff." *White & Carter*, for plaintiff. *J. H. Montgomery*, for defendant.

WILLIAM P. HAYFORD *vs.* VERNER H. DAVIS, Administrator.

Oxford County. Decided July 15, 1911. Assumpsit on an account annexed, brought against the defendant as administrator of the estate of one Alonzo F. Cox. Verdict for plaintiff for $820. Defendant moved for a new trial. Motion sustained unless plaintiff remits all of the verdict in excess of $500. *Frederick R. Dyer*, for plaintiff. *Tascus Atwood*, for defendant.

EVA E. HARVEY *vs.* CHARLES K. DONNELL.

Androscoggin County. Decided June 14, 1911. Assumpsit on an account annexed to recover for housework. Plea, the general issue. Verdict for plaintiff for $96.25. Defendant moved for a new trial. The defendant admitted that the services were performed but claimed that they were gratuitous. The rescript says: "The defendant claims, and we think with reason so far as the face of the record shows, that he produced a greater weight of evidence in support of his contention than was produced against it. But that is not enough. To justify the setting aside of the verdict, it must

be shown clearly that the verdict is wrong. And the burden of showing this is on the defendant. Here the defendant fails. There is nothing inherently improbable in the plaintiff's story, and the court, not seeing nor hearing the witnesses as the jury did, cannot say that the jury were not warranted in believing her." Motion overruled. *Ralph W. Crockett*, for plaintiff. *Tascus Atwood*, for defendant.

PEOPLE'S NATIONAL BANK *vs.* KENNEBEC WATER DISTRICT.

Kennebec County. Decided July 14, 1911. Action on the case wherein the plaintiff claimed that, on April 26, 1910, its woolen mills, with their machinery and supplies, were damaged by fire to the extent of approximately ten thousand dollars, through the negligence of the defendant in repairing the water pipe connected with the plaintiff's automatic sprinkler system. The plaintiff contended that the work was so negligently performed that, at the time of the fire, the automatic system failed to work and the plaintiff's loss or at least a part of it, was legally attributable to the defendant. Reported to the Law Court for decision on the question of liability.

The rescript says: "The record shows that just prior to March 25th, 1910, a leak was discovered in the pipe located on plaintiff's land and connecting one of the defendant's mills with the main in the street, and the plaintiff made arrangements with the defendant to repair the same. The leak was near an indicator post that indicated, when in proper condition, whether the water was on or off by the sign "open" or "shut," and the plaintiff claims that the workmen of the defendant must have disarranged the mechanism of this post, so that the sign read "open" while in reality the water was off.

"It further appears that the leak was repaired by defendant's workmen in a few hours, and, when the work was completed, the foreman of the crew notified the superintendent of the mill of the

fact, and a test was made, either by the superintendent or in his presence, to ascertain whether the water was on, and they both were satisfied that it was, and the workmen left; in fact the test was made by mistake on a faucet that was not connected with this repaired pipe, and the inference is therefore strong that the water was left shut off from that pipe. A month later a fire broke out underneath the office. The automatic sprinkler system located in one of the mills, and not connected with the pipe last repaired, worked. That in the other mill connected with this repaired line did not work. Considerable loss was suffered, and this suit was brought.

"*Held:* 1. That, considering all the evidence in the case, it is too meagre to constitute the foundation of a claim for negligence, and falls far short of creating a liability for damages caused by the fire.

"2. That if the valves in the indicator were in some way reversed, the defendant should not be held liable for that condition, as the test was made and the work in effect approved and accepted by the superintendent of the mill. The mistake, if any, was a mutual mistake.

"The necessary elements of actionable negligence are lacking." Judgment for defendant. *Heath & Andrews*, for plaintiff. *Harvey D. Eaton*, for defendant.

LIZENA LIGHT *vs.* E. A. STROUT COMPANY.

Lincoln County. Decided July 14, 1911. The rescript is as follows: "The plaintiff, in June, 1904, listed her farm in defendant's agency for $500. On December 13, 1904, the plaintiff signed another contract with the defendant in terms reducing the amount which she was to receive to $400, and allowing the defendant to retain as commission all he might receive in excess of that amount. Subsequently the defendant sold the property for $700, and notified the plaintiff that it had been sold, but did not state at what price. The plaintiff executed a deed to the purchaser and received her

four hundred dollars. Later, on learning that the purchase price was $700, and that the defendant had retained $300 as commission instead of $100, she brought this action to recover the additional $200. The jury found in the plaintiff's favor, and the defendant asks to have the verdict set aside as against the evidence.

"The issue was one of fact and was sharply drawn. The defendant relied upon the written contract bearing the plaintiff's signature allowing him as commission all in excess of $400. The plaintiff asserted that she never herself read the contract, but relied upon the defendant's agent as to its contents; and she understood that, while the listing price was reduced to four hundred dollars, the defendant was to receive as commission only one hundred dollars, whatever the sum realized. It was incumbent upon the plaintiff, attacking as she did an instrument bearing her signature, to maintain her position by clear and convincing proof. The jury have found that she did, and a careful study of the evidence does not induce us to disturb the verdict as manifestly wrong. The language of the contract itself is somewhat misleading, for while it states "I will pay to you or your order forthwith a commission of all you get in excess of $400, clear to me," it adds these unnecessary and possibly misleading words: "and it is mutually agreed that this property in no event shall be sold to your customer for less than $100 in excess of above price." A woman like the plaintiff, unintelligent and unaccustomed to business, might still have thought that this $100 dollars was to be the defendant's commission.

"The conduct of defendant's agent when the deed was made, in apparently endeavoring to keep from her the knowledge of the purchase price, and when asked by her the direct question of how much he got for the place, his reply 'I have got $400 clear to you, just as your contract calls for,' may properly have influenced the jury in coming to their conclusion. Taking the case in its entirety, the evidence, the situation of the parties, the surroundings and the subsequent conduct, we are not convinced that the plaintiff did not maintain her burden of proof, heavy as it was. Motion overruled." *Lindley Murray Staples*, for plaintiff. *Williamson & Burleigh*, for defendant.

THE TRUSTEES OF DUMMER ACADEMY

vs.

CHARLES E. BANKS.

Cumberland County. Decided July 14, 1911. Assumpsit brought in Superior Court in said county, to recover balance due for tuition, board, etc., of defendant's minor son while a student at Dummer Academy for the school year 1907-1908. Plea, the general issue. The defendant offered no evidence. Verdict for plaintiff for $200.75. Defendant moved for a new trial. The rescript says: "The record in this case shows sufficient undisputed testimony to warrant a jury in finding for the plaintiff. Therefore, the verdict, which was for the plaintiff, cannot be disturbed. Motion for a new trial overruled." *John H. Pierce*, for plaintiff. *Eaton, Keene & Gardner*, for defendant.

ANNIE L. MORAN *vs.* FRANK SOUTHARD.

Penobscot County. Decided July 25, 1911. Action against the defendant, a dentist, for malpractice. Verdict for plaintiff for $200. The defendant moved for a new trial. The rescript says: "A majority of the qualified Justices are of opinion that the verdict, which was for the plaintiff, was warranted by the evidence." Motion overruled. *Louis C. Stearns, and Louis C. Stearns, Jr.*, for plaintiff. *Martin & Cook*, for defendant.

HENRY CLAY PEABODY

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 8, 1911, IN MEMORY OF THE

HONORABLE HENRY CLAY PEABODY,

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT, WHO DIED ON THE TWENTY-NINTH DAY OF MARCH, 1911, IN THE SEVENTY-THIRD YEAR OF HIS AGE.

SITTING: WHITEHOUSE, SENIOR ASSOCIATE JUSTICE, presiding, SAVAGE, SPEAR, CORNISH, BIRD, HALEY, JJ.

The exercises were opened by FRANKLIN C. PAYSON, Esqre., vice-president of the Cumberland Bar Association, who spoke as follows:

May it please the Court: —

In the absence of the President of the Cumberland Bar Association, it becomes my sad duty to proclaim to your Honors the sudden death on March 29th, 1911, of the Honorable HENRY CLAY PEABODY, an Associate Justice of the Supreme Judicial Court of the State of Maine for the ten years last past.

During this period and during the twenty years just prior thereto while he presided over the Probate Court in and for the County of Cumberland, Judge PEABODY, by his rare patience, his strict impartiality and his unfailing courtesy endeared himself to the members of the Bar and to all others who were privileged to know him.

The Cumberland Bar Association has appointed a Committee to make to your Honors an appreciation of his life and character and I now move that the stated business of the term be suspended and that the Committee be heard at the present time.

Hon. JOSEPH W. SYMONDS, of Portland, formerly a Justice of the Supreme Judicial Court, then addressed the Court as follows:

May it please the Court:

I have the honor, in behalf of the committee, to present to the court a memorial to the late Honorable HENRY CLAY PEABODY, recently adopted by the Bar as an expression of their appreciation of his high service as associate justice of this court, of their affection for him personally and admiration for his life and character, and of their great respect for his memory. I am directed, too, by the committee formally to request that this memorial of the Bar may be placed upon the permanent files and records of the court.

Although he was a native of Maine, Judge PEABODY's boyhood was passed among the mountains of New Hampshire and his college course was at Dartmouth. A passionate fondness for the scenes with which his childhood had been associated continued during his life, and the brief vacations which he snatched from the urgency of public or private duties were likely to be spent in the midst of the loveliness and grandeur of that mountainous region.

But for more than half a century, from 1860 until he died, he lived in Portland. This was his home during the period of his professional study, of 18 years of active professional practice before he assumed the office of judge, and of his entire judicial service, in Probate and on the Supreme Bench. The period of his residence in Portland may be said to have included all the great experiences of his life. Here he was married and his children were born and he had the satisfaction of living to see his surviving sons associated together and following in his own footsteps as honored members of the Bar. He was identified with our City in all its affairs as one of its foremost citizens, with perhaps something of the retirement of the scholar and the gentleman about him, but with a genuine warmth of interest in everything pertaining to the common welfare.

During his practice he had acquired a peculiar proficiency in matters within the Probate jurisdiction and it may well be said to have been with universal approval that he was chosen Judge of Probate in 1880. The office of Judge of that Court in this County

is one that has uniformly been held by gentlemen of character and standing from a very ancient date, in its present form from about the time of the organization of our Country, in 1760, and with only slight differences of procedure for more than a century preceding that date. Important trusts are committed to its jurisdiction and grave responsibilities devolved upon it. It cannot be doubted that Judge PEABODY possessed exceptional qualifications for that important office. His familiarity with everything pertaining to its jurisdiction, his patient and considerate attention to details affecting suitors in that court (who are likely to be persons suffering from the recent loss of friends), his genuine kindliness and courtesy, his diligence and fidelity, his broad, general legal knowledge, all made him the ideal of a judge in that place.

For more than 20 years he held the office of Judge of Probate, and then he was appointed to the Bench of this, our highest court. The same qualities which had distinguished his judicial service in Probate manifested themselves, in some respects even more strikingly, in the broader and higher field. He was the same dispassionate man, of even temper, high-minded, thoughtful, calmly giving his best service to the duties of his office. His temperament, experience, discipline, his mental traits and habits, his tastes and tendencies alike in thought and in action, all were judicial. It might well be said, everything about him was judicial. It was an instinct with him, an unconscious, unvarying mental process, to fling everything into the scales of justice, there to be weighed for the final test of value; and no man ever watched what Rufus Choate called "the trepidations of the balance" more intently than he. He never forgot the words of Webster — Dartmouth graduate, counsel for the college at the crisis of its fate, in the great cause before the Supreme Court at Washington, in which Chief Justice MARSHALL drew the opinion in favor of the college, denying the power of the State of New Hampshire to change the college charter under the English crown; all the traditions of whose life Judge PEABODY was delightedly familiar with and greatly admired — he never forgot the words of Webster — at least it seemed as if they were always present in his mind:

"Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundation, strengthens its pillars, adorns its entablatures or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society."

In Judge PEABODY's character, or in his career, there was little tendency to extremes. He was not inclined to extravagance or excess in any direction. It was not by sudden and occasional strain of great intellectual effort that the results of his life were accomplished; rather by a quiet intensity and persistency of energy which left no daily duty undone. Every day the scroll was complete, written out to the end by his patient hand. In his walk through life, he liked the golden mean, the measured movement, the even tenor of the way. Some happy mingling of the original elements of character in him, some fine result of method and discipline, seemed to endow him with a harmony of mind and heart which events did not disturb, with the faculty of holding in all things the just balance, the true relation and proportion. He was not accustomed to yield to the mood of the moment. He was always the same; a true, kindly, just, learned and able man, with good judgment and ripe wealth of experience, whose life moved on a high plane to noble ends, under a genuine title of nobility, a mirror of truth and honor, an illustration of that quality of character and habit of conduct which is the ideal of our profession and among the noblest of human virtues, fidelity.

The confidence of the Bar in his integrity was unlimited. In the discharge of the duties of his high office it was impossible to think of him as swayed or influenced by any other motive than truth and right, the law and justice of the cause. He might be slow in forming his opinion. The conclusion in his mind was likely to be reached only after the strictest investigation and deliberation. It

was not easy for him to change an opinion once formed. The inclination with him was to act upon it with firmness, but he did not carry this to excess. His mind was hospitable to new phases of fact and to suggestions of reason and authority which had not previously been weighed. His career illustrates a roundness and completeness of intellectual gifts and attainments rather than exceptional brilliancy in a single direction. It was not the flash of the meteor, it was the full orb and the steady ray of the planet in its unchanging course.

He died at his work, without a day of lingering illness to break the charm or to darken the close of a long life of useful labor. In the midst of the battle, as in the old Homeric days, some favoring and sheltering divinity wrapt the cloud about him and he passed from sight, from the labor and the conflict into silence and shadow, into the peace, we trust, which passeth understanding.

He was the good Judge. The grateful remembrance of the men of his own times will follow him while they live; the records of the highest court of his native State, the law reports of Maine, will be the permanent and final witnesses of his work and his fame.

Mr. FRED V. MATTHEWS, of Portland, then spoke as follows:

May it please the Court:

I have been asked to address the Court on behalf of my brethren at the Bar on this sad occasion, which you have set apart for the expression of our sense of common bereavement. Your honored associate, our beloved brother, Justice HENRY CLAY PEABODY, has passed from our midst to his rest.

We are impressed with a deep sense of personal loss. We bow in reverent humility and resignation to the orderings of the Almighty, but we shall ever fondly cherish our memories of the departed.

An alwise Providence granted our brother a long life of usefulness to his fellows, a life fully ripened by years of kindly service, by wise reflection and patient forbearance, by his charitable ways; the natural fruition of his trained mind, so well stored with the riches

of the ages. Death has taken away his judicial robe, not ruthlessly, as sometimes at a midday hour: it has withdrawn it from him with a gentle hand to relieve him after his service was complete.

We occupied adjoining offices for nearly twenty-two years. I saw much of him during all that time. May I speak of him personally as I knew him in almost daily association.

He was genial. He was courteous. He was kind. He was a loyal friend; he was always just to an adversary. He was fair to all. He was charitable. He always looked upon the brighter side. He was cheerful in all circumstances.

He believed in mankind, and the higher ideals in life; his instincts were all true to the nobler things. He was democratic, yet he was uncompromising toward all that is base, or sordid. He had a keen sense of humor which often came to his relief in the tedium of his painstaking industry and his patient attention to others. He was often moved by tragic and pathetic incidents, but never made blind by them to the path of his duty as a judge between man and man. He was ever ready with well intended and helpful suggestions to a flagging brother with a righteous cause, proffering the fruit of his long experience in presiding over the varied questions arising in the affairs of men.

No man ever questioned his courage or his integrity. To the last day of his life he was ever exceedingly attentive to the matter before him. His faculties were keen, his brain alert. His thoughts did not stray, his mind was on the case; his eyes reflected as his words suggested to the day of his death his keen interest in every detail which might help to reach the truth.

Brothers here assembled: — you knew him at the Bar and on the Bench; Your Honors: — presiding in the Court, you knew him as your associate upon the Bench of this, the highest tribunal of justice of our State, —

I need not remind you, one and all, of the high esteem and respectful attention which his genial, courteous and sincere conduct and bearing commanded of you.

Would I could bring back to you the joy of his cordial greetings, in asking that there be recorded in this court a testimonial of love

and respect for our departed brother from my fellow-citizens in this community where he resided so many years and presided as Judge for a generation over the most valued material interests of his fellow-men.

It was my great privilege to visit Judge PEABODY and his family for a week, during his vacation, the last summer of his lifetime, at his summer home at Gorham, New Hampshire, on his father's old homestead farm on the Androscoggin River, amidst the grandeur and beauties of the mountains where, staff in hand, in the early mornings, he was accustomed to roam amidst the haunts and scenes of his boyhood and youth, listening to the familiar call of the birds, seeking favorite wild flowers, drinking renewed vitality and strength from the atmosphere of field and forest, recalling to mind those incidents of his earlier years which are more and more fondly cherished in the serene hours of maturer life, when one lives his youth again in the joys and sorrows of his grandchildren.

No family relationship could have been more perfect, more beautiful, than was his there, with all his dear ones, his sons and grandchildren about him in the old home, where respected and in complete accord, untrammelled by the cares of his arduous duties as Judge, he and his dear life-long companion ruled their household with gentleness, love and thoughtfulness of others, and dispensed a genial and charming hospitality to friends and neighbors.

HENRY CLAY PEABODY was born in Gilead, Maine, April 14, 1838, the son of John Tarbell Peabody and Mercy Ingalls Burbank, his wife. He was educated in the public schools, Gould's Academy, at Bethel, Maine, and Fryeburg Academy, Fryeburg, Maine, and at Dartmouth College from which he graduated in the class of 1859.

He taught in public schools in Maine, New Hampshire, and Massachusetts while he was a student at academy and college. He read law in the office of General Samuel Fessenden, at Portland, Maine.

His law teacher invited him to become his partner, but, to repeat the words of the Judge, "this was unfortunately prevented by the severe sickness of General Fessenden which resulted in his total blindness."

Admitted to the Bar in 1862 he practiced law at Portland until 1880, when he was elected Judge of Probate of Cumberland County.

He held that office for twenty-one years by repeated elections, until he was appointed in 1900 by Governor Powers, Justice of the Supreme Judicial Court of Maine, in which office he was serving at the time of his sudden death in this Court on March 29, 1911.

At the time of his appointment Governor Powers was reported in public print to have said:—

"Judge PEABODY had by far the largest endorsement of any man who was named for the office. Outside of the claims of Cumberland County, which presented a fine array of talent, Judge PEABODY's endorsement came from everywhere, from the bench and the bar, from business men, and from the working people. When I read those letters and petitions, I had no choice. Judge PEABODY is one of the most scholarly men in Maine, and I believe he will give general satisfaction."

In this City of Portland he has held the positions of school committee and trustee of the Public Library and of the Greenleaf Law Library. He was a trustee of Fryeburg Academy.

Before holding judicial office he was something of a political orator, and an occasional Decoration Day speaker.

He was a member of the Fraternity Club and a frequent essayist before literary clubs and societies.

As Justice of the Supreme Court of Maine, he had occasion to preside at several of Maine's most notable trials. The opinions of this Law Court which were written by Judge PEABODY are 87 in number, including one of dissent; they are published in Volumes 96 to 108 of the Maine Reports and present a wide range of important principles of law and equity, disclosing great insight and a profound knowledge of the law.

Living in Portland, the chief commercial City of our State, a very large proportion of the equity hearings fell to him, and required much of his time and attention, becoming at times extremely burdensome in frequency and importance.

In addition to official duties, he was entrusted with the settlement of several large estates in Maine and New Hampshire.

He was married July 25, 1867, to Miss Ellen Adams of Portland. He has had three children, one of whom Arthur Glendower, died in 1880, the others Clarence Webster and Henry Adams Peabody, are lawyers associated in the practice of their profession in Portland.

His mortal remains are interred at Evergreen Cemetery.

The beneficient influences of his noble life persist and pervade the community in which he lived.

It is recorded in the Book how the great leader of his people gave commandment unto the judges of Israel:—"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God's. (1 Deut. 17)"

The record will ever attest his fidelity to this precept of Holy Writ.

Hon. Wm. M. Ingraham, Judge of Probate for Cumberland County, was the last speaker on the part of the Bar.

Judge Ingraham said:

May it please the Court:

When the sad news of the death of Justice Peabody was made public on the afternoon of the 29th day of last March, it can truthfully be said that the people of this community paused and bowed their heads in sorrow. The suddenness of the terrible news was a shock to all of his friends and especially to the members of the Bar. There was probably no Judge in Portland who enjoyed a more intimate acquaintance with the lawyers, and to them his death was a pronounced and irreparable loss.

It is apparent that his long judicial career must have made him a conspicuous figure in the State and particularly so in this community. For more than thirty years he occupied a seat upon the bench in two of our courts. His longer service was in the Probate Court, where for over twenty-one years he presided with marked ability and became known as an ideal Probate Judge. His extreme

patience, his kindly manner and gentlemanly bearing, brought him the love and kindly feeling of all those who had business to transact before him. It was always a pleasure to attend to matters in his court, as one was sure of a cordial greeting and would obtain if necessary a sympathetic and helpful hand. But with all his gentleness and easy manner, there was a force behind it that asserted itself whenever necessary for the preservation of the rights of parties and the prompt enforcement of law and justice. No man ever had a greater respect for law and its proper enforcement than Justice PEABODY. He was quick to see through a case, and he had no use for a lawyer who was trying to slide something by him which was the least questionable as to its merits. So honest and good was Justice PEABODY and so high was his sense of honor, that he would tolerate only those lawyers who were doing right and guarding with zealous care the interests of their clients.

The young lawyers had in him a firm friend, and one who was ever ready to give a helpful suggestion as an aid to surmount some difficult problem. And the noble example which he set to those in the early days of their practice will always be a guide and a high ideal for them to follow through life.

So his worth was appreciated and he was held in the highest esteem by his fellow citizens, and as we in this community delight to honor and advance those who deserve and merit promotion, it was not strange that when a vacancy occurred on the bench of the Supreme Judicial Court, all eyes were turned to Judge PEABODY of the Probate Court for elevation to that exalted position. He was appointed Nov. 29, 1900, and for more than ten years served faithfully in this office and rounded out his career on the bench with credit and honor both to himself and to the State. The same traits of character which he exhibited in the Probate Court remained with him in all his dealings while on the higher Bench, and served only to make him stronger in the love and esteem in which he was held both by the lawyers and public generally.

He presided over many important trials and there never was a time that he failed to evince that care and conscientious regard for the rights of those who were before him as litigants. He emphasized

the principle that a judge can be patient, give a full and fair hearing without that show of sternness and severity which might cause uneasiness and hesitancy on the part of lawyers and witnesses. It can be said that he upheld the dignity and learning for which our Supreme Court has always been famous. He was a scholar, a man of studious habits, and no one valued education more than he did. He worked hard and attained the goal of his ambition through his own efforts.

His opinions as found in the Maine reports are clear and beautifully written, showing in all cases the mind of a careful and conscientious Judge.

As a citizen he did his full duty. He was interested in the welfare of his City and State and always kept abreast of the times. Public questions interested him and he was ready with his kindly advice on matters concerning the public welfare.

Justice PEABODY will always be remembered and held in the highest regard and esteem, and the noble example of his life will serve as a guide and ideal for all men to follow.

MR. Justice WHITEHOUSE then responded for the Court as follows:

This is the eleventh occasion during the past twenty-one years upon which memorial services have been held by the court and the bar to commemorate the life and character of one of the late justices of the court. Two of these, Chief Justice APPLETON and Chief Justice PETERS, died after retirement from office. Justices DANFORTH, WALTON, VIRGIN, LIBBY, HASKELL, FOGLER, WISWELL, WOODWARD and PEABODY died while in service as members of the court. The frequency of these solemn events during what seems such a brief period of time to the surviving members of the court as it was constituted twenty-one years ago, is an impressive reminder of the changing skies with which life is arched, and of the relentless activities of the "husbandman that reapeth always" but is the "prince of peace." Of the eight justices above named who have been my associates at some time during this period, "all, all are gone, the old familiar faces."

On this occasion the court has listened with great sensibility to the tributes of respect and honor to the memory of Mr. Justice PEABODY. His life and character have been so fittingly and faithfully portrayed in the addresses at the bar, that the memorial service might well be deemed complete with but a brief expression of our sincere and sympathetic approval of the sentiments already expressed.

He was born in Oxford County, Maine, in the town of Gilead, formerly called Peabody's Patent, situated on the westerly border of the State, but in his infancy his parents moved across the line into the town of Gorham, N. H. Here in a rural district near the Village, in close proximity to the great White Mountain range and in full view of the beauty and grandeur of its picturesque scenery, the days of his boyhood and youth were passed. From an early period this had been one of the most attractive resorts for all lovers of natural scenery. Here in the love of nature he held communion with her visible forms. The landscape of his native town had taken hold on his heart. He made an annual pilgrimage to his early home and carried his children to it. Here in all its paths the silent things of nature were "breathing the deep beauty of the world." Here when fatigued and depressed by his labors and responsibilities he sought peaceful seclusion and rest. He retained to the last his keen zest for rambles over the hilltops and through the "silent places" of the forests near the old homestead. And his faithful stenographer tells us that "while upon the circuit, in the bright spring days it was his custom to be abroad very early in the morning and to seek out the haunts of the songbirds and to study them and their habits and to enjoy the music of their songs."

> "And the music in his heart he bore,
> Long after it was heard no more,"

Judge PEABODY was graduated from Dartmouth College in the year 1859, and immediately entered upon the study of the law in the office of Gen. Samuel Fessenden of Portland. In 1862 he was admitted to the bar and commenced the practice of his profession in

that city, where he continued to reside until the time of his death in March, 1911. He inherited from an honorable Puritan ancestry those sterling moral qualities and exalted public principles which have exerted such a potent influence upon New England character. I knew him in 1876 as a well educated and honorable practitioner at Cumberland bar. I knew him as an honest lawyer who conducted himself in the office of an attorney with all good fidelity as well to the courts as to his clients, and whose probity and good faith did not depend upon the commands of the statute, or the express requirements of his oath of office, but were inherent in his character and interwoven with every fibre of his moral being. I knew him as a scholarly, painstaking and conscientious member of the bar, who cherished high ideals respecting the ethical character and service of the legal profession and who uniformly exemplified these ideals in the sixteen years of his professional labor and experience; as one who held in constant reverence the honored traditions of the bar which declare the office of the advocate to be "as old as the magistracy, as noble as truth and as necessary as justice," justice, the "queen of all the moral virtues" and the chief end and purpose of human society. I knew him also as a kindly, affable and courteous gentleman, of sweet and gentle, yet resolute spirit, with positive convictions upon public questions and policies and clear conceptions of civic righteousness and duty.

In 1879 he was elected to the important and responsible position of Judge of the Probate Court of Cumberland County, and for twenty-one years he administered the affairs of that office with exemplary fidelity and signal success uniformly discharging its manifold duties with the graces of kindliness and patience and with tender thoughtfulness for the rights of all. He held the unqualified confidence and respect of the bar and the people of the county and state, and the probate court of this county was recognized as a model and guide for all the probate courts of the State. In 1895 he was appointed by the Governor a member of the commission to prepare uniform blanks and rules of practice and procedure for the probate and insolvency courts of Maine, and acted as president of the commission.

Thus when a vacancy occurred on the bench of the Supreme Court occasioned by the death of Justice HASKELL of Portland, the bar of Cumberland County unanimously recommended Judge PEABODY as in all respects eminently qualified for the position and he was appointed an associate justice of this court November 29, 1900. He came to the bench of the Supreme Court with an exalted sense of the judicial character and functions and in the discharge of his duties at nisi prius he was never unmindful of the fact that he was presiding over a tribunal in which the dearest interests of the people were constantly at stake, and all the faculties of a cultured mind, the ripe fruits of his experience and the finest qualities of an honest and kindly heart were faithfully and diligently employed in furtherance of that justice which seeks to embody in a judicial decree an enlightened moral sense of the court concerning the truth of the controversy. He brought to the discharge of the duties of this great office the same love of justice for its own sake, the same untiring industry and conscientious endeavor to discover the truth, the same gentle, kindly consideration and gracious demeanor which had characterized his judicial service in the probate court. But the gentleness of his disposition did not signify the absence of strength of character and personality, for he possessed in a high degree the moral courage which always gave him the power to act fearlessly according to his convictions of right and duty. He was careful and considerate of the rights of all suitors.

> "But he drew the thing as he saw it
> For the God of things as they were."

In the conduct of jury trials he uniformly exemplified the practical wisdom of Bacon's suggestion that "patience and gravity of bearing are an essential part of justice, and that an overspeaking judge is no well-tuned cymbal; that it is no grace for the judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short," that while counsel should not be allowed to "wind himself into the handling of the cause anew after the decision is declared," on the other side, "let not the judge meet the cause half way nor

give to the party occasion to say his counsel or proofs are not heard."

Campbell wrote of Lord Eldon that "among his qualifications for the judgment seat must be reckoned his fine temper and delightful manners."

Justice PEABODY's uniform courtesy and gentle disposition won for him the sympathy and good will of the bar, as well as the respect and affection of his associates, and like the soft answer which turneth away wrath, effectually removed all temptation to expressions of petulance from disappointed suitors or their counsel.

"The wind that beats the mountain blows
More softly through the open wold
And gently comes the world to those
That are cast in gentle mold."

His published opinions speaking for the Law Court, appear in a finished literary style and an apt and expressive diction acquired under the chastening influence of a liberal culture and the perusal of the best elements of English and American literature. They evince a painstaking and critical examination of the record in every case, and an analytical study of the pertinent authorities in an anxious endeavor to reach a sound conclusion that would do justice to all parties and injustice to none.

During the thirty-one years of his judicial experience "no cloud nor speck nor stain" has ever rested upon the purity of his motives, no untoward incident has ever ruffled or disturbed the serenity of his demeanor, and no conceivable influence except that of the law and the established truth has ever been suspected of controlling or affecting his rulings or his judgment. Without magnifying the importance of his office, but with a deep sense of its responsibilities, he sought with absolute impartiality and singleness of purpose to have the truth discovered and declared and exact justice administered in every cause. He never forgot the distinction pointed out by Chief Justice MARSHALL "that judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law."

Justice PEABODY was possessed of a keen but always a genial and kindly sense of wit and humor, which as it seemed to his associates was more frequently illustrated in both his social and official relations during the last few years of his life. It is a quality of the imagination indispensable to a true sense of proportion. "Ridicule is the test of truth," said Hazlitt, "for humor distorts nothing and only false gods are laughed off their pedestals." Father Faber is credited with the statement that there was no greater help to a religious life than a keen sense of humor. I recall more than one instance when a serious proposition swiftly crumbled before a humorous comment by Justice PEABODY. But his wit was never inspired by malice or tinged with bitterness.

Although admonished several years ago that he had symptoms of organic disease, his high sense of duty had enabled him to perform his accustomed service with such apparent cheerfulness for three years beyond the allotted age of man that there was no thought among his friends and associates that death was so near. But at last, when he was still in the full tide and stress of his judicial labor, with the ink scarcely dry upon the draft of an important decree which he had prepared, he fell as doubtless he would have chosen to fall, at the post of duty. "Like a shadow thrown softly and sweetly from a passing cloud, death fell upon him." Among the supplications of the Litany is the prayer to be delivered from sudden death. His death was sudden but if "the best preparation for the future is the present well seen to, the last duty done," it was not the unprepared death contemplated in the Litany. He had fulfilled the "swift and solemn trusts of life" committed to him and "his Creator drew

His spirit as the sun the morning dew."

"Never the spirit was born; the spirit
shall cease to be never;
Never was time it was not; end and
beginning are dreams.
Birthless and deathless and changeless
remaineth the spirit forever;
Death hath not touched it at all, dead
though the house of it seems."

For his pure and honorable life, for his high character, his love of truth and justice, and for the credit he reflected upon the legal profession and the courts of our State, his friends and associates, and the multitude of unknown mourners who were the recipients of his kindness, charity and mercy, will long remember him and lament his departure from them.

It is ordered that the memorial be entered upon the records of the court and that as a further mark of respect for the memory of the deceased, the court will now adjourn.

The response of Mr. Justice WHITEHOUSE concluded the exercises, and the Law Court adjourned for the day.

ADDENDUM

EXCERPTS FROM THE ADDRESS OF EX-CHIEF JUSTICE EMERY DELIVERED BY HIM JULY 27, 1911, AT THE BANQUET IN BANGOR TENDERED TO HIM BY THE MAINE STATE BAR ASSOCIATION.

I carried to my place upon the bench beliefs and ideals formed during 20 years of study and practice, during 15 years of which I had the benefit of association with that eminent lawyer and statesman, ex-Senator HALE. I beg leave to state some of them, not that the beliefs were correct or the ideals high, not that they were different from those of other lawyers and judges, but to indicate the motives of my judicial action.

I believed then, and believe now, that the court should first of all and above all be loyal to the law as expressed in the constitution, the statutes, and long accepted judicial opinions; that its justices should completely subordinate to that law their own views of principles and even of justice. I believed then, and believe now, that the court should regard the constitution as the supreme law and should enforce each of its guaranties of liberty or property against all efforts to override them, even against combined efforts of executive and legislature though backed for the time by public opinion. I believed then, and believe now, that when the official comes in conflict with the citizen, the court shall hold the official responsible to the citizen for all acts outside, or in excess, of his lawful authority in the premises, and should also hold him shorn of the protection of his precept if he neglects to execute it promptly and fully.

On the other hand, I believed then, and I believe now, that the court should not question the wisdom, nor even the justice, of acts of the executive within the law, nor of acts of the legislature not in conflict with some constitutional provision, but should allow them full force and effect whatever the consequences. Further, I believed

then, and believe now, that the court should recognize that except so far as the people have in the constitution guaranteed the inviolability of personal and property rights, those rights are subject to such control, and even limitation, as the legislature may adjudge expedient for the public weal. Still further, I believed then, and believe now, that where not bound by constitution, statute or settled judicial rule, the court should strive to develop principles consonant with modern conditions and enlightenment. I also believed then, and believe now, in each justice of the court preserving his individuality; in his announcing his dissent from the majority in cases where he deems the principle important and the majority opinion unsound and its effect injurious. I think dissenting opinions are useful. If the majority opinion be sound, the dissenting opinion will only make that soundness more apparent. If the majority opinion be unsound, its unsoundness should at once be disclosed and a contemporaneous dissenting opinion may serve that purpose. A majority opinion that will not stand firm upon its reasoning and authorities, unshaken by any dissenting opinion, should not be the majority opinion.

Lastly, I believed, and still believe, that whatever the inconvenience to the State and the people, the court and its justices in obedience to Article III of the constitution should resist every attempt of the executive or the legislature to exercise judicial power, and should in turn refuse to exercise any executive or legislative power, though the legislature may ask them to do so. So long as the court keeps, and is kept, strictly within the judicial field, it will be respected and loyally sustained; but it cannot enter other fields, whether by trespass or invitation, without danger to its dignity and authority.

I also had beliefs and ideals as to the functions, duties and responsibilities of the presiding Justice at nisi prius. I believed he was bound to obey faithfully the injunction of the constitution that in this State "right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." I believed that while he was the servant of the law and the State, he was not the servant of the bar or of the jury, but that

they were to assist him in the search for the truth, whether of law or fact. I believed he was more than the chairman of a meeting or the umpire of a game, and had vastly greater powers and duties. I believed he should be the master in his court and control its proceedings; should himself be prompt and alert and insist on promptness and alertness in others; should insist on the respect due the court, on due order and decorum in the court room, on due observance of established rules of procedure. I believed he should discourage delays and waste of time; should restrain counsel and witnesses from immaterialities and repetitions; should insist on fairness and even courtesy to witnesses; should resolutely suppress all attempts to confuse the issues or mislead the jury. I believed he should rule decisively and with all possible clearness and then insist that his rulings be respected, but compensate the aggrieved party by readily allowing full exceptions.

I believed parties are entitled to early and speedy trials and that hence continuances should be sparingly granted and only for legal cause shown. I believed the rights of the parties and of the taxpayers to be superior to the convenience of the counsel. I believed that in divorce cases he should consider himself the protector of society, and should see to it that no such cause was heard without proper notice, and no divorce granted but upon full, precise allegation and convincing evidence of its truth. Finally and generally, I believed that, so far as practicable, his administration of the business of his court should be by rule rather than by discretion.

MEMORANDA

Hon. HENRY C. PEABODY, of Portland, a Justice of the Supreme Judicial Court, died March 29, 1911. Mr. Justice PEABODY was born April 14, 1838. He was appointed a Justice of the Supreme Judicial Court November 29, 1900, and was re-appointed in 1907. Previous to his elevation to the Bench of the Supreme Judicial Court he was Judge of Probate for Cumberland County for nearly twenty-one consecutive years. Information concerning his life, character and public services can be found in the account of the services and exercises held in memory of him before the Law Court July 8, 1911, and published in this volume.

Hon. GEORGE F. HALEY, of Saco, was appointed a Justice of the Supreme Judicial Court to fill the vacancy caused by the death of the late Mr. Justice PEABODY. His nomination was confirmed April 12, 1911, and he took the oath of office April 13, 1911.

Hon. LUCILIUS A. EMERY, of Ellsworth, Chief Justice of the Supreme Judicial Court, filed his resignation as Chief Justice in the summer of 1911, the same taking effect July 26, 1911. He was appointed Chief Justice December 14, 1906. He was first appointed a Justice of the Supreme Judicial Court October 5, 1883, and remained a member of that court until his resignation.

Hon. WILLIAM PENN WHITEHOUSE, of Augusta, was appointed Chief Justice of the Supreme Judicial Court to succeed Hon. LUCILIUS A. EMERY, who resigned. The nomination of Mr. Justice WHITEHOUSE as Chief Justice was confirmed July 13, 1911, and he took the oath of office July 26, 1911.

Hon. GEORGE M. HANSON, of Calais, was appointed a Justice of the Supreme Judicial Court to fill the vacancy caused by the resignation of Chief Justice EMERY. His nomination was confirmed July 13, 1911, and he took the oath of office July 26, 1911.

Hon. LEVI TURNER, of Portland, Justice of the Superior Court, Cumberland County, died February 19, 1911. He was appointed Justice of that Court September 21, 1906.

Hon. JOSEPH E. F. CONNOLLY, of Portland, was appointed Justice of the Superior Court, Cumberland County, in February, 1911, and took the oath of office March 2, 1911.

Hon. FRED EMERY BEANE, of Hallowell, was appointed Justice of the Superior Court, Kennebec County, April 5, 1911, the appointment taking effect April 26, 1911.

Gen. CHARLES HAMLIN, of Bangor, formerly Reporter of Decisions, died May 15, 1911. Gen. HAMLIN held that office sixteen consecutive years and in that time issued 18 volumes of Maine Reports.

INDEX

"An index is the X-ray of a book."
Socrates

"ANANIASING."

See FRAUD.

APPEAL.

See CORPORATIONS. COURTS. EQUITY. EXCEPTIONS. GUARDIAN AND WARD.

When an equity case is heard by the Law Court on appeal, the statute makes it the duty of the court to "affirm, reverse or modify the decree of the court below, or remand the cause for further proceedings as it may think proper."
Trask v. *Chase*, 137.

Exceptions taken to the admission of testimony during the hearing of a case in equity are ineffectual, when the case goes to the Law Court on appeal, because, even if the rulings admitting testimony were erroneous the court does not sustain the exceptions and send the case back for a new hearing, but, disregarding the inadmissible evidence, it decides the case finally, as the statute requires, and upon such evidence as it deems admissible. The same rule applies when evidence is erroneously excluded, if the record sufficiently shows what that evidence was. *Trask* v. *Chase*, 137.

In equity matters the findings of the sitting Justice are to stand unless clearly shown to be erroneous. *Trask* v. *Chase*, 137.

Whether the granting a petition under Revised Statutes, chapter 65, section 30, for leave to enter and prosecute an appeal will work inconvenience or even hardship, and whether any and what terms should be imposed upon the petitioner are questions solely for the Justice hearing the petition. His decision of those questions is not reviewable on exceptions.
Sproul v. *Randell*, 274.

A reason for appeal from dismissal of a petition for an allowance in a guardianship matter under Revised Statutes, chapter 69, section 8, that the ruling "was contrary to the law and the facts," is sufficient where the appeal proper shows the nature of the matter and the decision.
Farnum's Appeal, 488.

APPEAL AND ERROR.

See APPEAL. CASES ON REPORT. COURTS. CRIMINAL LAW. DESCENT AND DISTRIBUTION. EQUITY. EXCEPTIONS. GUARDIAN AND WARD. NEW TRIAL.

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See HUSBAND AND WIFE. SALES.

ASSUMPTION OF RISK.

See MASTER AND SERVANT.

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See INSANE PERSONS.

ATTACHMENT.

See CORPORATIONS. DEEDS. TRUSTS.

An attachment of real estate, in a suit upon an account "for balance due," without items, is invalid and creates no lien. Such an attachment is not validated by an amendment of the writ, after entry, by filing an itemized account. *Bisbee* v. *Mfg. Co.*, 185.

An attachment of real estate, in a suit upon an account annexed, with a proper itemized bill, and also upon an omnibus count, including the money counts, for a like amount, is invalid, and creates no lien, when there is no specification under the money counts, and the itemized bill attached to the first count is not referred to in the second count. *Bisbee* v. *Mfg. Co.*, 185.

ATTORNEY AND CLIENT.

See CORPORATIONS.

AUTOMOBILES.

See CONSTITUTIONAL LAW.

BAIL.

In scire facias on a recognizance, the objection that the officer's return on the writ fails to disclose a reason for not serving the precept on all of the defendants cannot be availed of by demurrer going wholly to the declaration, as the officer's return is no part of the declaration. *State* v. *Reed*, 435.

BALLOTS.

See ELECTIONS.

BANKS AND BANKING.

The Civil Code of Colorado, section 12, does not provide a method for enforcing the double liability imposed by the laws of Colorado, 1885, page 264, on stockholders in banking corporations as to stockholders in such corporations who are residents of Maine. *Miller* v. *Spaulding*, 264.

The laws of Colorado, 1885, page 264, providing no method for enforcing the double liability imposed in an action outside the State, the course of procedure must be regulated by the law of the State where it is sought to make the remedy available, under the rule that remedies are regulated by the lex fori, and no law existing in Maine whereby, in actions at law, one or more persons may sue for the benefit of themselves and others interested in a question of common or general interest an action in Maine by three creditors of a Colorado bank to enforce double liability imposed by the Colorado statute upon stockholders cannot be maintained. *Miller* v. *Spaulding*, 264.

BETTERMENTS

See ADVERSE POSSESSION.

A claim for betterments can be set up only in real actions, Revised Statutes, chapter 106, section 20, relating to betterments, applying only to such actions, and cannot be recovered in forcible entry and detainer, since chapter 96, section 1, provides that such action may be maintained against a disseizor who has not acquired any claim by possession or improvement.
United States v. *Burrill*, 382.

As a claim for betterments can arise only out of an adverse possession of such a character that it could, by lapse of time, mature into a title, no valid claim therefor can be set up against the United States.
United States v. *Burrill*, 382.

BILLS AND NOTES.

See CONTRACTS. EVIDENCE. FRAUDULENT CONVEYANCES. STATUTE OF LIMITATIONS.

A provision endorsed on a corporate note that it would be renewed unless stock was sold to pay it is part of the contract, and, as construed by the parties, operated to renew the note for a year on the maker's failure to sell such stock, execution of a new note not being essential to a renewal.
Alden v. *Machine Co.*, 508.

CASES ON REPORT.

See COSTS.

Revised Statutes, chapter 79, section 46, provides that questions of law arising on reports of cases may come before the Supreme Judicial Court as a court of law. *Held*, that the word "case" is used in its unrestricted sense, as a contested question before a court of Justice, a suit or action, a cause, and the phrase "reports of cases" contemplates a method of submitting questions involving both law and fact, in the most comprehensive manner, to the decision of the court, so that a report of a case under the statute must submit the whole controversy for final decision unless some question is reserved, and hence upon a report without restriction, the Law Court may pass upon the question of costs in a probate case. *Mather* v. *Cunningham*, 242.

CESTUI QUE TRUST.

See TRUSTS.

CHARITIES.

A testamentary gift to provide funds to establish and maintain an institution for the education of young women, to promote their moral, intellectual, and physical education, provides for a school of a different and higher type than a high school, for the education of young women only, and does not authorize use of the funds in whole or in part in assisting in maintaining a town high school or other school for both sexes, though the funds be insufficient to effect the donor's purpose. *Allen* v. *Nasson Institute*, 120.

If the original purpose of a public charity under a trust fails, and there are no objects to which, under the specific terms of the trust, the funds can be applied, a court may determine whether, in the event that has happened, it was not the donor's probable intention that the gift be applied to some kindred charity as nearly like the original purpose as possible; but if it appears that the gift was for a particular purpose only, and there was no general charitable intention, the court cannot by construction apply the gift cy pres to the original purpose. *Allen* v. *Nasson Institute*, 120.

Under a testamentary gift to provide a fund to establish and maintain an institute for the education of young women, the fact that the fund amounts to only $32,000 does not warrant a holding that the original purpose has failed so as to permit application of the cy pres doctrine to direct its use to some nearly allied purpose. *Allen* v. *Nasson Institute*, 120.

If the trustees of a testamentary gift to be used in establishing and maintaining an institute deem the funds inadequate, they may permit them to accumulate. *Allen* v. *Nasson Institute*, 120.

COMMERCIAL PAPER.

See BILLS AND NOTES.

COMMON CARRIERS.

See PRINCIPAL AND AGENT. SALES. STREET RAILWAYS.

A carrier, in the absence of statute to the contrary, may, by special contract, limit its liability, at least against all risks but its own negligence or misconduct. *Hix* v. *Steamship Company*, 357.

Where a shipper for three years had been receiving bills of lading in the same form and terms as one in question, his knowledge of its terms, in the absence of fraud of the carrier, must be conclusively presumed, and he cannot escape the presumption by not reading it. *Hix* v. *Steamship Company*, 357.

While a passenger upon a street railway car terminates the relation of passenger and carrier upon alighting from the cars when the carrier has no control over the street or place of alighting, it is otherwise where either the general law or the provisions of the carrier's charter cast upon the carrier the duty to keep in repair the portion of the street upon which the passenger alights. *White* v. *Street Railway*, 412.

COMMON LAW.

See DOWER. FISH AND FISHERIES. WATERS AND WATERCOURSES.

The common law of England has never been in force in Maine except as far as it has been adopted in the usages and customs of the people. *Conant* v. *Jordan*, 227.

The doctrine of the English common law respecting private ownership of ponds has never been recognized nor adopted in Maine, so far as ponds of more than ten acres are concerned, and fishing and fowling upon them has been free from the beginning. *Conant* v. *Jordan*, 227.

The common-law doctrine of the marriage relation is in force in Maine, except as modified by statute. *Perkins* v. *Blethen*, 443.

CONDITIONAL SALES.

See SALES.

CONSTABLES.

See SHERIFFS AND CONSTABLES.

CONSTITUTIONAL LAW.

See SHERIFFS AND CONSTABLES.

Under the Constitution of Maine, Article III, section 2, declaring that no person belonging to one of the three co-ordinate departments of government shall exercise any of the powers belonging to either of the others, it is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons, and courts are not justified in preventing the enforcement of a statute by declaring it invalid unless satisfied beyond a reasonable doubt that it is in clear violation of the Constitution. *State* v. *Phillips*, 249.

The right to use the public highways is not an absolute unqualified right, but is subject to limitation and control by the legislature whenever necessary to promote the safety and general welfare of the people. Article I, section 1, of the Constitution of Maine, specifying certain natural and unalienable rights of man, is not violated by such an exercise of the State's police power. *State* v. *Phillips*, 249.

The exercise of the State's police power to limit and control the use of highways as by excluding automobiles from some of them, is not a violation of the fourteenth amendment to the United States Constitution, forbidding any State to deny to any person the equal protection of the laws. *State* v. *Phillips*, 249.

A statute is not class legislation simply because it affects one class and not another, where it affects all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. *State* v. *Phillips*, 249.

The legislature by passing an act prohibiting the use of automobiles in such of the four towns on the island of Mt. Desert as should accept the act, having determined that it was reasonable and expedient, its judgment must be deemed conclusive, and the court cannot say that the act had no tendency to promote the safety, health and welfare of the people; and hence that it was not enacted in the exercise of the State's police power. *State* v. *Phillips*, 249.

However the legislature may have understood an existing statute, only the court can authoritatively determine its force and scope. *Sproul* v. *Randell*, 274.

A power long exercised by the legislature without question must be held to be within its constitutional powers unless plainly prohibited by some express provision of the constitution. *State Treasurer* v. *Penobscot County*, 345.

The constitution does not plainly prohibit the legislature from imposing upon a county the expense of enforcing the laws of the State within that county and the power to do so has been exercised so long without question, it must be held to be a constitutional power of the legislature, even if otherwise questionable. *State Treasurer* v. *Penobscot County*, 345.

Executive officers necessarily have the power, so far as not limited by the constitution or statute, to determine when and in what locality within their jurisdiction there is need of the exercise of their powers for the enforcement of the laws. The people and local officers of that locality have no constitutional nor statutory right to be heard on that question.
State Treasurer v. *Penobscot County*, 345.

Neither the Act of 1905, chapter 92, popularly known as the "Sturgis Law" and authorizing the appointment by the governor of special officers to enforce certain laws in any county, nor the Act of 1909, chapter 255, imposing upon the county the payment of the fees and expenses of such special officers in enforcing the laws in that county, violates any constitutional right of the county or its sheriff. *State Treasurer* v. *Penobscot County*, 345.

CONSTRUCTION.

See BILLS AND NOTES. CONTRACTS. DEDICATION. DEEDS. EASEMENTS. ELECTIONS. INSURANCE. INSURANCE (HEALTH).

CONTEMPT OF COURT.

See RECEIVERS.

CONTRACTS.

See ACCORD AND SATISFACTION. BANKS AND BANKING. BILLS AND NOTES. COMMON CARRIERS. CORPORATIONS. DAMAGES. DEEDS. EVIDENCE. HUSBAND AND WIFE. INSURANCE. INSURANCE (HEALTH). LIENS. LOGS AND LUMBER. PHYSICIANS AND SURGEONS. PLEADING. PRINCIPAL AND AGENT. SALES. SCHOOLS AND SCHOOL DISTRICTS. STATUTE OF FRAUDS. TRESPASS. WITNESSES.

The defendant, who was sued under the name of Ida B. West, made and signed a written contract with the plaintiff "for laying blocks of a cement house" on her land, for a breach of which on her part suit was brought. In the declaration the plaintiff set out in full a written memorandum of contract, in which the defendant was named as Ida B. West, and as having signed the

CORPORATIONS.

See APPEAL. BANKS AND BANKING. EQUITY. EVIDENCE. EXCEPTIONS. STREET RAILWAYS.

The directors of a corporation are trustees standing in fiduciary relations to the corporation and its stockholders, and are held to the exercise of the utmost good faith. *Trask* v. *Chase*, 137.

Holders of the majority of the stock in a corporation have a right to control the corporation, and it is a fraud for the directors or a majority of them to take advantage of a temporary ascendency in the board of directors to so manipulate the sale and issue of stocks as to oust the control from the majority of the stockholders, and secure it to themselves.
Trask v. *Chase*, 137.

The allegations in a bill in equity for an injunction and other relief, to the effect that the defendants, constituting a majority of the directors of a corporation, but owning less than a majority of its stock, collusively and fraudulently issued stock to one of their number, for the purpose of securing control of the corporation by the ownership of a majority of the stock, and thereby preventing the plaintiffs, who had been the owners of a majority of the stock, but were a minority of the directors, from retaining control, state a case cognizable in equity. *Trask* v. *Chase*, 137.

The acts thus charged constitute a breach of trust, and are a fraud upon the minority directors, who are the majority stockholders.
Trask v. *Chase*, 137.

In such case, equity has jurisdiction irrespective of whether the injured parties have a remedy at law, or whether such a remedy will be effective, or whether the loss from the want of an equitable remedy will be irreparable. Whether the defendants are insolvent or pecuniarily irresponsible, or not, is immaterial, and need not be alleged. *Trask* v. *Chase*, 137.

In such case it is not necessary to allege or prove that the stock thus fraudulently sold was sold at less than its real value. Such a fact, if true, is evidence merely of fraud. It is at least sufficient if it is alleged in effect that the corporation is alive, a going concern, with valuable assets.
Trask v. *Chase*, 137.

The allegations in a bill in equity for injunction and other relief to the effect that the defendants, who are a majority of the directors, but owning less than a majority of the stock, intend to issue to themselves the balance of capital stock unissued, in violation of a by-law which prescribes that the directors shall issue the unissued stock to stockholders "in proportion to their respective interests," and that they will do so unless restrained, state a case

COSTS.

See CASES ON REPORT.

COUNTIES.

See CONSTITUTIONAL LAW.

COURTS.

See APPEAL. CASES ON REPORT. EXCEPTIONS. NEW TRIAL. PROBATE COURTS. SHERIFFS AND CONSTABLES.

A petition under Revised Statutes, chapter 65, section 30, for leave to enter and prosecute a probate appeal is a "civil proceeding" within Revised Statutes, chapter 84, section 1, and notice thereon may be ordered by a Justice in vacation. *Sproul* v. *Randell*, 274.

A failure to enter in the Supreme Court of Probate an appeal taken from a decree of the Probate Court is within the statute, R. S., chapter 65, section 30, and a petition for leave to enter and prosecute such appeal can be sustained. *Sproul* v. *Randell*, 274.

That the failure to enter a probate appeal was because of an understanding on the part of the petitioner that some official of the Probate Court would have it entered is a sufficient reason for granting leave to enter and prosecute the appeal, if the Justice finds that such understanding was without the fault of the petitioner and that "justice requires a revision" of the matter. *Sproul* v. *Randell*, 274.

The affirmance, without hearing, of a decree of the Probate Court by the Supreme Court of Probate under Revised Statutes, chapter 65, section 31, because of the failure to enter and prosecute the appeal taken, does not necessarily bar a subsequent petition under section 30 for leave to enter and prosecute the appeal. *Sproul* v. *Randell*, 274.

COVERTURE.

See HUSBAND AND WIFE.

CRIMINAL LAW.

See INDICTMENT. INTOXICATING LIQUORS.

In a trial for maintaining a liquor nuisance, an instruction defining, negatively and affirmatively a common nuisance, was properly refused as being substantially covered by the Justice's statement of the transactions relied on by the State, accompanied by the interrogatory to the jury, "Has that evidence satisfied you beyond a reasonable doubt — that is, given you a clear and abiding conviction — that for that time at least and on the day following that was a place of resort to which men went without invitation, and, having gone there, liquors were drank and dispensed?" *State* v. *Fogg*, 177.

CROPS.

See FRAUD.

CUSTOMS AND USAGES.

See COMMON LAW. WATERS AND WATERCOURSES.

CY PRES DOCTRINE.

See CHARITIES.

DAMAGES.

See CHARITIES. CONTRACTS. FRAUD. SHERIFFS AND CONSTABLES.

"DEALER'S TALK."

See FRAUD.

DECEIT.

See FRAUD.

DECLARATION.

See PLEADING.

DECREES.

See EQUITY.

DEDICATION.

In the absence of facts showing a contrary intention, the plotting of land, with parcels designated as parks, recording of the plan, and sale of lots with reference thereto ordinarily constitute a dedication of such parcels.
Bartlett v. *Harmon*, 451.

Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the free exercise and enjoyment of such use. *Bartlett* v. *Harmon*, 451.

A lease of lots belonging to an association owning a large tract of plotted land, subject to the association's right to "use, lay out, and lease all lands not already laid out or designated, as streets or avenues," negatives an intention to dedicate, as a park, land designated on the plot as a park; and permitted the association, as against one claiming under the lease, to lease the park for private purposes, and the holder of the last mentioned lease to make certain improvements therein. *Bartlett* v. *Harmon*, 451.

Construction of a reservation in a lease of land as permitting the lessor to lease, for private purposes, neighboring land plotted as a park, is aided by the fact that for several years a cottage was maintained on the land under a lease without objection by the lessee under the first mentioned lease.
Bartlett v. *Harmon*, 451.

DEEDS.

See BOUNDARIES. EASEMENTS. ESTOPPEL. EVIDENCE. NAVIGABLE WATERS. QUIETING TITLE. TRUSTS.

Where, while a grantee was at the home of the grantor, she told him to hand her a tin box where she kept her papers, and handed him the deed therefrom, saying that she might as well give it to him then, she having held it until that time, because the grantee was in debt and there might be an attachment put on the farm, and the grantee said that he was in debt more than ever, and that she had better hold the deed longer, and that he did not want during her life to have an attachment put on the farm, whereupon she took the deed and put it back in her box which she kept, and he visited her three of four weeks before she died, when she told him that she was going to give him the deed before he went home, and that she wanted him to take it before he went and he left without taking it, *held*, that there was no delivery of the deed.
Dudley v. *Nickerson*, 25.

Neither the retention of a deed by the grantor nor its surrender by the grantee to the grantor after a valid delivery will defeat the right of the grantee's creditors to attach the property conveyed. *Dudley* v. *Nickerson*, 25.

While delivery of a deed may be inferred from the acts or words of the grantor and grantee, such acts and words must be construed in the light of the object sought to be accomplished and, in making such construction, the presumption that the law is known is not to be disregarded. *Dudley* v. *Nickerson*, 25.

DELIVERY.

See DEEDS. SALES.

DEMURRER.

See BAIL. EQUITY.

DESCENT AND DISTRIBUTION.

See DIVORCE. EXECUTORS AND ADMINISTRATORS. MISTAKE OF LAW. NONSUIT.

Revised Statutes, chapter 77, section 7, imposes a lien in favor of the administrator of a solvent estate upon the share of an heir who may be indebted to the intestate at the time of his death. The lien is made enforceable by suit and attachment by the administrator within two years after administration granted, and is made to have priority to any other attachment of the share.
Weston Company v. *Colby*, 104.

DIRECTORS.

See CORPORATIONS.

DISMISSAL AND NONSUIT.

See APPEAL. EXCEPTIONS. GUARDIAN AND WARD. NONSUIT.

DIVORCE.

See DOWER.

Under the provisions of Revised Statutes, chapter 62, section 9, providing that "when a divorce is decreed to the wife for the fault of the husband, for any cause, except impotence, "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," such divorced wife is entitled to one-third in common and undivided of all the real estate, except wild lands, of which the husband was seized during coverture, unless she has barred her right therein.

Leavitt v. *Tasker*, 33.

The expression "wild lands" as used in Revised Statutes, chapter 62, section 9, does not include a wood lot or other land used with the farm or dwelling house, although not cleared. *Held*, that a wife divorced for the fault of her husband, to wit desertion, was entitled to one-third, in common and undivided, of a certain 28 acre wood lot used with the farm.

Leavitt v. *Tasker*, 33.

DOWER.

See DIVORCE.

At common law dower applied to all the lands of which the husband was seized and possessed during coverture, including wild and unimproved lands, subject to certain exceptions. *Leavitt* v. *Tasker*, 33.

DRAMSHOPS.

See INTOXICATING LIQUORS.

DRUGGISTS.

A registered apothecary or any one who undertakes to act as a qualified druggist in preparing medicines and filling prescriptions must possess a reasonable and ordinary degree of knowledge and skill respecting the duties he professes to be able to perform, but he need not possess the highest degree of knowledge and skill known in his profession; it being sufficient that he have that reasonable degree of learning and skill ordinarily possessed by other druggists in good standing as to qualifications in similar communities. *Tremblay* v. *Kimball*, 53.

EASEMENTS.

See ESTOPPEL.

The owner of the servient estate over which a right of way has been granted may make any lawful use of his land that he chooses, not inconsistent with the right of the owner of the right of way. He cannot narrow the way so as to render it less suitable and convenient than it was before.

Drummond v. *Foster*, 401.

Upon the record in the case at bar, it was considered that the original grant was intended to be, and was, of a right of way, sufficiently wide for the purpose of a thoroughfare, and not for turning teams upon it, that the plaintiffs were not entitled to the use of the full width between the rear end of the defendants' store and the rear end of the lot, and that the erections made by the defendants, which were complained of, did not in any substantial degree render the way less convenient and suitable for use as a thoroughfare, and did not deprive the plaintiffs of any right.

Drummond v. *Foster*, 401.

ELECTIONS.

See SHERIFFS AND CONSTABLES.

The requirement of Revised Statutes, chapter 6, section 10, that general ballots specify the offices for which candidates have been severally nominated, is designed to give electors a convenient and reliable method of voting, and an immaterial error in describing an office will not defeat a ballot.

Opinions of the Justices, 514.

Under Revised Statutes, chapter 6, section 10, providing that general ballots shall specify the offices for which candidates have been severally nominated, the terms employed in designating an office should be interpreted with reference to the general provisions of the statute relating to that office, of which a voter is presumed to know.

Opinions of the Justices, 514.

Electors being presumed to know that clerks of judicial courts, provided for by Revised Statutes, chapter 81, section 1, are also the county clerks, provided for by Public Laws 1909, chapter 155, the fact that the names of the nominees for clerks of judicial courts were placed under the designation "county clerks" did not defeat their election as clerks of judicial courts, and they should be notified that they have been so elected.

Opinions of the Justices, 514.

ELECTRICITY.

See CORPORATIONS.

ENFORCEMENT COMMISSIONERS.

See CONSTITUTIONAL LAW.

EQUITY.

See APPEAL. CORPORATIONS. EXCEPTIONS. FRAUDULENT CONVEYANCES. HUSBAND AND WIFE. NUISANCE. QUIETING TITLE. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. TRUSTS. WATERS AND WATERCOURSES.

In this State equity procedure is not from term to term but is from day to day, and orders and decrees in equity cases date and have effect as of the day they are made, though made during a regular term of court.
Parsons v. *Stevens*, 65.

The signing, entering and filing a decree as and for the final decree in an equity suit is equivalent to the enrollment of the final decree under the older procedure, and has the same effect to end the suit if no appeal be taken.
Parsons v. *Stevens*, 65.

After the signing, entering and filing a final decree in equity, the proper remedy for any error therein (other than clerical) is by appeal, or by bill or petition for review. *Parsons* v. *Stevens*, 65.

When, after issue joined, a decree has been intentionally and regularly signed, entered and filed as and for the final decree in an equity suit, it cannot be withdrawn or otherwise vacated, except by consent, even by the justice who made it, because of alleged errors therein, at least in cases where the remedy by appeal or petition for review has not been lost without fault of the aggrieved party. *Parsons* v. *Stevens*, 65.

A decree not made upon default, or nil dicit, but after answer filed, issue joined, and evidence taken, is not a "decree pro confesso."
Parsons v. *Stevens*, 65.

Breach of trust and fraud are among the fundamental grounds of equitable jurisdiction. *Trask* v. *Chase*, 137.

If a demurrer be filed to the whole bill, and there is any part of the bill which on its face entitles the plaintiff to relief, the demurrer, being entire, must be overruled. *Trask* v. *Chase*, 137.

In equity, merely technical and formal defects in a bill are not open to attack under a general demurrer. *Trask* v. *Chase*, 137.

ESTATES.

See DESCENT AND DISTRIBUTION. DOWER. EXECUTORS AND ADMINISTRATORS. WILLS.

ESTOPPEL.

See INSURANCE. INSURANCE (HEALTH).

EVIDENCE.

EXCEPTIONS.

EXECUTION.

See CORPORATIONS.

EXECUTIVE POWERS.

See CONSTITUTIONAL LAW.

EXECUTORS AND ADMINISTRATORS.

See DESCENT AND DISTRIBUTION. EXCEPTIONS. STATUTE OF LIMITATIONS. WAIVER. WILLS. WITNESSES.

FEES.

See WITNESSES.

FELLOW SERVANT.

See MASTER AND SERVANT.

FENCES.

Under Revised Statutes, chapter 26, section 3, requiring fence viewers to "signify in writing" to one refusing to repair or rebuild a partition fence their determination that the fence is insufficient, a notice of such determination sent a delinquent by registered mail is insufficient, when it is not received by him until after the time fixed for repair or rebuilding, and when no evasion or wrongful act on his part is shown to prevent receipt of it; actual notice being required. *Goodwin* v. *Hodgkins*, 170.

Revised Statutes, chapter 26, section 4, authorizing recovery of double compensation for building partition fences in certain cases, being penal in its nature, one suing thereunder must show compliance with all the requirements of the statute. *Goodwin* v. *Hodgkins*, 170.

FIRES.

See INSURANCE. NEGLIGENCE.

FISH AND FISHERIES.

See WATERS AND WATERCOURSES.

The public have the right of free fishing and fowling upon Great Pond in Cape Elizabeth, which contains more than ten acres, although the territory in which the pond is situated was held in private ownership as early as 1631, and has so continued until the present time. *Conant* v. *Jordan*, 227.

Fishing and fowling upon ponds more than ten acres in extent has been free in Maine from the beginning. *Conant* v. *Jordan*, 227.

FORCIBLE ENTRY AND DETAINER.

See UNITED STATES.

A claim for betterments can be set up only in real actions, Revised Statutes, chapter 106, section 20, relating to betterments, applying only to such actions, and cannot be recovered in forcible entry and detainer, since chapter 96, sec. 1, provides that such action may be maintained against a disseizor who has not acquired any claim by possession or improvement.
United States v. *Burrill*, 382.

FORFEITURE.

See INSURANCE. INSURANCE (HEALTH).

FRAUD.

See CORPORATIONS. EQUITY. EVIDENCE. FRAUDULENT CONVEYANCES. INSURANCE (HEALTH). QUIETING TITLE. SALES. STATUTE OF FRAUDS.

In order to be actionable, a false representation in the sale of real estate must be a determining ground of the transaction. *Davis* v. *Reynolds*, 61.

Representations as to the value of real estate or the price for which it can be sold, or that a third person will shortly purchase it for a certain sum are but expressions of opinion which are not actionable. *Davis* v. *Reynolds*, 61.

The statement of a vendor of real estate that a third person has paid or will pay a certain sum for an undivided interest in the property is not actionable. *Davis* v. *Reynolds*, 61.

That a vendor made misrepresentations, known by him to be untrue, which the purchaser relied on, thereby being deceived and induced to purchase, shows liability of the vendor. *Adams* v. *Burton*, 223.

Statements by a vendor as to the quantity of hay cut on the land during a particular season were material representations, and not mere "dealer's talk." *Adams* v. *Burton*, 223.

Evidence *held* to sustain a finding that misrepresentations were made by a vendor with knowledge of their untruth, and that the purchaser was thereby deceived and induced to purchase. *Adams* v. *Burton*, 223.

A purchaser's measure of damage for the vendor's deceit in the sale of land is the difference between the actual value of the land and its value based on the vendor's representations. *Adams* v. *Burton*, 223.

In an action for deceit against a vendor, requested instructions that his statement that one season he cut 60 to 65 tons of hay was an estimate or opinion only, as the hay was then in the barn and could have been as readily calculated by the purchaser as by the vendor, and hence was not a material representation, and that a statement as to the length and width of a barn was not a material representation, as the purchaser could have easily measured it, were properly refused, as not being entirely correct legal propositions. *Adams* v. *Burton*, 223.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

One who has conveyed property to avoid anticipated claims cannot invoke the aid of equity to obtain a reconveyance. *McGuire* v. *Murray*, 108.

An estate cannot defeat a note given by a testatrix for land conveyed to her by her daughter, though the testatrix knew the conveyance was intended to defeat claims that might arise against her daughter.
McGuire v. *Murray*, 108.

GAME.

See FISH AND FISHERIES.

GARNISHMENT.

See TRUSTS.

GIFTS.

See CHARITIES.

GREAT PONDS.

See COMMON LAW. FISH AND FISHERIES. WATERS AND WATERCOURSES.

GUARDIAN AND WARD.

See APPEAL. EXCEPTIONS. INSANE PERSONS.

An appeal from a dismissal of a petition for an allowance, in a guardianship matter, under Revised Statutes, chapter 69, section 8, is triable de novo.
Farnum's Appeal, 488.

Revised Statutes, chapter 69, section 8, authorizing an allowance from a ward's estate for reasonable expense in defending guardianship proceedings, includes all expenses reasonably incurred and extends to expenditures by a third person, permitting him to invoke the statute on his own behalf, and not requiring him to enforce his demand as an ordinary creditor.
Farnum's Appeal, 488.

A claim under Revised Statutes, chapter 69, section 8, for expenses in defending a ward against guardianship proceedings, is properly presented by petition in the name of the claimant. *Farnum's Appeal*, 488.

HARMLESS ERROR.

See EXCEPTIONS.

HIGHWAYS.

See COMMON CARRIERS. CONSTITUTIONAL LAW. ESTOPPEL. STREET RAILWAYS.

HUSBAND AND WIFE.

See COMMON LAW. DIVORCE. DOWER. LOGS AND LUMBER.

Revised Statutes, chapter 63, section 1, empowering married women to deal with their separate estate independently of their husbands, permits them to contract with their husbands as well as with strangers.
Perkins v. *Blethen*, 443.

Actions at law do not lie between husband and wife on contracts between them.
Perkins v. *Blethen*, 443.

A married woman can enforce her legal contract against a stranger as though she were unmarried, and is personally liable thereon, but cannot enforce a contract against her husband at law, nor is the contract enforceable by him against her at law. *Perkins* v. *Blethen*, 443.

Equity has jurisdiction of a suit between husband and wife on their contract, through failure of the courts at law to recognize the parties in their individual capacities. *Perkins* v. *Blethen*, 443.

"Coverture" is the legal condition of a married woman.
Perkins v. *Blethen*, 443.

Disabilities arising from the marriage relation affect one party as much as the other. *Perkins* v. *Blethen*, 443.

Existence of the marriage relation can be pleaded in bar by a defendant in assumpsit brought by his wife's assignee; the relation not being a mere personal disability to be pleaded in abatement as not going to the merits.
Perkins v. *Blethen*, 443.

ICE.

See WATERS AND WATERCOURSES.

IMPROVEMENTS.

See BETTERMENTS.

INDICTMENT.

See CRIMINAL LAW. INTOXICATING LIQUORS.

INFANTS.

See GUARDIAN AND WARD. PAUPERS.

INJUNCTION.

See CORPORATIONS. EQUITY. EXCEPTIONS. NUISANCE. WATERS AND WATERCOURSES.

INSANE PERSONS.

Revised Statutes, chapter 69, section 4, provides that the judge of probate may appoint guardians for an insane person on written application of the municipal officers of the town where he resides. Section 5 provides that guardians may be appointed on application, as aforesaid, for persons certified by the municipal officers of any town to have been committed by them or their predecessors to an insane hospital. *Held:* that in an application under section 5 by municipal officers of a town, the proceedings were not in compliance with the statute, where there was no certificate of such officers that the insane person had been committed "by them or their predecessors," and the application merely alleged that such person had "recently been duly committed to and is now in the asylum at Augusta." *Paine* v. *Folsom*, 337.

Under an application for appointment of guardian for an insane person under Revised Statutes, chapter 69, section 5, the court did not acquire jurisdiction where no notice was given either by the municipal officers prior to the application or by the judge of probate subsequently; personal notice being required, independent of statute, before one can be deprived of his liberty or property. *Paine* v. *Folsom*, 337.

It is inconsistent with the commonly accepted ideas of personal rights that the entire estate of a citizen can be taken from him and committed to another upon an ex parte proceeding. *Paine* v. *Folsom*, 337.

Personal rights cannot be too far abridged even by statutory enactments. *Paine* v. *Folsom*, 337.

INSTITUTIONS.

See CHARITIES.

INSTRUCTIONS.

See CRIMINAL LAW. EXCEPTIONS. FRAUD.

INSURANCE.

See INSURANCE (HEALTH).

The defendant, a Mutual Fire Insurance Company, in consideration of a cash payment and a premium note, in 1904, issued to one Adrianna Smith a policy in the standard form, insuring her dwelling house and barn. The policy contained no permission for other insurance. Mrs. Smith died in 1905. By her will she devised the insured premises to her son, and in 1906 the son conveyed them to his father Eben Smith. After the death of Mrs. Smith, Eben

Smith notified the defendant of that fact, and directed that notices of assessments on the premium note should thereafter be sent to him. This was done, and he paid all subsequent assessments of which he had notice, including one made after a fire which destroyed the buildings in 1909, and after due proofs of loss had been made by Eben Smith. After the property was conveyed to Mr. Smith he procured additional insurance on the dwelling house, but none on the barn. The proofs of loss disclosed the additional insurance, as well as the transfer of title to the son by will, and from the son to Eben Smith by deed. Prior to Jan. 8, 1907, the policy, by endorsement, had been made payable to the executor of the assignee of a mortgage upon the premises, as his mortgage interest might appear, and on that day the executor, with the assent of the defendant, assigned his interest in the policy as mortgagee to the plaintiff. At the time of the fire the plaintiff held two other mortgages upon the insured premises. After the proofs of loss were made Eben Smith assigned his claim for insurance to the plaintiff as mortgagee. The defendant had no notice of the additional insurance until after the fire, and none of the transfer of the title, except such as should be inferred from the notice by Eben Smith that Mrs. Smith was dead, and the request that thereafter notices of assessments should be sent to him. The plaintiff claims both as mortgagee and assignee of Eben Smith's claim.

Held: 1. That under the terms of the policy, by which it was provided that "it shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent of the company, or if, without such assent, the said property shall be sold," the policy was avoided, at least as to the dwelling house, by the procuring of the additional insurance, and as to all of the property, by the sale and conveyance from the devisee of the insured to another person.

2. That the provision in the policy to the effect that if made payable to a mortgagee, no act or default of any other person shall affect the mortgagee's right to recover does not protect the plaintiff, since the policy was not made payable to him as mortgagee under the two mortgages which he now holds, but under an entirely distinct mortgage.

3. That the plaintiff as assignee has no greater right than his assignor, Eben Smith, had.

4. That the notice given to the defendant of the death of the insured, and the direction to send the notices of assessment thereafter to Eben Smith was not sufficient to charge it with notice that the property had been "sold" to him; and that the defendant, having no other notice, is not estopped by the making of assessments upon the premium note, the giving notice thereof to him, and the receipt and retention of the assessments paid by him, to set up the conveyance to him by deed, contrary to the provisions of the policy, as a defense in an action upon the policy.

5. That the change of title by will or descent does not avoid a policy, in the standard form.

INSURANCE (HEALTH).

See WAIVER.

INTENT.

See CRIMINAL LAW. INDICTMENT.

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW. CRIMINAL LAW. INDICTMENT. SHERIFFS AND CONSTABLES.

LICENSES.

See EXECUTORS AND ADMINISTRATORS. INTOXICATING LIQUORS.

While the State may impose taxes in the form of licenses upon different occupations within its limits, such power must be exercised in obedience to the federal Constitution. *State* v. *Bornstein*, 260.

LIENS.

See CORPORATIONS. DESCENT AND DISTRIBUTION. LOGS AND LUMBER.

In order to bring a case within Revised Statutes, chapter 93, section 29, which provides that "whoever labors . . . in erecting . . . any building thereon, by virtue of a contract with or by the consent of the owner, has a lien thereon, and on the land on which it stands . . . to secure payment thereof," it must appear that the laborer performed the labor in "erecting the building." *Monroe* v. *Clark*, 134.

When one contracts to furnish completed articles, like cut and fitted stones, for a building to be erected, and is to have no part in the erection of a building, his employees have no lien on the building for their labor in preparing and completing the articles. *Monroe* v. *Clark*, 134.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LIS PENDENS.

See PENDENTE LITE.

LOGS AND LUMBER.

Revised Statutes, chapter 93, section 46, provides that "whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen, or repairing property while thus employed, has a lien on the logs and lumber for the amount due for his personal services and services performed by his team," etc. *Held:* That this statute gives no lien for cutting or hauling manufactured lumber. *Mitchell* v. *Page*, 388.

Where one suing to enforce a lien for services in cutting and hauling logs given by Revised Statutes, 1903, chapter 93, section 46, so intermixed such services with the nonlien labor of firing a sawmill boiler, cutting up slabs, and hauling and sticking manufactured lumber, that it was impossible for him, at the trial to make any separation or for the court from the evidence, to make any such distinction as would authorize a judgment for lien for any definite amount, the lien must fail. *Mitchell* v. *Page*, 388.

Revised Statutes, 1903, chapter 93, section 46, gives to any person laboring at cutting, hauling, or driving lumber, etc., a lien thereon for the amount due for his personal services, which lien shall continue 60 days after the lumber, etc., subject thereto shall have arrived at the place of destination for sale or manufacture. *Held*, that where the place of destination for manufacture of logs was a sawmill and no labor was performed by one seeking to enforce a lien under the section, in hauling logs to the mill after December 1, 1908, he was not entitled to a lien thereon, where his action was not begun until June 16, 1909. *Mitchell* v. *Page*, 388.

The lien imposed on logs and lumber by Revised Statutes, chapter 93, section 46, is for the benefit of those only who labor thereon for wages, and can be enforced only by a personal action against the person or corporation contracting to pay such wages, and by an attachment of the logs and lumber on the writ in that action. *Mott* v. *Mott*, 481.

A married woman cannot maintain an action against her husband for wages or services in cooking for him and persons employed by him in laboring on logs and lumber under Revised Statutes, chapter 93, section 46, and hence has no lien on the logs and lumber for such services. *Mott* v. *Mott*, 481.

LUNATICS.

See INSANE PERSONS.

MALPRACTICE.

See PHYSICIANS AND SURGEONS.

MARRIAGE.

See DIVORCE.

MASTER AND SERVANT.

See DAMAGES. EXCEPTIONS.

In a legal sense, incompetency or unfitness of a servant is not predicated solely upon a want of ability and comprehension. It may be found side by side with even eminent skill, respecting the particular thing to be done, and yet that skill so often and persistently exercised in violation of rules, orders and regulations as to establish a character for such reckless acts as to render a person, who is in every way mentally competent, legally incompetent.
Robbins v. *Street Railway*, 42.

Past acts of negligence on the part of a servant in the performance of his duties have a direct and natural tendency to prove unfitness and incompetence, are prima facie admissible, and their admission is not in conflict with any rule or policy of law. *Robbins* v. *Street Railway*, 42.

Specific acts of prior negligence of a servant are admissible to prove his incompetency where his employer has or ought to have knowledge thereof.
Robbins v. *Street Railway*, 42.

Specific acts of prior negligence of a servant are admissible to prove the employer's knowledge of his incompetency.
Robbins v. *Street Railway*, 42.

In an action against a street railroad to recover damages for personal injuries to the plaintiff, a motorman, caused by a collision of street cars, *Held:* 1. That the other motorman was incompetent and negligent, and that that incompetency was known to the defendant both when the plaintiff was injured and prior thereto, yet the incompetent motorman was retained in the defendant's employ. 2. That the defendant was liable in damages to the plaintiff.
Robbins v. *Street Railway*, 42.

Employees in the prosecution of their work must exercise their senses and reasoning faculties for the discovery of the risks attending their employment, and, unless they stipulate otherwise, they assume the risks such exercise would reveal to them. *L'Houx* v. *Construction Co.*, 101.

The danger to be apprehended from the breaking off and flying about of bits of steel from the point of a small steel cold chisel held against an iron surface and struck hard with a seven pound hammer is so obvious that an employee of mature years and of experience in the use of steel drills must be held to have appreciated the danger, even against his testimony that he did not.
L'Houx v. *Construction Co.*, 101.

If a master undertakes to furnish completed stagings and other like aids to construction, for his servants to use during the erection of a building, and fails to use reasonable care to make them reasonably safe, he is responsible to a

servant, who, while properly engaged in his work, is injured in consequence thereof, unless the servant has assumed the risk, or is at fault himself. The servants who build the stagings are not fellow servants of those who afterwards use them. *Elliott* v. *Sawyer*, 195.

A master may fully discharge his duty as to stagings by furnishing suitable and sufficient materials to his servants for them to use in building the stagings, if they undertake to build them for themselves. In such case, each servant in the general undertaking is a fellow servant of each of the others. The stage-builders are fellow servants of those who afterwards use the stagings, and for their negligence the master is not responsible.
Elliott v. *Sawyer*, 195.

When a master has assumed the duty of furnishing his servant with a completed staging to work upon, and has impliedly directed or invited him to go upon it, and it appears to the eye, without particular examination, to be ready for use, and in the same condition that the stagings, before that time, had customarily been in when ready for use, the servant may assume that the master has done his duty. The failure to make a particular inspection is not contributory negligence. *Elliott* v. *Sawyer*, 195.

When, in a suit by a servant against his master for injuries caused by a defective and unsafe staging, it is claimed that the servant was improperly and prematurely upon the staging before it was completed, it is permissible to show that the servant was impliedly directed or invited to go upon it, and for that purpose, evidence of the customary manner in which the work on the building had previously been carried on is admissible.
Elliott v. *Sawyer*, 195.

Where the evidence warranted the jury in finding that the defendant had assumed the duty of furnishing the staging as a completed structure for the plaintiff to use, that the plaintiff was impliedly directed or invited to go upon the staging, and was properly upon it, *held* that he did not assume the risk, and that he was not guilty of contributory negligence.
Elliott v. *Sawyer*, 195.

When the jury have properly found that a plaintiff was directed or invited to go upon a staging to work, and that the defendant had assumed the duty of furnishing it as a completed structure, and when at the same time the defendant admits that the staging was incomplete, insecure and unsafe, by reason of not being sufficiently stayed, and it appears that that was the cause of the plaintiff's injury, it necessarily follows that the defendant was negligent. In such case, the character of the staging in other respects becomes unimportant and immaterial. And the defendant cannot be said to be aggrieved by the erroneous admission of testimony, respecting the safety of the staging, since he could not have been prejudiced by it. *Elliott* v. *Sawyer*, 195.

MECHANICS' LIENS.

See LIENS.

MINORS.

See PAUPERS.

MISTAKE OF LAW.

See DESCENT AND DISTRIBUTION.

MORTGAGES.

See EXECUTORS AND ADMINISTRATORS. INSURANCE.

MOTION.

See NEW TRIAL.

MUNICIPAL CORPORATIONS.

See COMMERCE. COMMON CARRIERS. SCHOOLS AND SCHOOL DISTRICTS. STREET RAILWAYS. TAXATION.

NAVIGABLE WATERS.

See WATERS AND WATERCOURSES.

NEGLIGENCE.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW TRIAL.

The jurisdiction conferred upon the court as a court of law by Revised Statutes, chapter 79, section 46, over "cases in which there are motions for new trials upon evidence reported by the justice" is limited to cases of jury trials, and does not include cases submitted to the presiding Justice for decision without the aid of a jury. *Espeargnette* v. *Merrill*, 304.

While the burden was on the plaintiff to satisfy the jury of the defendant's liability yet after verdict for the plaintiff, the burden is on the defendant to make it clearly appear that the verdict is wrong. *Coombs* v. *King*, 376.

NONSUIT.

See TRIAL.

A voluntary nonsuit in an action to recover land as an heir, does not bar a subsequent suit by the heir's grantee. *Holman* v. *Lewis*, 28.

A judgment of nonsuit is not a bar to a subsequent suit, even when ordered by the court, because, while the facts introduced may be held insufficient in law to support the action, they have not been adjudged — that is, decided — in the defendant's favor. *Holman* v. *Lewis*, 28.

NOTES.

See BILLS AND NOTES.

NOTICE.

See COURTS. DESCENT AND DISTRIBUTION. FENCES.

NUISANCE.

See CRIMINAL LAW. EQUITY. INDICTMENT. INTOXICATING LIQUORS. WATERS AND WATERCOURSES.

When what is claimed to be a nuisance already exists, the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate, unless for some sufficient reason a remedy at law will not be adequate. *Bliss* v. *Junkins*, 425.

Where under a bill in equity praying that the defendants be enjoined from entering on, or attempting to take any of the plaintiff's land, and from erecting or maintaining on the land certain structures complained of, and it appeared that at the time the bill was brought the defendants had already entered upon the land, and a large part, if not all, of the offending structures had already been erected, and it further appeared that the plaintiff had allowed the work to go on for many weeks without objection, that a temporary injunction was not asked for, and that the work was all completed before a hearing on the bill, the bill was dismissed, and the plaintiff remitted to a remedy at law. *Bliss* v. *Junkins*, 425.

OFFICERS.

See RECEIVERS. SHERIFFS AND CONSTABLES.

ORDINANCES.

See COMMERCE.

PARENT AND CHILD.

See FRAUDULENT CONVEYANCES. GUARDIAN AND WARD.

PARKS.

See DEDICATION.

PARTIES.

See UNITED STATES.

PAUPERS.

See INSANE PERSONS.

Under Revised Statutes, chapter 27, section 1, Clause II, a legitimate unemancipated minor child, whose father has no pauper settlement in the State, takes the settlement which its mother has within it. If the mother's settlement changes during such child's minority then the settlement of the child will change likewise and be the same as that of the mother.

Albany v. *Norway*, 174.

PAYMENT.

See BILLS AND NOTES. EXECUTORS AND ADMINISTRATORS.

PENDENTE LITE.

PERSONAL RIGHTS.

See INSANE PERSONS.

PHYSICIANS AND SURGEONS.

See DAMAGES. WITNESSES.

PLEADING.

See BAIL. BILLS AND NOTES. CONTRACTS. CORPORATIONS. EQUITY. HUSBAND AND WIFE.

In an action of trespass quare clausum, when the plaintiff's close is described in the declaration as "beginning at the westerly corner of land owned" by H. F. thence proceeding by courses and distances around a tract of land "to the bounds first mentioned," and no monuments are mentioned except the starting point, an amendment substituting the "southerly corner" of land of H. F. for the "westerly corner," as the point of beginning, is not allowable. The description as amended would include land not included in the original declaration, and such an amendment would introduce a new cause of action. *Cilley* v. *Railroad Company*, 117.

POLICE POWER OF THE STATE.

See CONSTITUTIONAL LAW.

PONDS.

See COMMON LAW. FISH AND FISHERIES. WATERS AND WATERCOURSES.

POOR PERSONS.

See PAUPERS.

POWERS.

See CHARITIES.

PRESCRIPTION.

See ADVERSE POSSESSION. EASEMENTS. STATUTE OF LIMITATIONS.

PRESUMPTIONS.

See EASEMENTS. ELECTIONS.

PRINCIPAL AND AGENT.

See INSURANCE (HEALTH). SCHOOLS AND SCHOOL DISTRICTS.

Where the employee of shippers of horses had supervised several shipments for his employers and signed bills of lading in their name, and had given the duplicate bills to one of them, who had never repudiated the agency or questioned his authority to sign, the agent was held out to the carrier as authorized both to deliver the horses and to sign the bills, and could sign a bill of

PROBATE COURTS.

See COURTS. INSANE PERSONS.

PROCESS.

See BAIL.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROVERBS.

PROXIMATE CAUSE.

See STREET RAILWAYS.

PUBLIC LANDS.

See WATERS AND WATERCOURSES.

PUBLIC SERVICE CORPORATIONS.

See COMMON CARRIERS. STREET RAILWAYS. WATERS AND WATERCOURSES.

QUIETING TITLE.

One suing to remove a cloud on title, caused by a deed fraudulently obtained, under which legal title is vested, must plead and prove his possession.
Clark v. *Clark*, 505.

RAILROADS.

See COMMON CARRIERS. STREET RAILWAYS.

REAL ACTIONS.

See FORCIBLE ENTRY AND DETAINER. NONSUIT. PENDENTE LITE. QUIETING TITLE.

In a real action to recover land the burden is on the plaintiff to prove title to the land demanded. *Holman* v. *Lewis*, 28.

RECEIVERS.

See CORPORATIONS.

Where the creditors of an insolvent corporation, whose property was in the hands of receivers, seized and sold the property on execution, and held the receivers out of possession, etc., *held* that while a creditor by his conduct may become in contempt of court and may bar himself of the right to pursue his priority in equity, yet under the circumstances of the case at bar the claims of the judgment creditors should not be regarded as barred by their conduct concerning the execution sales, or the matters connected with the same.
Bisbee v. *Mfg. Co.*, 185

RECOGNIZANCES.

See BAIL.

RECORDS.

See INTOXICATING LIQUORS.

RENEWAL.

See BILLS AND NOTES.

REPORT.

See CASES ON REPORT.

RESULTING TRUST.

See TRUSTS.

REVENUE.

See TAXATION.

REVIEW.

See APPEAL. CASES ON REPORT. COSTS. EQUITY. EXCEPTIONS. NEW TRIAL.

Revised Statutes, chapter 91, section 1, clause VII, provides as follows: "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice had not been done, and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment." *Held:* That this clause cast upon a petitioner seeking a review thereunder, in an action in which he was defaulted and judgment was rendered against him, the burden of negativing negligence on the part of himself and of his attorney and that the burden was not sustained, it not affirmatively appearing that the judgment was rendered without the negligence of the attorney employed by the petitioner, and the negligence of the attorney, unexplained, was the negligence of the petitioner. *Taylor* v. *Morgan & Company*, 334.

Each petition for review is addressed to the sound discretion of the court, and must rest upon its own proven facts.

Taylor v. *Morgan & Company*, 334.

RIGHT OF WAY.

See EASEMENTS.

ROADS.

See COMMON CARRIERS. CONSTITUTIONAL LAW. STREET RAILWAYS.

RULES OF COURT.

RUMSHOPS.

See INTOXICATING LIQUORS.

SALES.

See EVIDENCE. SHERIFFS AND CONSTABLES.

Where a buyer ordered clothing to be delivered "on or about September 1st, 1908," and the goods were shipped so that they arrived at destination August 11th, though the buyer had expressly stated to the seller that he would have no room for the goods in his store before September 1st, and, in reply to the seller's notice that they had been shipped, promptly refused to accept them, the sellers in return assuring him that the order called for September 1st delivery, that the bill was so dated, and that he had no cause for complaint and the goods were burned August 17th in a freight shed of the common carrier, *held* that there was no acceptance by the buyer, the premature shipment being a breach of the terms of the order. *Arons* v. *Cummings*, 19.

The prima facie evidence of acceptance by the buyer arising from a delivery to the carrier as the buyer's agent being overcome by the positive refusal of the buyer to accept the goods, which refusal was justified by the premature and unauthorized shipment, *held* that the sellers could not recover for the goods as for a breach of contract. *Arons* v. *Cummings*, 19.

An action for goods sold and delivered cannot be maintained without proof of an actual delivery to and acceptance by the buyer.
Arons v. *Cummings*, 19.

For the refusal to accept goods sold and tendered to the buyer according to the contract, the remedy of the seller is an action of special assumpsit for a breach of the contract of bargain and sale. *Arons* v. *Cummings*, 19.

Breach of warranty of a piano sold is available to the buyer, in actions against him on a note for the price, to the extent of the difference between the value of the piano as represented and its actual value, as a partial failure of consideration for the note, or he can rescind by returning the property, and claim in defense of the actions an entire failure of consideration; and he can file in set-off payments previously made. *Tainter* v. *Wentworth*, 439.

Evidence in an action against a constable for the conversion of a motor boat levied upon and sold by him under an attachment in a suit against one Turner, *held* not sufficient to show a conditional sale of the boat by the plaintiff to Turner. *Wright* v. *Fickett*, 448.

SCHOOLS AND SCHOOL DISTRICTS.

Under Private and Special Laws 1868, chapter 465, section 2, as amended by Private and Special Laws 1907, chapter 129, permitting the superintending school committee of Lewiston to appoint a superintendent of schools for such term as they may determine, but providing that he may be removed at the pleasure of the committee, the committee cannot deprive themselves of the right to remove at any time by making a contract of employment for a definite term and for the payment of the agreed salary for the whole term, though the superintendent be discharged. *Collins* v. *Lewiston*, 220.

SCIRE FACIAS.

See BAIL.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

SENTENCE.

See CRIMINAL LAW.

SET-OFF.

See SALES.

SHERIFFS AND CONSTABLES.

See CONSTITUTIONAL LAW. SALES.

The constitutional provision that sheriffs shall be elected by the people of their respective counties (Const. Art. IX, section 10) does not prohibit the legislature from authorizing the governor to appoint other officers with the powers of the sheriff for the enforcement of the laws of the State within the counties. *State Treasurer* v. *Penobscot County*, 345.

In an action against a constable for the conversion of a motor boat levied upon and sold by him under an attachment, the evidence showed that the plaintiff purchased the boat for $80, but defendant sold it for $125, and there was no other evidence introduced bearing on the value of the boat. *Held*, that, $125 may be taken as the damages to the plaintiff. *Wright* v. *Fickett*, 448.

SPECIFIC PERFORMANCE.

A daughter deeded land worth $5,000 to her mother to avoid prospective claims against her, which did not materialize, taking a note for $2,000 as the price. The daughter and her husband remained in possession, paying the taxes, and the note was never paid. Several years afterwards, and after the mother and daughter died, the note and deed were discovered, whereupon it was agreed by the husband and the mother's heirs, etc., that the note be canceled, which was done, and that the land be deeded to the husband. *Held*, that equity will enforce a conveyance according to the agreement.

McGuire v. *Murray*, 108.

STATES.

See CONSTITUTIONAL LAW. SHERIFFS AND CONSTABLES.

STATUTE OF FRAUDS.

The statute of frauds having been enacted for the purpose of preventing frauds, should not be used fraudulently. *McGuire* v. *Murray*, 108.

The statute which prohibits suit to charge one on a contract concerning land, unless it is in writing, applies only where he is charged upon the contract, and not to equities resulting from res gestae subsequent to and arising out of the contract; the ground being equitable fraud, not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. *McGuire* v. *Murray*, 108.

A letter admitting an oral agreement to buy land is insufficient under Revised Statutes, chapter 113, section 1, paragraph IV, requiring such contracts to be evidenced in writing, where it fails to set up the terms previously agreed upon, and particularly omits any reference to the purchase price.

Thurlow v. *Perry*, 127.

Under Revised Statutes, chapter 113, section 1, paragraph IV, requiring a contract for a sale of lands to be in writing signed by the party to be charged, or his duly authorized agent, all essential terms of the contract must appear, including the amount of the purchase price where the contract contains a stipulation as to price, so that no part of the agreement need be proved by parol evidence. *Thurlow* v. *Perry*, 127.

STATUTE OF LIMITATIONS.

A witnessed note given in 1893 was not barred in 1905.

McGuire v. *Murray*, 108.

STATUTES.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

STOCKHOLDERS.

STREET RAILWAYS.

An electric railroad crossing is a place of known danger, and no one should approach it without senses alert, nor should one attempt to pass over it without considering the safety or peril of the act. Travelers upon the highway should know that upon them as well as upon the motorman rests a duty of anticipating and avoiding collisions, a duty which they owe not only to themselves, but to the railroad company and to the passengers in the car. *Philbrick* v. *A. S. L. Railway*, 429.

STREETS.

See COMMON CARRIERS. STREET RAILWAYS.

"STURGIS LAW."

See CONSTITUTIONAL LAW.

SUPERINTENDING SCHOOL COMMITTEE.

See SCHOOLS AND SCHOOL DISTRICTS.

TAXATION.

See CORPORATIONS. COSTS.

The plaintiffs, copartners, having paid, under protest, a tax assessed to them by the assessors of the defendant town, upon lumber, bring this suit to recover it back. Logs had been hauled by the plaintiffs from other towns into Minot and had there been sawed. The lumber was then "stuck up" in a field in Minot for seasoning. It was intended for sale and it was intended to remain there until sold. Remaining there on the ensuing April 1, it was assessed. None of the plaintiffs resided in Minot. To sustain the assessment, under Revised Statutes, chapter 9, section 22, it must appear :

1. That the plaintiffs were, at the time of the assessment, carrying on business in the town of Minot, and that the property assessed was employed in that business, or
2. If their place of business was in some other town than Minot, that the property so employed was placed, deposited or situated in Minot ; also in either case,
3. That the property assessed was employed in trade, in the erection of buildings or vessels, or in the mechanic arts ; and
4. In case the place of business was in some other town than that in which the property was deposited, that the plaintiffs, their servants, sub-contractors or agents, so employing the property, occupied, for the purpose of the employment, a store, shop, mill, wharf, landing place or shipyard in Minot.

5. The case fails to show that the plaintiffs at the time of the assessment, were carring on business in Minot, within the meaning of the statute, or if the property assessed was employed in trade in Minot, that the plaintiffs occupied, for the purposes of such employment, a store, shop, mill, wharf, landing place, or shipyard in Minot.

6. A field, where lumber is "stuck up" for seasoning, there to remain until sold, and then to be hauled to a railroad for transportation, is not a "landing place" within the meaning of the statute. *McCann* v. *Minot*, 393.

TENDER.

See ACCORD AND SATISFACTION. CORPORATIONS.

TORTS.

See FRAUD. NEGLIGENCE. NUISANCE. TRESPASS.

TOWNS.

See PAUPERS. TAXATION.

TRAVEL AND ATTENDANCE.

See COSTS.

TRESPASS.

To sustain an action of trespass quare clausum the plaintiff must prove that the entry was unlawful when made, or became unlawful by unlawful acts injuring the close after entry. *Hatch* v. *Rose*, 182.

For any acts after entry to render the original entry unlawful (being otherwise lawful,) the entry must have been in invitum, by authority of law, and not by license from the owner. *Hatch* v. *Rose*, 182.

If one enters upon real estate under an agreement with the owner to make specified improvements or changes in the real estate, the fact that he does not make all the changes agreed upon, or does not make them in the manner specified, does not render the original entry unlawful. *Hatch* v. *Rose*, 182.

TRIAL.

See ACCORD AND SATISFACTION. APPEAL. COMMON CARRIERS. COSTS. EVIDENCE. FRAUD. NEW TRIAL. STREET RAILWAYS.

A nonsuit is not equivalent to a judgment for the defendant.
Holman v. *Lewis*, 28.

It is a trial court's province to construe written instruments, but where the effect of an instrument depends, not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the instrument must be left to the jury.
Fuller v. *Smith*, 161.

To make a question for the jury, there need be no conflict of evidence, and if facts are undisputed, but reasonable men might differ in the inferences to be drawn from them, the question is for the jury.
Fuller v. *Smith*, 161.

TROVER.

See SALES. SHERIFFS AND CONSTABLES.

"TRUE RECORD."

See INTOXICATING LIQUORS.

TRUSTEE PROCESS.

See TRUSTS.

TRUSTS.

See CORPORATIONS. EQUITY. WILLS.

An equitable fee simple estate in trust is liable for the debts of the cestui que trust, and the trustee may be charged as equitable trustee by equitable trustee process to reach and apply the trust funds in his hands in payment of the cestui que trust's debts, under the statute authorizing such process to reach and apply in payment of a debt any property or interests, legal or equitable, of a debtor which cannot become apt to be attached on writ, or taken on execution in suit at law. *Haley* v. *Palmer*, 311.

In order for a resulting trust in land to arise when the purchase money is paid by one person out of his own money and the land is conveyed to another, the money may be paid by the cestui que trust himself, by

WAIVER.

See EXECUTORS AND ADMINISTRATORS. INSURANCE. INSURANCE (HEALTH).

A waiver in pais is more than a passive, negative state of mind. It is a positive affirmative act; not mere negligence to claim a right, but a voluntary choice not to claim it. *Hurley* v. *Farnsworth*, 306.

A waiver is the voluntary relinquishment of some known right, benefit or advantage which the party otherwise would have enjoyed, it being essentially a matter of intent, and, when the only proof of that intent rests in what a party does or forbears to do, his acts or omissions should be so manifestly indicative of an intent to voluntarily relinquish a then known particular right or benefit that no other reasonable explanation is possible, full knowledge of all the material facts that establish such right being necessary. *Berman* v. *Accident Association*, 368.

WARRANTY.

See EVIDENCE. SALES.

WATERS AND WATERCOURSES.

See FISH AND FISHERIES. NAVIGABLE WATERS.

The test of a title to ice on a stream is the ownership of the soil over which it forms. *Wilson & Son* v. *Harrisburg*, 207.

Owners whose lands do not extend beyond the edge of a stream are not riparian proprietors in the full sense of the term.
Wilson & Son v. *Harrisburg*, 207.

Where the taking from a river of an ice company's ice and the construction of an ice slip as threatened by defendants would have involved a continuing trespass during that and each succeeding season and an interference with the company's established method of business, it was a threatened nuisance, depriving them of the enjoyment of their property rights, which is subject to injunction. *Wilson & Son* v. *Harrisburg*, 207.

Under the common law of Maine, based in part upon the Colonial Ordinance of 1641-47 of Massachusetts, and in part upon the usages and customs of the early inhabitants, the title to all great ponds containing more than ten acres is in the State for the use of the public.
Conant v. *Jordan*, 227.

Any pond containing more than 10 acres is a "great pond" within the Colonial Ordinance of 1641-47, forbidding appropriation of great ponds to any particular person or persons. *Conant* v. *Jordan*, 227.

WAYS.

See COMMON CARRIERS. CONSTITUTIONAL LAW. STREET RAILWAYS.

WAYS OF NECESSITY.

See EASEMENTS. ESTOPPEL.

WILLS.

See CHARITIES. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. TRUSTS.

trust for him by her son F., to be used for his comfort and necessities according to the discretion of such son. *Held*, that the testatrix's children other than C., surviving her, received their shares absolutely in fee simple, and C. received his share in equitable fee simple in trust, the legal estate passing to the trustee F., the beneficiary interest to the cestui que trust, and the trust terminating at the death of C., the remaining portion of the trust estate passing by his will or descending to his heirs.

Haley v. *Palmer*, 311.

WITNESSES.

Where physicians were employed by the plaintiff in a personal injury case to examine her physical condition to enable them to qualify as medical expert witnesses at the trial, and made the examination and appeared voluntarily, and testified without any agreement as to their compensation, they were entitled to reasonable compensation for their services above the legal fee due to the ordinary witness prescribed by Revised Statutes, chapter 117, section 13, as amended by Public Laws, 1907, chapter 66.

Gordon v. *Conley*, 286.

In an action by a distributee of an estate in the name of the judge of probate on the executor's bond where the executor was called as a witness by plaintiff, his co-defendants and sureties could testify to any conversation made by him which tended to contradict his testimony, but their evidence of statements made by him in a conversation, not in the presence of plaintiff, was inadmissible for other purposes. *Hobbs* v. *Bennett*, 294.

WORDS AND PHRASES.

WRIT OF ENTRY.

See REAL ACTIONS.

WRIT OF ERROR.

See CRIMINAL LAW.

WRITS.

See ATTACHMENT.

APPENDIX

"No book is complete without an appendix."
Hadadrimmon.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

COLONIAL ORDINANCES OF MASSACHUSETTS.

STATUTES OF COLORADO.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Page 57, 12th line from bottom of page, strike out "*Pullen* v. *Wiggin*, 51 Maine, 596" and substitute therefor, "*Patten* v. *Wiggin*, 51 Maine, 594."

Page 127, second head note, second line, strike out "evidence" and substitute therefor "evidenced."

Page 533, *Ladd* v. *Richardson*, strike out "motion overruled" and substitute therefor "motion granted, verdict set aside."