"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

108

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 20, 1911 — DECEMBER 13, 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.

PRESS OF

THE THOMAS W. BURR PTG. & ADV. CO.

BANGOR, MAINE

FIDELITY TO CLIENTS

"It is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do, ... but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession."

MR. JUSTICE BREWER.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

---

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

1. Resigned July 26, 1911
2. Died March 29, 1911.

Justices of the Superior Courts

JOSEPH E. F. CONNOLLY, CUMBERLAND COUNTY
FRED EMERY BEANE, KENNEBEC COUNTY

ATTORNEY GENERAL

WILLIAM R. PATTANGALL

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.

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TABLE OF MEMORANDUM DECISIONS REPORTED

TABLE OF CASES CITED

BY THE COURT

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

LIVERMORE FALLS TRUST AND BANKING COMPANY

vs.

EDWIN RILEY et als.

Androscoggin. Opinion February 20, 1911.

Limitation of Actions. Bills and Notes. Indorsers. Corporations. Directors. Estoppel. Revised Statutes, chapter 83, sections 100, 103.

Under Revised Statutes, chapter 83, section 103, an indorsement by the payee of a payment on a note is insufficient proof of payment to take the case out of the statute of limitations.

The directors of a corporation sustain a fiduciary relation to the stockholders.

Where a trustee of a corporation in his individual capacity signed his name on the back of a note at its inception and which note was payable to the order of the corporation, *held* that he became an original promissor with the other makers.

Where a trustee of a corporation had indorsed at its inception a note payable to the order of the corporation and he negligently failed to attempt collection of the note before the same was barred by the statute of limitations, and the other officers of the corporation relied on his indorsement, *held* in a suit on the note by the corporation against the trustee that he was estopped to plead the statute of limitations.

On an agreed statement of facts. Judgment for plaintiff against defendant Riley. Judgment for the defendants, Ridlon and White.

Assumpsit on a promissory note for $2500. Plea, the general issue with a brief statement invoking the statute of limitations.

The plaintiff filed a counter brief statement which appears in the opinion. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is fully stated in the opinion.

Frank W. Butler, and Heath & Andrews, for plaintiff.

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

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

WHITEHOUSE, J. This is an action of assumpsit to recover the amount due on a promissory note for $2500 dated April 6, 1900, payable to the order of the plaintiff company four months after date, signed by George W. Ridlon and W. I. White, and on the back by the defendant Edwin Riley. Under the name of the defendant Edwin Riley on the back of the note is the following, namely, "6 mos. int. pd. July 31, 1906, $75."

The defendants pleaded the general issue and for a brief statement of special matter of defense, pleaded the statute of limitations.

By way of counter brief statement the plaintiff filed the following:

"The plaintiff was incorporated under Chap. 275 of the private and special laws of Maine for 1895. That in Sec. 7 of said chapter it is provided that 'No loan shall be made to an officer or director of said Banking and Trust Company except by the unanimous approval of the executive board in writing;' that the defendant was during the entire year 1900 and at the time said money was loaned and the note taken as described in the plaintiff's writ and to the date of said writ was one of the officers or directors of said Banking and Trust Company and a member of the executive board thereof; that said money was loaned to the said defendant and his co-promissors without the unanimous approval of said executive board in writing as required in Sec. 7 of said chapter; that the directors of said Trust & Banking Co. called in their said charter 'trustees,' had no knowledge that said money was so loaned or that said note was so outstanding and unpaid until more than six years after the same was due; that it was and is the legal duty of the said defendant, Edwin Riley, as one of the trustees of said Trust &

Banking Co., to protect the assets of said bank for the stockholders thereof; that as such trustee he was and is under the legal obligation to guard the assets of said bank and protect the same from loss for the benefit of said stockholders; that the fact that said note was outstanding as aforesaid was never mentioned to or referred to or passed upon by the board of trustees of said plaintiff company or by its executive board and that the existence of said note was never called to the attention of said trustees or said board by said defendant, Edwin Riley, at any meeting of said board, or otherwise and was wholly unknown to said trustees. Said Edwin Riley having been at the time said money was taken from said bank and said note given, one of the trustees thereof, and having continued in that official capacity up to and including the present time, and never having called the attention of said trustees to the fact that said note was outstanding and unpaid and having procured said loan in violation of law as aforesaid, is now therefore and thereby equitably estopped from pleading the statute of limitations as he has attempted to plead them in his pleadings filed in this case, and by reason of the foregoing the fact that more than six years has elapsed since said note matured now constitutes no defense to the maintenance of this action thereon. All of which the plaintiff is ready to verify."

The case comes to the Law Court on the following agreed statement of facts.

"It is admitted that Edwin Riley who signed said note on the back thereof at the inception of the note, received no part of the proceeds of the same; that he has never paid any part of the principal or interest, never authorized any payment and never knew that any payment had been made thereon until since January 1, 1910; that no demand for payment either principal or interest has ever been made on him until or after August 13, 1909.

The bank records show the following votes were passed:

April 6th, 1900. Trustees present Edwin Riley, J. H. Maxwell, I. G. Sharaf, E. C. Dow, Geo. Chandler and C. H. Sturtevant.

Voted to discount a note for $2500 dated April 6th, 1900, payable in four months. Signed W. I. White and Geo. Ridlon. Endorsed Edwin Riley.

"Sept. 13, 1909."

Trustees present, S. H. Niles, Edwin Riley, H. D. Parker, George Chandler, E. C. Dow, J. H. Maxwell, I. G. Sharaf, C. H. Sturtevant, E. H. Morison, J. G. Ham.

On motion of Edwin Riley it was unanimously voted that our attorney be instructed to collect the note of $2500 signed by George W. Ridlon endorsed by W. I. White and E. Riley.

August 13, 1909, was the first time said Riley knew the note was not paid. It is admitted that on April 6, 1900, said Riley was one of the trustees of the plaintiff corporation and continued as such trustee until June 1, 1910; that from the date of the note until August 13, 1909, the plaintiff corporation took no action whatever in relation to the note or the collection thereof, or the interest on the same; and that the matter was never called to the attention of the plaintiff corporation either by the treasurer thereof or the said Edwin Riley or either of the trustees; that the plaintiff corporation has always held possession of the note; that the loan was not made by the unanimous approval of the executive board of the plaintiff corporation in writing; that the defendant Ridlon never paid any part of the note or the interest thereon, or knew that the payment was made, and never authorized any to be made; that there are and always have been nine trustees of the plaintiff corporation and that the endorsement on the back of the note is in the hand writing of the treasurer of said plaintiff corporation.

The Law Court to render judgment in accordance with the legal rights of the parties."

It is not in controversy that upon the facts reported in the agreed statement, the note appears to be barred by the statute of limitations as to the defendants Ridlon and White. It is provided by section 100 of chapter 83, R. S., that "no acknowledgment or promise takes the case out of the operation of the statute, unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." But section 103 of the same chapter declares that "Nothing herein contained alters, takes away or lessens the effect of payment of any principal or interest made by any person; but no endorsement or memorandum of such payment made on a

promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment is made or purports to be made, is sufficient proof of payment to take the case out of the statute of limitations; and no such payment made by one joint contractor or his executor, affects the liability of another."

As already noted, it appears from the admissions in the foregoing agreed statement that neither the defendant Ridlon nor the defendant Riley ever paid anything on account of either principal or interest on the note, and that the indorsement of $75 thereon is in the handwriting of the plaintiff's treasurer. Under the statute above quoted such an endorsement is "not sufficient proof of payment to take the case out of the statute of limitations," as to the defendant White.

But the plaintiff contends that upon the facts and circumstances disclosed by the history of the defendant Riley's connection with this transaction, with the legitimate inferences to be drawn therefrom, under the established principles of equity applicable to the relation sustained by him to the corporation, the defendant Riley must be deemed to have waived his right to plead the statute of limitations in bar of this action and be held equitably estopped to invoke the relief which that statute, regarded as a statute of repose, was designed to afford under ordinary and more meritorious conditions than those in the case at bar.

It is an elementary principle inherent in the nature of corporations, the conduct of their business and the protection of their properties, that the directors sustain a fiduciary relation to the stockholders. They may not be trustees for the creditors of the corporation in the sense in which an agent is the trustee of his principal, but the relation existing between the directors of a corporation and the stockholders for whom they act is substantially that of trustees and beneficiaries.

In *Railway Company* v. *Poor*, 59 Maine, 278, the court said: "Every person is to be deemed a trustee to whom the business and interests of others are confided and to whom the management of their affairs is entrusted. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property

embraced within the trust, save with the consent of all parties interested. The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. Persons who become directors of a corporation place themselves in the situation of trustees, and the relation of trustees and cestui que trust is thereby created between them and the stockholders. . . . If a director be a party to a contract entered into with himself, his duty as an officer is in conflict with his interests as an individual. . . . If he enters originally into the contract as a director with himself as a party, it is not difficult to perceive who would have an advantage in the bargain."

The same principle is stated by Mr. Pomeroy in section 1077 of his equity jurisprudence as follows:

"It is the duty of the trustee not to accept any position or enter into any relation or do any act inconsistent with the interests of the beneficiary. This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. This rule applies alike to agents, partners, guardians and administrators, directors and managing officers of corporations, as well as to technical trustees."

The defendant Riley was one of the plaintiff's trustees at the time he signed the note in question and continued in that capacity until June 1, 1910. He signed the note at its inception and thereby became an original promissor with the other defendants. As a trustee he was under obligation to cooperate with the other members of the board in the exercise of all due care and vigilance to safeguard the property and protect the rights of the corporation. It was his duty to act with all good fidelity for the promotion of the best interests of the stockholders and to accept no personal loans from the bank in violation of the provisions of its charter. He owed an "undivided duty to his beneficiary," and was not justified in making any contract which would "subject him to conflicting

duties or expose him to the temptation of acting contrary to the best interest" of the corporation. The fact that he was instrumental in obtaining the loan in question without the "unanimous approval of the executive board in writing" emphasized his duty to be watchful and alert in protecting the bank against any loss arising from the transaction.

It appears from the agreed statement that he did not learn that the note was unpaid until August 13, 1909, nine years after the note became due. This must be regarded as a remarkable admission of a failure of duty on his part to ascertain the facts in regard to the note and cause measures to be taken for its collection before the expiration of six years from its maturity. According to his own admission he gave no attention whatever to this loan of $2500 until after the lapse of nine years, when, with an evident belief in his own security from liability, and with new born zeal for the interests of the bank, he moved that their attorney be instructed to collect the note. The treasurer and other trustees appear to have acted upon the confident assumption that he would discharge his duty as a trusted member of the board, and to have been lulled into inactivity by the appearance of his signature on the back of the note and his conduct in the premises.

Under the circumstances, the plaintiff's claim that the defendant Riley is now equitably estopped to set up the statute of limitations in his defense must be deemed a meritorious one. The principle upon which it is based is analogous to that frequently applied in bills for the specific performance of oral contracts which have been partly performed, and the statute of frauds is invoked in defense. "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." *Woodbury* v. *Gardner*, 77 Maine, 68. In such a case "the defendants are estopped to set up the statute of frauds in defense." *Low* v. *Low*, 173 Mass. 580. In 4 Pom. Eq. Jur. sect. 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." See also *McGuire* v. *Murray*, 107 Maine, (77 Atl. 692), and *Bank* v. *Marston*, 85 Maine, 488.

In *Harrisburg Bank* v. *Forster*, 8 Watts, 12, (Penn.) the precise question presented in the case at bar was directly involved and distinctly determined in favor of the plaintiff upon the ground above stated. In that case the defendant was cashier of the bank, and the action was brought against him to recover the amount of four promissory notes signed by him, payable to the bank. As in the case at bar the defendant insisted that he was protected by the statute of limitations. But the court held in an elaborate opinion, that the defendant could not avail himself of the statute of limitations to defeat the action unless he could clearly show a performance of all his duties in relation to the note, in exhibiting the same as due and unpaid, to the board of directors, and that the knowledge of the president or of individual directors of the bank that the note was due and unpaid, was not a fact from which negligence could be inferred on the part of the bank, so as to allow the operation of the statute in favor of the cashier. In the opinion the court said, speaking of the cashier: "It was his duty, on the nonpayment of the notes at maturity, to make a full, accurate and true statement of the case to the board of directors. And this was necessary, that they might take some order as to the measures to be taken; whether they would permit them to lie over, or would order their immediate payment. Unless this was done, the omission to do his duty amounts to such a concealment of the state of the case as in contemplation of law would deprive him of the protection of the statute." . . . . "The security of the stockholders requires the utmost good faith on the part of the officers of the bank, and to enable them to shield themselves by a statute made to prevent fraud, they must adhere strictly to their duty. The same principle will also apply to a director, whose note may be suffered to lie over. If the cashier omits to lay the matter before the board, he must do it himself, or consent to forego the benefits of the act." . . . . "The court say, if the directors knew, or if by ordinary care and

diligence might have known that the notes were due and unpaid, the statute of limitations operates. This position must be taken with the important qualification that they had official information that they were unpaid. The case does not depend upon what is termed ordinary care and diligence on the part of the directors, when there has been an omission of duty on the part of the cashier, who seeks to protect himself from payment. Until the directors have this knowledge, it is the opinion of the court the statute does not begin to run against the bank, notwithstanding the notes are due. In the complicated concerns of a bank, it is impossible that the directors can be sufficiently aware of the nonpayment of all notes and securities belonging to the institution."

It will be observed that this case is essentially "on all fours" with the case at bar. It is the only case cited by counsel on either side, and the only one to which the attention of the court has been called, in which the precise question here presented has been considered and decided.

It is the opinion of the court that the defendant in the case at bar is equitably estopped to set up the statute of limitation to avoid payment of his note, and that the certificate must be,

Judgment for the plaintiff against the defendant Riley for the amount of the note and interest.

Judgment in favor of the defendants, Ridlon and White.

ADELBERT I. CLARK *vs.* JACOB COBURN.

Androscoggin. Opinion February 20, 1911.

Eminent Domain. Delegation of Power. Construction. "Adjacent" Land. Statute, 1907, chapter 60. Revised Statutes, chapter 20, section 8.

1. Statutes purporting to give authority to exercise the sovereign power of eminent domain are to be construed strictly against the donee of the power. Words in the statute fairly susceptible of a meaning limiting the power are to be so construed, if the context will allow.
2. In the statute, R. S., chapter 20, section 8, granting authority for the taking of "adjacent" land to enlarge a private cemetery, the word "adjacent" should be construed in its limited, primary meaning of "adjoining" or "contiguous," and not extended to land near by, but not adjoining.
3. Land separated from an existing private cemetery by a highway fifty-five feet wide is not "adjacent" to the cemetery, and cannot be taken for its enlargement under the statute.

On exceptions by defendant. Overruled.

Trespass quare clausum fregit alleging that the defendant broke and entered the plaintiff's close in the town of Greene, and there trod down, trampled upon and spoiled the grass there growing, etc. Plea, the general issue with brief statement alleging "that he entered upon the land described in the plaintiff's writ at the time alleged in said writ as the employee and agent of the Valley Cemetery Company, a duly organized corporation which company was then and there rightfully and legally in possession of said land by virtue of proceedings taken by it and the municipal officers of the town of Greene in compliance with the statutes of Maine, to enlarge its cemetery or burying ground within said town of Greene, and that it and said municipal officers had done all acts required by law prior to said alleged trespass to place said cemetery corporation in the rightful possession of said land, and the said defendant further alleges that the sum awarded as damages for the taking of said land, viz: four hundred dollars, was duly tendered to the plaintiff

in gold but was by him refused, and said four hundred dollars was brought into court on the first day of the term to which the plaintiff's writ was returnable."

The case was heard by the presiding Justice without a jury, with the right of exceptions. The presiding Justice ruled that the defendant had not shown a justification for his entry, and rendered judgment for the plaintiff with damages assessed at $1.00. The defendant excepted.

The case is stated in the opinion.

John A. Morrill, for plaintiff.

Tascus Atwood, and Newell & Skelton, for defendant.

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

EMERY, C. J. The statute, R. S., ch. 20, sec. 8, as amended by ch. 60 of the Public Laws of 1907, provides that "The municipal officers of any town may on petition of ten voters enlarge any . . . incorporated cemetery or burying ground within the town by taking the land of adjacent owners," etc. In the town of Greene was a cemetery known as the Valley Cemetery, established and administered by the Valley Cemetery Company, a corporation. This cemetery was bounded on the northwest by the southeast line of a county road which was some fifty-five feet wide. The municipal officers of Greene upon petition under the statute essayed to enlarge this cemetery by taking land of the plaintiff situated upon the opposite side of the county road.

The plaintiff, besides other objections, objects that, as to the land sought to be taken, he was not an "adjacent owner" within the purview of the statute, since the land was separated from the cemetery by a strip of land fifty-five feet wide upon which was a highway.

It may be conceded that the term "adjacent" does not necessarily, nor even most frequently, mean "adjoining" or "contiguous," but it is susceptible of that meaning in many connections, and indeed has been held not only by lexicographers, but by courts, often to have that meaning in various connections. *Camp Hill Borough*, 142 Pa. St. 511. Does it have that meaning in the

statute cited? We think it does. The statute is in derogation of private right and hence is to be construed strictly against the donee of the power to take private property against the will of the owner. Such power granted to, or for, a person or corporation, is not to be extended beyond the plain, unmistakable meaning of the language used. Words in the statute fairly susceptible of a meaning limiting the power are to be so construed if the context will fairly permit. *Spofford* v. *B. & B. R. R. Co.*, 66 Maine, 26; *Currier* v. *Marietta, etc., R. R. Co.*, 11 Ohio St. 228.

In this case the power is granted, not to establish a new or even an additional cemetery to be opened and managed by the same corporation as an existing cemetery, but only to "enlarge" that cemetery. To establish on the plaintiff's land a cemetery as proposed would not "enlarge" the original Valley Cemetery in the strict, primary sense of the term. It would really establish another cemetery under the same administration. There would be two cemeteries with a strip of land and a highway between and separating them. There must needs be a separate entrance to each. There would be no continuity. They could not be enclosed as one. Indeed, they would undoubtedly come to be designated by different and distinguishing names.

However the term "adjacent" should be construed in other statutes, or in other connections, we are satisfied that as used in its connection in this statute it must be held limited to lands adjoining, or contiguous, to the original cemetery. It follows that the statute gave no power to take the plaintiff's land on the opposite side of the road, and that the judgment awarded the plaintiff must stand. As this disposes of the case, the other objections urged need not be considered.

Exceptions overruled.

INHABITANTS OF MILLINOCKET *vs.* CHARLES W. MULLEN.

Penobscot. Opinion February 22, 1911.

Trespass. Constructive Possession. Gist of Trespass Quare Clausum. Who May Sue. Towns. Statute, 1824, chapter 254. Revised Statutes, chapter 16, sections 49, 50 to 59 inclusive.

"Constructive possession" of land is that possession which the law presumes the owner has, in the absence of evidence of exclusive possession in another.

The gist of trespass quare clausum is the injury to the possessory right.

The holder of the title to land, if in actual possession by himself or authorized representative, or in constructive possession, is the party to whom the right of trespass accrues.

Inhabitants of a town being vested with the fee to school lots can waive trespass in cutting timber thereon and sue in assumpsit; the right of action not resting in the special corporation created by Revised Statutes, chapter 16, sections 50-59, as trustees of the ministerial and school funds.

On exceptions by plaintiffs. Sustained.

Assumpsit on account annexed for $342.47, and interest, for "stumpage on school lots." The writ also contained a count for money had and received, and also an omnibus count of the usual form. Plea, the general issue. At the conclusion of the testimony for the plaintiffs, and on motion of the defendant the presiding Justice, pro forma, ordered a nonsuit, with the stipulation that if the action was maintainable and the exceptions to the order of nonsuit were sustained, that the defendant should be defaulted for the full amount claimed with interest. The plaintiffs excepted to the order of nonsuit.

The case is stated in the opinion.

Stevens & Stevens, for plaintiffs.

Joseph F. Gould, for defendant.

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

KING, J. Action of assumpsit containing an account annexed for $342.47 and interest for "stumpage on school lots," with a count

for money had and received for the same amount, and containing also the usual money counts. The only question presented is whether the action is maintainable by the plaintiffs.

It appears that the defendant caused certain lumber to be cut on the school lots in Millinocket in the years 1901-2, and received as stumpage thereof, $342.47.

This court decided, in *State* v. *Mullen*, 97 Maine, 331, which was an action for trespass involving the same acts of cutting for which the stumpage is here sued for, that the fee in these school lots became vested in the inhabitants of Millinocket, upon its incorporation, by virtue of sec. 49, c. 16, R. S., and that the acts of cutting by defendant, being subsequent to the incorporation, were trespasses.

The plaintiffs contend that they had a right of action against the defendant for trespass upon these school lots, and that accordingly they had the right, which they exercised, to waive the tort and bring this action of assumpsit for the amount of money shown, and admitted, to have been received by defendant as the fruits of his trespass.

In answer the defendant contends that the inhabitants of Millinocket, although the fee in these school lots is vested in them, cannot maintain this action because the right of action, if any exists, is in that special corporation which was created and empowered by the statute as the trustees of the ministerial and school funds. R. S., c. 16, secs. 50 to 59 inclusive. We do not think the defendant's contention is sustainable.

The fee of the school lots was in the plaintiffs at the time of the trespass, and the case does not show that the plaintiffs were not also in the actual possession of the lots at the time. But in the absence of evidence of actual possession, the plaintiffs had the constructive possession of the property -- that possession which the law presumes the owner of the title to real estate has, in the absence of evidence of exclusive possession in another. The gist of the action of trespass quare clausum is the injury to the possessory right. Hence, it is a well settled principle that the party holding the title to real estate, if in actual possession of it, by himself or his authorized representa-

tive, or having the constructive possession of it, is the party to whom the right of an action of trespass accrues, 28 Am. & Eng. Ency. of Law, 573 and cases cited.

The conclusion follows that the plaintiffs had the right of action against the defendant for his trespass, by virtue of their title in fee to the property, unless the statute, which invested them with the fee, and which also created and clothed with power the trustees of the ministerial and school funds, has otherwise provided.

The statute relating to ministerial and school lands and the funds arising therefrom, (R. S., c. 16, sec. 49 et seq.) provides in substance, and so far as material here, that the fee in lands granted or reserved for the use of the ministry, or first settled minister, or for the use of schools in any town "shall vest in the inhabitants of such town" for such uses (§49); that the municipal officers, town clerk and treasurer of such town, where no other trustees are lawfully appointed for that purpose, shall be a corporation and trustees of the ministerial and school funds, with the usual powers granted to similar corporations (§50); that they shall annually elect a president clerk, and treasurer (§51); that they may sell all such ministerial and school lands belonging to and lying in their town, and the treasurer's deed thereof, executed by order of the trustees, shall pass the estate (§52); that as soon as may be they shall invest the proceeds of such sales at interest in certain securities, etc. (§53); that they may, by gift, grant or otherwise take and hold for the use of the ministry and for the schools real and personal estate, the amount of the annual income of which is limited in the statute (§54); that the income of the fund from the sale of lands under sec. 52, and from the rents and profits of real estate held under sec. 54, shall be annually applied to the support of public schools in the town and expended like other school money (§55).

The original statute was chapter 254 P. L. 1824. We have found no amendments materially changing it, but in the various revisions the language of the original act has been considerably condensed, and some portions of it omitted. In the original act it was provided, with respect to the lands the trustees were authorized to take and hold by gift, grant or otherwise, that they were

authorized "with the consent of their respective towns, at a legal meeting called for that purpose, to lease such lands or real estate, or any part or parts thereof, on such terms and conditions as said towns may prescribe; the rents and profits to be applied to the uses herein prescribed."

It seems clear from these statutory provisions that the legislative purpose was to place the ministerial and school funds, arising from the sale or otherwise of these lands, the fee in which was thus vested in the inhabitants of the town, in the control and management of an agency or instrumentality that should be perpetual and yet be entirely separate from the inhabitants of the town, either as individuals or as a municipality. The purpose was a wise one. It made more certain that the funds would be carefully preserved, invested, and the income thereof applied to the uses intended. This independent instrumentality, the trustees of the ministerial and school funds, was authorized to negotiate sales of the lands, and the statute provided specially the means by which the title should be transferred to purchasers. There is no provision in the statute that actions involving the title to such lands are not to be brought in the name of the inhabitants of the town in whom the fee is vested. It would seem that such actions must necessarily be so brought. The case *Argyle* v. *Dwinal*, 29 Maine, 29, which was a writ of entry, was so brought. And there is no express provision of the statute which takes from the holders of the fee of such lands, and transfers to the trustees of the ministerial and school funds, the right to maintain an action of trespass quare clausum for trespass thereon. In the absence of such an express provision we do not think the statute can be construed to imply it. To the same effect is the reasoning and the conclusion of the court in *State of Maine* v. *Cutler*, 16 Maine, page 351, where it is said: "When the first settled minister shall be settled on the territory, he would have the right to enter on the lot reserved to *him*, and as pastor of the first parish in the town, would become possessed of the lot reserved for the *ministry*, but for the Stat. C. 254, of Feb. 12, 1824, which vests it in the inhabitants of the town, and not in a particular

parish, and the town will be entitled to the management of the school land in whom the fee is vested by that statute, for the use and support of school funds therein forever."

Having a right of action against the defendant for the trespass the plaintiffs could waive the trespass and maintain assumpsit for the money which the defendant had received from the trespass. In *Gardiner Mfg. Co.* v. *Heald*, 5 Maine, 381-386, it is said: "If one man enter upon the land of another, and there cut down his trees and sell them, the party injured may waive the trespass, ratify the sale, and maintain assumpsit against the wrongdoer for the money." This principle is nowhere denied, its application being limited to cases where it is shown that the tort-feasor has received money or money's worth as the fruits of the trespass. It is therefore the opinion of the court that this action is maintainable by the plaintiffs, and in accordance with the stipulation of the parties the defendant is to be defaulted for the full amount of the bill sued for.

Exceptions sustained.
Defendant to be defaulted for amount of bill sued for.

CHARLES W. HOTCHKISS *vs.* BON AIR COAL AND IRON COMPANY.

Kennebec. Opinion February, 1911.

Vendor and Purchaser. Fraudulent Representations. Mines and Minerals. Trial. Instructions. Exceptions. Contracts. Rescission. Evidence. Revised Statutes, chapter 109, section 20.

1. In an action to recover back money which the plaintiff claims he was induced to pay by the false representations of the defendant, it is incumbent on the plaintiff to show that the representations were made intentionally, with the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them; that they were false, and were known by the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that they were expressions of past or existing facts, and not expressions of opinion; that they were material; and that he relied upon them, was deceived, and was thereby induced to part with his money.
2. When a representation is capable of being understood, either as an expression of opinion, or as a statement of a positive fact, whether it is to be regarded as the one or the other may depend upon the surrounding circumstances, and the question must be submitted to the jury with appropriate instructions.
3. A representation that a tract of mining land contracted to be sold is solid or continuous, is material as a matter of law, if a want of continuity would materially affect the cost of mining, and therefore the value of the land. And under the circumstances of this case, it is deemed that the question of the continuity of ownership of the land contracted did materially affect the question of value.
4. When the parties to a contract for the sale of coal bearing lands had in mind a coal which would produce coke suitable for smelting iron and to be sold in the Chicago market, and it appears that such a coal must contain less than one per cent of sulphur, a representation that the coal would compete or compare favorably with other specified coals in the Chicago market, which coals contain less than one per cent of sulphur, is to be construed as a representation that the coal in question contains less than one per cent of sulphur, and such a representation is material.
5. Representations, in the sale of mining lands, as to the cost and profits of mining, as the business has been carried on, are material and actionable, and if false and fraudulent and relied upon, money, the payment of which was induced by them, may be recovered back.
6. Statements made by the presiding Justice in his charge to the jury of the contentions of the parties are not rulings of law, and are not exceptionable.

7. The refusal of the presiding Justice to give a requested instruction which called for a ruling upon a question of fact is not exceptionable.

8. Exceptions to rulings which are not prejudicial will not be sustained.

9. There is no legal distinction between representations by an owner of the qualities of a thing which he proposes and agrees to sell at the option of a prospective purchaser, and similar representations made by him concerning the qualities of another thing which he agrees first to buy, and then to include in the sale to the same purchaser; and false representations respecting the qualities of the latter thing may be actionable.

10. What is a reasonable time within which the right of rescission of a contract must be exercised, when the facts are undisputed, is a question of law; but when the facts are in dispute, the question of reasonable time must be submitted to the jury with appropriate instructions.

11. When several alleged false representations are in question, an instruction to the jury that "you will be authorized to find that the rescission was made within a reasonable time" is equivalent to a ruling of law that upon the undisputed facts, as applied to each of the representations, the rescission was made within a reasonable time.

12. What is a reasonable time within which the right of rescission of a contract must be exercised must be considered with reference to all the circumstances of the case. A lapse of time which would be unreasonable in one case may be entirely reasonable in another. Under the evidence in this case, it is held that a ruling as a matter of law that the right of rescission was seasonably exercised was not erroneous.

13. Assumpsit for money had and received is a proper form of action to recover back money paid through fraud or false pretenses, and is appropriate to the claim of the plaintiff in this case.

14. When objection is made to testimony offered, and the presiding Justice says "You may omit it for the present; I will consider it," and the evidence is not afterwards offered, and no further ruling is made, exceptions do not lie as for the exclusion of the testimony.

15. There is sufficient evidence in the case to support the verdict of the jury.

16. The word "almost" implies uncertainty, want of precision, and one using it within certain limits does not commit himself to exactness or positiveness; but the word also implies that the limits are narrow, and, when such limits are transcended, the expression may, and sometimes must, cease to be regarded as an opinion and become a representation of a fact.

17. In mining parlance an interference exists where within the boundaries of the lands sold, or partially within those boundaries, there are other lands owned by other parties; and it is a prejudicial interference, when the intervening lands are so situated as to interfere with the operation and use of the lands sold, and thereby affect their value.

18. "Metallurgical coke" is coke suitable for the smelting of iron.

On motion and exceptions by defendant. Overruled.

Action of assumpsit for money had and received to recover the sum of $100,000 paid by the plaintiff to the defendant for an option to purchase certain coal and iron properties in the State of Tennessee, with interest on said sum from March 13, 1906, the date of said payment. Plea, the general issue.

Tried to a jury at the October term, 1908, Supreme Judicial Court, Kennebec County. Verdict for plaintiff for $116,133.33. The defendant filed a general motion for a new trial and also excepted to several rulings made during the trial.

The case is stated in the opinion.

Page, Crawford & Tuska, A. M. Goddard, and H. D. Howe, for plaintiff.

T. M. Steger, Heath & Andrews, and Charles C. Treube, for defendant.

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

SAVAGE, J. This is an action for money had and received, in which the plaintiff seeks to recover $100,000 which he paid to the defendant, a Maine corporation, for an option to purchase certain iron and coal lands which the defendant owned, and certain other iron and coal lands which the defendant agreed to acquire and convey to the plaintiff. The plaintiff did not exercise the option. And he claims now to recover back the money paid on the ground that he was induced to take the option and pay the money therefor by the fraudulent misrepresentations of the defendant, or its authorized officers and agents. The plea was the general issue. The verdict was for the plaintiff. And the case comes before us on the defendant's exceptions, and a motion for a new trial.

In the year 1905 the attention of the plaintiff, who lived in Chicago, was attracted to the iron and coal properties of the defendant, which were situated in Tennessee, by one Fall, who at that time or later had some sort of an option upon them, or upon a majority of the stock in the defendant corporation. The plaintiff was president of a railroad company, whose road run into Chicago.

He wished to increase the business of his company, and to that end, in part at least, he wished to purchase coal lands, the coal of which would produce coke suitable for smelting iron ore, and he hoped to supply that coke to the Chicago market. During the year 1905 certain somewhat general examinations were made by the plaintiff and his agent and representative, Potter, of the properties which were afterwards included in the option. The defendant was then operating its mines on these properties, and had been doing so more or less from some time in the year 1903. Its iron mines were widely separated, but its coal mines, the "Bon Air," the "Ravenscroft," and the "Eastland" were situated within a radius of from ten to twenty miles from one another. The latter was on the Sewanee vein, so called; the others were not.

On March 13, 1906, the parties entered into what is called in the case an "option contract." By this contract the defendant agreed to sell to the plaintiff its coal lands, some 44,000 acres, on which three mines were then being operated, and its iron ore lands, amounting to a little over 80,000 acres, on which were two blast furnaces where it manufactured iron from its own ore. By the contract, the defendant also agreed to acquire, on or before May 1, 1906, certain other lands, that it might be able to transfer them to the plaintiff under the option. These other lands were coal lands, adjacent to the defendant's coal lands and are called in the case the "North American lands" and the "Steger lands." The Sewanee vein, above referred to, run through these lands. The "North American" lands, about 35,000 acres, were then owned by the North American Coal & Coke Company, one-tenth of whose stock was owned by the general manager of the defendant company, and the other nine-tenths by persons not connected with these proceedings. The "Steger lands, about 25,000 acres, were owned by a syndicate made up almost wholly of men who were either directors or stockholders of the defendant company.

By the contract the defendant agreed to execute a mortgage for $1,500,000, which would be a first mortgage on the North American and Steger lands, and a second mortgage on the defendant's own lands which were already mortgaged for $765,000. Of the

bonds secured by the new mortgage, $1,000,000 could be used in the acquisition of the North American and Steger lands, while the remaining $500,000 could be sold only at par, and the proceeds could be used only for the improvement and development of the North American and Steger lands.

The defendant accordingly issued its bonds for $1,500,000 secured by mortgage as agreed. It acquired the North American and Steger lands in accordance with the contract, paying its own bonds for them. And it performed every other contract condition precedent.

The option was to run until March 1, 1907. The full contract price was to be $5,000,000 for the property the defendant then owned and that which it agreed to acquire, subject to the mortgages. For the option to purchase this property during the life of the option the plaintiff paid $100,000, which was to be credited as a part of the purchase price if he elected to purchase.

Coincident with the option contract, the plaintiff subscribed for $250,000 of the improvement bonds above referred to, and agreed to take them on or before August 1, 1906, but this subscription was rescinded in the following September.

On February 16, 1907, the plaintiff in writing rescinded the option contract, alleging fraudulent misrepresentations on the part of the defendant, and on March 7, 1907, six days after the option would have expired by limitation, he brought this suit, alleging in his specifications certain fraudulent misrepresentations, which it is claimed were a part of the inducement to take the option and pay the $100,000.

During the year 1906, the plaintiff caused the books of account and other books and papers of the defendant to be examined by expert accountants, with a view to ascertain the cost of mining coal and its selling price, the cost of mining iron ore and manufacturing it, and its selling price, the monthly profits, past and present, and the past and present annual profits of the defendant company. The plaintiff also caused an examination and tests to be made on the North American and Steger tracts to ascertain the probable quantity and the quality of the coal deposited there.

While the plaintiff in his specifications claimed other fraudulent misrepresentations, three only were submitted to the jury, and it is only necessary to consider those.

First, the plaintiff claims that it was represented to him that the Bon Air, North American and Steger lands were an almost unbroken tract, and in effect, that there were no interferences, or at least no prejudicial "interferences," and that the North American and Steger lands were in fact an unbroken tract. In mining parlance, an interference exists where within the boundaries of the lands sold, or partially within those boundaries, there are other lands owned by other parties. And it is a prejudicial interference, when the intervening lands are so situated as to interfere with the operation and use of the lands sold, and thereby affect their value.

It should be observed that in the option contract the lands were described as consisting of many parcels, each separately described in terms or by reference to the registry of recorded deeds, and not as one solid tract embracing all within specified external boundaries.

The plaintiff contends that the representations as to the North American and Steger lands were untrue, and that they were material as affecting the value of the lands to be sold.

Secondly, the plaintiff claims that the defendant fraudulently misrepresented the coking qualities of the coal on the North American and Steger tracts, with respect to the quantity of sulphur contained in it. It is conceded that when the sulphur content exceeds one per cent, it cannot be used in the manufacture of iron or steel.

Thirdly, the plaintiff claims that the defendant made fraudulent misrepresentations to him as to the cost of mining coal and its selling price, the cost of mining iron ore and manufacturing it, and its selling price, and the monthly and annual profits of the defendant, both past and present, and he claims that such mispresentations were material and are actionable.

Upon these propositions of fact, the defense generally and broadly stated is, that the defendant did not make the representations alleged; that such representations as were made were true; that if the defendant made the representations alleged, they were

merely expressions of opinion, and were so understood by the plaintiff, that the representations which were made were not relied upon by the plaintiff, and as to some of the representations, that they were not material. But it is admitted that such representations as are alleged to have been made respecting the coking qualities of the coal on the North American and Steger tracts were material, and if untrue, actionable.

Some of the representations now relied upon by the plaintiff it is claimed were made by Mr. Williams, the president of the defendant corporation, and some by Mr. Overton, its general manager. It is conceded that the representations of either of these gentlemen bound the corporation. And for convenience we shall refer to the representations of either of them as the representations of the defendant. It is claimed that some of these representations were made to the plaintiff personally and some to Mr. Potter, his representative and agent, who afterwards communicated them to the plaintiff. And it is claimed that representations relating to the same subject matter, but differing somewhat in terms, were made at different times during the negotiations by Williams or Overton to the plaintiff or Potter or both. The defendant contends that it is not bound to answer for the representations made to Potter, but we think otherwise. It is clear that Mr. Potter was known by the defendant to be the representative of the plaintiff. The defendant knew that Mr. Potter was sent by the plaintiff to the mining regions to examine the properties in question, to gather information and report to the plaintiff, and that in all matters of investigation he continued to represent the plaintiff. He says that he reported the representations made to him to the plaintiff. It cannot be questioned that representations made to an agent with the understanding that they are to be reported by him to the principal, stand in the same category with those made directly to the principal.

There is no contention here as to the general principles of law respecting actionable false representations. And if the plaintiff would recover back money with which he claims he was induced to part by the representations of the defendant, it is incumbent upon him to show that the representations were intentionally made, with

the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them; that they were false, and were known by the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of its own knowledge; that they were expressions of past or existing facts, and not expressions of opinion; that they were material; and that he relied upon them, was deceived, and was thereby induced to part with his money. *Eastern Trust & Banking Co.* v. *Cunningham*, 103 Maine, 455; *Goodwin* v. *Fall*, 102 Maine, 353; *Atlas Shoe Co.* v. *Bechard*, 102 Maine, 197. Such representations are fraudulent. And if the plaintiff has proved all the essentials which go to make actionable the false representations he alleges, or any one of the representations, he is entitled to recover back the $100,000 which he was thereby induced to pay for the option, and to hold his verdict for the same, unless he is in other respects barred, as the defendant claims.

The representations in regard to the continuity of the land and the coking qualities of the coal are so interwoven in the plaintiff's testimony that it will be convenient to state them together. As to these the plaintiff testified as follows: —

"Q. I will take up first the matter of the lands themselves. Now in regard to the coal lands. What if anything was said to you in regard to the area, extent and continuity of the coal lands by Mr. Overton on that trip in November, 1905?

A. Mr. Overton stated to me that the Bon Air Company itself owned in the vicinity of 44,000 acres, somewheres from 40,000 to 45,000 acres—I think he specifically stated about 44,000 as near as he could figure—of coal lands in the Cumberland Plateau, a practically unbroken field; that there were some interferences, that is, by ownerships that they did not possess, owners other than the corporation, but they were all of little or no consequence except such as they had options upon or were able to acquire without any trouble at any time they wanted to; that their associates and themselves owned an adjoining tract of land comprising from 50,000 to 60,000 acres of additional coal lands and that those coal lands had two veins upon all of them, and upon many, three, of first-class fuel

coal and first-class coking coal from which coal could be made that would compete with the Pennsylvania and Virginia coals in the Chicago market, that it was as to analysis fitted to that market; that the fuel coal was first-class in every particular, good for any market. The coke ovens that they had constructed were, as he stated to me, kind of experimental plants. Of course two hundred coke ovens are not of much importance in the commercial world of coke. And the other coal that they were mining at Eastland was of a character that would make a coal fitted for the Chicago market.

Q. The Chicago market for what purpose?

A. For the manufacture of steel and iron.

Q. And in speaking of the analysis of the coal did he make any comparison with any other known coal?

A. He said it would compare favorably with the so called Connellsville coal, Pennsylvania, which is one of the oldest operations in the country.

Q. Just state the conversation.

A. It would compare favorably with the Connellsville coal.

Q. You spoke of some other coal properties which Mr. Overton spoke of having control of, either he or the company.

A. Those properties were known as the T. M. Steger and North American Coal & Coke Company's properties, which they have since acquired, comprising 60,000 about, and they were supposed to carry, and he represented them as carrying, the Sewanee vein of coal generally, and that coal upon that property in particular was low in sulphur, which is a very important factor and would make the best coking coal for the Chicago market, which I was looking for coal for; that this land was an almost unbroken tract. He showed me a map of it or a government map upon which they had marked the Steger and North American Coal and Coke Company's property and the properties of the Bon Air Coal and Iron Company. That map I believe we have now.

Q. You spoke of representations of its being almost an unbroken tract. To what properties did that representation apply as Mr. Overton stated?

A. It applied to all the properties that the Bon Air, with the Steger and North American, possessed, and the extent of any ownerships within their property was not of sufficient importance to interfere with its general operation, that they amounted to very little, and that all that did amount to anything they would be able to acquire and were in a position to acquire at any time they wanted to; so it might be regarded as an unbroken field of coal comprising from 100,000 to 104,000 acres.

Q. In speaking of the matter of interferences in these properties did he draw any distinction as to the relative number of interferences in the Bon Air property that was owned by the company and the T. M. Steger Trustee and North American Company's property, with respect to the relative number of interferences?

A. The North American and Steger properties, it was not represented that there were any. That I understood from what they stated to me, that that was entirely unbroken; and that the Bon Air interferences, while there were several, they amounted to practically nothing. There was one piece of property they spoke of, one they had some trouble about, at Clifty Creek, where there was a small mine, near their Eastland property, that they always thought they could acquire when they wanted to."

The plaintiff also claims that the defendant gave him a map which represented the North American and Steger properties as unbroken by interferences.

And in regard to the coking qualities of coal in the North American and Steger tracts, Potter testifies that Overton told him that "in their examinations of the coal underlying all that country, in that district, from numerous outcrops and several drillings it showed almost invariably low sulphur, sulphur sufficiently low for the manufacture of metallurgical coke," by which term is meant a coke suitable for the smelting of iron. And as is admitted such a coal must not contain over one per cent of sulphur.

I. *Continuity.* This question relates to the North American and Steger tracts only. The defendant contends that the alleged representations were not made, nor relied upon if made, but that the plaintiff was fully advised that there were interferences before

he took the option, and substantially what they were, though not perhaps their precise location on the face of the earth,—and that he relied upon his own knowledge of the situation. The determination of these issues depends upon the degree of credit which should properly be given to the testimony of the respective witnesses. And upon this question of credibility, which arises many times in this case, we shall comment briefly later.

But the defendant goes further and contends that the representations testified to were merely expressions of opinion, and so received. And in argument under its first exception it complains that it was error for the court to submit to the jury the question whether the representations were expressions of fact or of opinion. But we think no error is shown. We think, also, that the jury were warranted in finding that the representations, or some of them at least, were expressions of fact, and were so understood. The question may be viewed in two aspects. First, the plaintiff testifies explicitly that the defendant represented that the North American and Steger tracts were unbroken in ownership—in effect, that there were no interferences, prejudicial or otherwise, on those tracts. This is clearly an expression of a fact, and not of an opinion. Secondly, the plaintiff testifies that Overton represented that "this land was an almost unbroken tract," and being asked to what properties that representation applied, answered:—"It applied to all the properties that the Bon Air, with the Steger and North American, possessed, and the extent of any ownership within their property was not of sufficient importance to interfere with its general operation, that they amounted to very little, and that all that did amount to anything they would be able to acquire, and were in a position to acquire at any time they wanted to, so it might be regarded as an unbroken field of coal comprising from 100,000 to 104,000 acres." This and the former statement may not be wholly consistent. And yet, it may not be improbable that the plaintiff, even if he did understand that there were no interferences on the North American and Steger tracts, might understand the defendant in speaking of the whole, Bon Air, North American and Steger, as "an almost unbroken tract," as meaning

broken only by the interferences on the old Bon Air property. For doubtless, in their conferences the parties were in some respects considering all the properties as a whole. In any event, it was for the jury to say what he meant.

But if the representation was, not of unbroken ownership, but of non-prejudicial interferences in part on the North American and Steger lands, even then the representation was not necessarily wholly an expression of opinion, though some parts of it, doubtless, were. Whether saying of a certain tract of land that it is "almost unbroken" by the ownerships of others is an expression of opinion or not may depend upon circumstances. Whether it is an opinion may depend upon the number, the extent, and the situation of the lands owned by others. Within certain limits it might be regarded almost necessarily as an opinion. The word "almost" implies uncertainty,—want of precision. One using it within certain limits does not commit himself to exactness or positiveness. But the word "almost" also implies that the limits are narrow. When those limits are transcended, the expression may, and sometimes must, cease to be regarded as an opinion, and become the representation of a fact. If, for instance, the interferences on the North American and Steger lands amounted, as it is claimed, to one-fifth or more of the entire area, can it be any longer said that the expression "almost unbroken tract" must necessarily be regarded as an opinion? We think not. Even the qualifying statement that the interferences were not of sufficient importance to interfere with the general operation of the property might not properly be regarded, under all the circumstances, as a mere expression of opinion. It depends upon the circumstances. But we think we need not consider the topic further. The presiding Justice did not discriminate between the different phases of the same expression, and was not asked to. He had already properly instructed the jury that it must appear that the representations were made as of the defendant's "own knowledge, and not merely as an expression of opinion," if they were to serve as a basis of recovery; in substance, that no person is authorized in law to depend upon a mere expression of opinion as an inducement to purchase; that "in many cases, the

representation is capable of being understood either as an expression of opinion, or as a statement of a positive fact, and the meaning of it must be considered and examined and determined with reference to the subject matter, with reference to the knowledge which the parties had of the matter at the time, with reference, of course, to the precise language in the first place and as interpreted by the subject matter and all of the circumstances surrounding the parties at the time."

These general instructions certainly reached all the phases of this branch of the case. The jury were instructed that opinions expressed were to be disregarded, and how to determine, in case of doubt, what should be regarded as an expression of opinion, and what not. If the defendant wished for more specific and discriminating instructions, we think it should have asked for them. We discover no error in the ruling complained of.

It will be convenient in this connection to notice the remaining contention of the defendant under its first exception. The presiding Justice, having stated the contention of the plaintiff, to support which evidence had been introduced, that interferences would or might materially affect the expense of operating the mines, and the claim that the interferences did materially affect the value of the property, said to the jury;—"I say for the purposes of this case that it (the representation that 'the whole tract was practically solid') would be material if it affected as claimed the cost of mining as suggested." The defendant challenges the correctness of this rule, on the ground as stated in its brief, that "while the question of materiality is one of law for the court, where the evidence raises the question of fact as to whether or not the plaintiff treated the matter as in any degree material, the question of materiality should be submitted to the jury." Of course, if such was the case, it would be a question of mixed law and fact, and the court should submit the question of fact to the jury, with instructions as to what would or would not be material as matter of law. The jury applying the law of materiality as given by the court to the facts found by them would determine the issue of materiality in that particular case. But they do not determine the law of materiality.

In discussing this exception, the defendant does not point out any evidence that the plaintiff did not treat the matter as material, nor have we found any. There is, indeed, testimony that the plaintiff was informed of the interferences, that he knew all about them, from which it is properly argued that he did not rely upon the representations, and was not deceived and in that sense did not treat the representations as material. But if the jury found this contention to be true in fact, it must be conclusively assumed, under other instructions given them, that they did not return a verdict against the defendant on the continuity issue, and in that case the question of materiality raised by the exception is itself immaterial.

The ruling complained of and our conclusion are necessarily based upon the assumption that the representations were made and relied upon as claimed by the plaintiff. The ruling assumed to touch only the question of materiality as a matter of law. The presiding Justice instructed the jury that it must appear that the plaintiff relied upon the representation, and that he had been induced to take the option. That question the jury passed upon. If the representation was made and was relied upon, then it seems clear to us that the question of the continuity of ownership in an area for the most part untested and untried did materially affect the question of value. The fact that there were interferences would affect value, even if the precise effect of the interferences were unknown. This exception must be overruled.

II. *Coking qualities of coal.* This contention relates solely to the coal on the North American and Steger tracts, and is concerned only with the amount of sulphur in the coal. The coal on the old Bon Air tract was not a metallurgical coking coal, and that fact the plaintiff well understood. One of the representations was to the effect that the coal underlying these tracts "showed almost invariably low sulphur, sulphur sufficiently low for the manufacture of metallurgical coke;" and another that coke made from it "would compete with the Pennsylvania and Virginia cokes in the Chicago market, that it was as to analysis fitted for that market," that "it would compare favorably with the so called Connellsville, Pennsylvania, coal." There is no question but that the Connellsville coal

is regarded as a standard coking coal, with considerably less than one per cent of sulphur. The evidence shows, and it is also admitted, that if the representations were made, they were made with reference to the fitness of the coal to produce a coke that would be suitable for smelting iron. The plaintiff wanted a coal which would produce a coke suitable for the iron manufacturing market of Chicago. The defendant knew this. It was this quality of the coal which both parties had in mind when the representations were made. And as already stated, to produce such a coke, the coal must not contain in excess of one per cent sulphur.

It is admitted that the representations were material, but the defendant contends that they were merely expressions of opinion, and, further, that the plaintiff did not rely upon them; that during the year prior to the making of the option he had become acquainted with all the facts which were known to the defendant, and that he relied not upon the representations, but upon his own knowledge of the situation. The plaintiff unquestionably knew that tests had previously been made of coal from the same veins, but several miles distant, showing very low sulphur. Tests were made by his direction in 1905 of Eastland coal on the same veins, six miles distant, on the Bon Air property, which showed very high sulphur, prohibitively high. It also appears that several tests of coal taken by Overton, as he says, from the North American and Steger were made known to the plaintiff in 1905. These tests showed very low sulphur, and were satisfactory in that respect. On the other hand, the plaintiff claims that taking all the circumstances into account, and particularly the high sulphur which was uniformly shown by tests made by him in 1906, it is a fair and legitimate inference that the coals which showed satisfactory tests in 1905 were not taken from the North American and Steger tracts, or, at least, not from workable veins on those tracts. We state these contentions, not to discuss them at this point, but merely to show their nature, and that the issues depended to a considerable degree upon the credibility of witnesses.

The contention that the representations were merely expressions of opinion may be disposed of briefly. When it is remembered

that the parties had in mind a coal which would produce coke suitable for smelting iron and to be sold in the Chicago market, and that such a coal must contain less than one per cent of sulphur, it is clear that a representation that a coal would compete with the Pennsylvania and Virginia coals in the Chicago market, and a representation that it would compare favorably with the Connellsville, Pennsylvania, coal, meant that that coal contained less than one per cent of sulphur, and whether it did or not is a question of fact. Whether, however, the representation was intended to express an opinion concerning that fact, and was so understood by the plaintiff, was a question for the jury, and was properly submitted to them.

The defendant's second exception relates to this topic. It excepts to all that the presiding Justice said to the jury on the coking question, which ended with the following ruling: "I say to you if you find that the representation was made as of a matter of fact of the defendant's personal knowledge, it would be material as affecting directly in an important way the value of the property." We discover no error in this part of the charge. The defendant specifically objects to the ruling as to materiality above quoted, upon the same grounds as urged in its objections upon the same question under its first exception. And we overrule this exception for the same reasons that we overruled the first exception.

III. *Cost, Prices and Profits.* We can only briefly epitomize the contentions of the parties upon this branch of the case. The evidence discloses many representations concerning many items, that is to say, representations as to cost and selling prices by items in detail, as well as to net profits by the ton of the different products, and net profits of the whole operation. It is impracticable to state an analysis of the testimony. We will refer to some of the items, but it will not be necessary to refer to all. As briefly as we can we state the contentions of the parties.

The plaintiff's claims are represented in the following tabular statement:

Subject matter by the ton.	*Representations to plaintiff*	*to Potter*	*Actual fact shown by defendant's books and accountants' reports.*
Cost to mine Bon Air coal.	85 c to 90 c	90 c to $1.	$1.23 to $1.26 6 months '06 $1.35
" " Eastland coal	60 c to 65 c	75 c to 85 c	$.764 6 mos. $.743
" " Ravens- (and all from) croft coal	(60 to 85 c)		$1.02 6 " $.926
Cost to mine iron ore 60 c.		60 c.	$.779-.825. 6 mos. $.834-$1.104
" to manuf. pig iron $11 to $12.		$10.50 to $11.50	$11.94 av. 6 mos. '06 $12.84 At Allen's Creek.
Selling price Bon Air coal	Not less than $1.45	Av. $1.45	$1.35 to $1.44 $1.38 '05 6 mos. '06 $1.392
" " Eastland	$1. and more	$1.15	$.91 3 mos. '05 6 mos. '06 $.84
" " Ravenscroft	$1.18 to $1.28		6 mos. '06 $1.118
" " Pig iron		av. $14.133	$13.19 av. 3 yrs. 6 mos. $14.157 At Allen's Creek
Profits coal general-ly	not less than 35 c 25 c.		($.121 to $.179 Bon Air (av. 3 years $.149 (6 mos. '06 $.035 ($.148 Eastland 3 mos. '05 (6 mos. '06 $.098 ($.155 Ravenscroft 6 mos. ('06, $.192

Profits pig iron	$2 to $4	$3.	($2.956	1903
			(1.062	1904
			(1.817	1905
			(1.903	1906 6 months.
Net profits monthly		$16,000 to $25,000	$6,000 to $12,000	
" " annually		$200,000 to $250,000	$163,510.76	1903
			108,445.76	1904
			143,471.57	1905
			73,916.42	6 mos. 1906

The foregoing figures are taken from the evidence. The data for full tabulation are not complete in all respects. Taking the book figures on cost and profits as they stand, the parties disagree as to what was actual cost and actual profits. The defendant claims that some elements not appearing upon the books, and which it is not now necessary to specify, affect the question of actual cost and profits, reducing the one and enlarging the other. And in argument the plaintiff says some concessions may be made. The defendant denies that the representations were made as alleged, and claims that all representations which were made were mere estimates and were so understood by the plaintiff, and that the plaintiff was expressly told that these figures showing the results of these years of experimental work at the beginning of the defendant's operations must not be taken as a basis on which to consider values.

But after making all concessions that can reasonably be claimed, it is evident the jury were warranted in finding that some of the representations on this branch of the case, if made as alleged, and made as statements of fact, were untrue; and, if made as estimates, were incorrect. Whether they were warranted in finding that they were made at all depends upon the credibility of the witnesses. And here the defendant vigorously attacks the credibility of the plaintiff on the particular ground that in a deposition given by him before the trial, he stated the representations differently from those testified to at the trial, for example, the cost of mining coal, 70 to 80 cents

a ton; that the profit on coal was from 25 to 60 cents a ton; that the cost of mining iron ore was from 50 to 55 cents a ton; that cost of manufacturing pig iron was from $10 to $10.50 a ton; that the profits on pig iron were from $4 to $6 a ton; that the monthly profits ranged from $12,000 to $25,000. To this the plaintiff replies that differing statements were made at different times. The questions whether the representations were made, and if made, whether as statements of fact or mere estimates, and whether they were relied upon by the plaintiff were properly submitted to the jury.

The presiding Justice ruled that if made, as claimed, they were material, on the undisputed facts in the case. In its third exception the defendant seeks to test the correctness of this ruling. It is well settled in this State and elsewhere that representations as to the cost and selling price of articles manufactured by the seller and proposed to be sold to the buyer, and the profits of the manufacture are material and actionable, and if false and fraudulent and relied upon, money, the payment of which was induced by them, may be recovered back. *Coolidge* v. *Goddard*, 77 Maine, 578; *Hoxie* v. *Small*, 86 Maine, 23; *Braley* v. *Powers*, 92 Maine, 203. This principle must apply as well to representations as to the profits of a business proposed to be sold, and in the sale of mining lands, as to the profits of mining as it is carried on by the owner. This principle is not controverted.

But the defendant states his objection to the ruling in these words:—"If the undisputed facts show that the parties did not treat the matter as material, this ruling, we submit, is erroneous." So it would be. If the parties did not treat the representations as material, they were not material in fact in this case, though they were of a character which the law deems material. But the presiding Justice was not attempting to settle any disputed questions of fact. He was stating a principle of law. The disputed questions, whether the representations were made, whether they were made as of facts, whether the plaintiff relied upon them, and whether they were true, had been submitted to the jury, as already stated. But beyond the range of dispute there were other facts not

in dispute, namely, that the defendant was an owner seeking to sell, that the plaintiff was a prospective purchaser seeking information; that the representations, if made as such, were given for the purpose of information, and that whether they were true or not affected the value of the property in question. Upon these undisputed facts the representations were material as a matter of law. This exception must be overruled.

Thus far we have contented ourselves, for the most part, in stating the contentions of the parties and have refrained from comment upon the effect of the evidence. In addition to what has been said already, in regard to the several alleged representations, it should now be said that the defendant contends with great force not only that all representations which were made were substantially true, but that the plaintiff's conduct shows that he so understood it, at least with regard to continuity and profits, and that he was finally dissuaded from exercising the option, not because he had been deceived, but perhaps because of unforeseen difficulties in financing the enterprise, which called for the immediate outlay for the purchase and the contemplated development of almost $10,000,000. It is contended that he knew of the want of continuity of the North American and Steger tracts as early as July, 1906, when he approved the mortgage in which over two hundred parcels owned by others were specifically excepted, though it is not claimed that he knew the precise location of those parcels until later, perhaps in October. It is claimed that he knew by the accountants' reports in July and August, 1906, that the cost, prices and profits had not been as he now claims they had been represented. And it is argued that if he knew these things, his subsequent conduct was inconsistent with his present claims as to misrepresentations. It is said that he made no protest that the representations had been untrue. He proceeded with his investigations and tests; as late as October 1, 1906, he wrote to Overton that on the assumption that later tests should show coal sufficiently low in sulphur to satisfy the Chicago market, "there is little doubt but what the purchase of the property may go through, and the whole arrangement terminated in a satisfactory manner," and not until

his letter of rescission February 16, 1907, did he claim specifically that there had been any misrepresentations as to continuity or profits. All of this, if true, has, of course, a tendency to show either that the representations were not made, or that the plaintiff had not relied upon them, but upon his own knowledge of the situation after examination.

And even as to the coking qualities of the coal, it is contended that he held onto his option and made no complaint to the defendant from about October 24, 1906, when he received the final tests, until February 16, 1907. In short, it is contended that the misrepresentations alleged by the plaintiff are an after-thought. And it must be conceded that there is much force in the argument so far as continuity and profits are concerned, much less force so far as coking qualities of the coal are concerned. And we do not forget that if it were shown that the plaintiff assumed false positions with respect to some of the issues, it must seriously affect his credibility as to the others.

We now state our conclusions upon the motion. The testimony is voluminous. An analysis of it in detail would far transcend the reasonable limits of an opinion. Nor would it serve any use except the satisfaction of the parties. We have had to content ourselves with the barest summary of the contentions of the parties, with such extracts from the testimony as would best illustrate them. We think we have at least made apparent the multiplicity of the contentions. We have not thought it necessary even to notice all of the minor contentions. But we have made a most painstaking study of the 1800 pages of printed matter contained in the record, and of the more than 400 pages of the briefs of counsel, and we have bestowed upon the case a care commensurate with its importance.

The correct decision of the fundamental issues of fact in this case must depend chiefly, if not wholly, upon the varying degrees of credibility which may properly be attached to the testimony of the plaintiff and Potter on the one side, and of Williams and Overton on the other, considered in the light not only of what they say, but of their conduct and of the general situation. The jury, by law,

are made the judges of the credibility of witnesses. They not only hear them, they see them. We can only read their testimony. The burden is on the defendant to pursuade us that the verdict is clearly wrong. We are not persuaded to that extent. We think it would be going too far to say that the jury were not warranted in accepting the testimony offered by the plaintiff, and in finding that some, at least, of the alleged representations were made, as of matters of fact, as of the knowledge of those making them, that they were made with intent that they should be acted upon, that they were untrue, that the plaintiff relied upon them and was deceived, and was thereby induced to pay the $100,000 for the option. Moreover, the weight of the evidence, as to some of the propositions, seems to us clearly to preponderate in favor of the plaintiff. The motion for a new trial must be overruled.

But this does not end the case. The defendant has other exceptions which must be considered. Exceptions 4 and 11 may be considered together. We have already said that the plaintiff's attention was called to the defendant's properties in 1905, by one Fall, a son of one of the directors. The record shows that at various times, but not all the time from March 28, 1905, until February 21, 1906, and while the negotiations with the plaintiff were proceeding, Fall had various written options from the defendant, or the majority of its stockholders, either on the stock of the defendant, or on its property, or both; also from the owners of the North American and Steger tracts. In some of the options it was provided that on sale of the property Fall should receive a commission of $500,000. This fact was not made known to the plaintiff. Fall claims to have stood as a broker for his employers while he held the options, and he was very much in evidence with the plaintiff, from whom it appears that he expected, at least, after the option contract was signed, to receive a commission or a division, in case the arrangements were successful. In the course of his charge the presiding Justice remarked as follows: "On the other hand the plaintiff says there are many things here which are in harmony with his contention as to the conduct of the parties at the time, that they were anxious to dispose of this property, that they had arranged with young Fall to give him

$500,000 for negotiating the sale. While they refused to give the plaintiff an option for less than $100,000 in cash, they charged Mr. Fall nothing but agreed to give him $500,000, and they showed great anxiety to dispose of the property." To these remarks exception 4 was taken. The court made no ruling of law. But counsel says that "the instruction given put the court in the position of ruling that under the various Fall options he was to receive $500,000 from the sale finally made to Hotchkiss." We do not think so. The presiding Justice was referring to what Fall was to receive under his own options, and in view of the whole record, we think he must have been so understood by the jury. But even if it were otherwise, the defendant was not prejudiced. The matter was a collateral one anyway. Its only use was to show the extent of the anxiety of the defendant to sell. It could make no difference to the defendant whether that was shown by the commission provided for in Fall's options, or by the same commission out of the plaintiff's purchase money.

But at the end of the general charge the defendant requested the following instruction, touching the same matter, "Eighth: That legally and properly construed the right of Fall, Jr., to receive any commission whatever from the defendant corporation or its stockholders ceased after February 21, 1906, and from February 21, 1906, and thereafterwards Fall had no claim for commission from the defendant corporation or its stockholders. Upon the undisputed evidence Fall's right to demand commissions ceased on February 21, 1906." To the refusal to give this ruling the defendant took his exception 11. This exception is not sustainable. First, it called for a ruling upon a question of fact. Secondly, for the reasons just given under exception 4 the defendant was not prejudiced. Moreover, although so far as the case shows Fall's last written option expired February 21, 1906, the presiding Justice could not well say that Fall's right to demand commissions ceased on February 21, 1906, "on the undisputed evidence," when there was evidence that on February 22, 1906, Overton told the plaintiff that Fall "was fussing around about some commission and they would have to pay

him a little something," and repeated the same statement substantially on March 12.

Exception 5 is to the following instruction: "If you find that any of these misrepresentations alleged to have been made was made under all the rules and qualifications I have given you as to what the representation must be—as of his own knowledge and the plaintiff relying upon it and that it was material—that would justify the plaintiff in rescinding the contract and he would be entitled to recover back the one hundred thousand dollars and interest from March 13, 1906; otherwise, your verdict will be that the defendant did not promise." We discover no error in the ruling. We shall discuss later the matter of rescission.

Exceptions 6, 9 and 10 are not pressed.

Exception 7 is to the refusal to give the following requested instruction: "That under the undisputed facts the defendant corporation is not, as a matter of law, liable for any of the representations claimed by the plaintiff relating to the properties of the T. M. Steger Trustee, and of the North American Coal and Coke Company, said properties at and before the execution of the option contract of March 13th, 1906, not then being owned by the defendant and the defendant not then being in possession thereof." The cases cited by the defendant under this exception, *Medina* v. *Stoughton*, 1 Salk. 210; *Morley* v. *Attenborough*, 3 Welsb. H. & G. Exchq. 499; *Pratt* v. *Philbrook*, 33 Maine, 23, are not in point. We do not know of any that is. But we can conceive of no legal or logical distinction between representations by the owner of the qualities of a thing which he proposes and agrees to sell at the option of a prospective purchaser, and similar representations made by him concerning another thing which he agrees first to buy, and then to sell to the same purchaser, at his option. We think there is no distinction. If the defendant made false representations about the coal on the North American and Steger lands with a view to induce the plaintiff to buy them in connection with its own lands, or to pay for an option of purchase, and as a part of the arrangement the defendant was to purchase these lands, and to convey them to the plaintiff at his option, and if the plaintiff relying upon the represen-

tations was so induced to take and pay for the option, there is no reason why the defendant should not be subjected to the same liabilities as it would have been if it had made the same representations about the coal on its own lands.

Exceptions 8 and 12 will be considered together. Exception 8 is to the refusal to give the following requested instruction: "That under the undisputed facts the plaintiff did not rescind the option contract of March 13th, 1906, within a reasonable time and for this reason this action is not now maintainable," and exception 12 is to the following instruction which was given: "I am requested to instruct you that it was the duty of the plaintiff to rescind within a reasonable time. I give you that instruction, but I say for the purposes of this trial, if you find any one of these alleged incorrect misrepresentations to have been made with all the qualifications I have put in, you will be authorized to find that the rescission was made within a reasonable time."

Under these exceptions the defendant contends that as a prerequisite to the right to maintain this action in assumpsit it was the duty of the plaintiff, upon discovery of the fraud or falsity of the representations to rescind the option contract, and to do so within a reasonable time, and that upon the undisputed or admitted facts the plaintiff did not rescind within a reasonable time, as a matter of law, and hence that the action is not maintainable in any event. Or if the facts were in dispute, which in this case must relate to the times when the plaintiff became cognizant that the representations were not true, then it presented a question of mixed law and fact, and the presiding Justice should have submitted to the jury the question of reasonable time under proper instructions, instead of ruling as he did, that "if you find any one of these alleged incorrect misrepresentations to have been made with all the qualifications I have put in, you will be authorized to find that the rescission was made within a reasonable time."

It is contended that this instruction was virtually, though not expressly, a ruling as a matter of law that the rescission was made within a reasonable time, and that the action was maintainable, if the jury found for the plaintiff on all the other elements in the case.

This involved, it is said, a finding of fact, namely, when the fraud became known to the plaintiff, and as to this it is claimed that the fact was in dispute.

Briefly stated the position of the defendant is this. A party to a contract may avoid it when it is induced by the fraud of the other party. If he wishes to recover back in assumpsit the consideration paid, he must rescind the contract, and he must rescind it within a reasonable time after the fraud is discovered. In order to make the rescission effectual he must restore the consideration, or whatever he has received under the contract, and place the other party in statu quo. If he cannot place the other party in statu quo, or if the rights of innocent third parties have intervened, he cannot rescind, but is remitted to his remedy for the deceit, either by defending against a claim for the unpaid part of the consideration, if any, or by his independent action for deceit. To recind within a reasonable time he must act promptly, as soon as he reasonably can under all the circumstances. He must elect at once, and no longer hold the other party to his contract. From expressions culled from the cases, "promptly on discovery," "must then decide," "immediately." "as soon as possible," "promptly on the first information," "at once," "as soon as may be," "as soon as he discovers falsity," "as soon as he learns the truth," "promptly, unconditionally and unevasively," "an instant duty to perform," "so much time as is necessary conveniently to do," counsel deduces the rule that with no facts to excuse delay, the party defrauded must rescind his contract at once, using no more time than is reasonably necessary to get into direct communication with the opposite party.

The foregoing rules are undoubtedly sound as general principles. In the application of them to this case, counsel contends that since the rule was given as to all classes of misrepresentations, indiscriminately, it permitted the jury to find not only that February 16, 1907, the date of the rescission, was within a reasonable time after October 24, 1906, when it may fairly be said that all the facts had come to the knowledge of the plaintiff, but that it was within a reasonable time from the preceding July, when it is claimed that

the plaintiff knew by examination and approval of the mortgage, that there was a want of continuity in the North American and Steger tracts, and knew by the accountants' reports that the alleged representations as to cost, prices and profits were not true. And whatever may be said of the question from the standpoint of October 24, the defendant says it was clearly erroneous in law to rule, or to permit the jury to find that the longer period from July, about seven months, was a reasonable time.

It is contended, moreover, that it was the duty of the plaintiff, knowing from the mortgage the want of continuity of the lands referred to, to rescind, if rescind he would, before the mortgage was executed and the bonds were issued, and before the owners of the North American and Steger tracts had conveyed them to the defendant, receiving their pay in the bonds secured by the mortgage. It owed this duty, it is claimed, to the defendant, to the defendant's stockholders, and to the owners of North American and Steger lands. And the contention is that by neglecting to exercise the right of rescission at that time the plaintiff waived the right. The parties had been put into new positions, — and positions prejudicial to them if the contract was not carried out. They could not then be put in statu quo, and therefore the plaintiff had lost his right of rescission, on that ground. Such are the contentions. And the complaint in this respect is that if it were an undisputed fact that the plaintiff knew of the want of continuity before the execution of the mortgage, the ruling was wrong in that the jury were permitted to find that there was an effectual rescission at all; and if the fact was in dispute, the issue should have been submitted to the jury under proper instructions, and not decided by the presiding Justice.

We think that taking the instruction complained of as a whole, it must be regarded as an instruction in law upon undisputed facts, and it can be sustained only if justified by the undisputed facts. What is a reasonable time within which the right of rescission must be exercised, when the facts are undisputed, is a question of law; but when the facts are in dispute, the question of reasonable time must be submitted to the jury with appropriate instructions.

But what is a reasonable time must in any event be considered with reference to all the circumstances surrounding the case. It is not an absolute term. It is a relative term. A lapse of time which would be unreasonable in one case may be entirely reasonable in another. The importance of the transaction, the nature of the contract, the complexity of the issues involved, the necessity for opportunity to study the consequences and to exercise calm and deliberate judgment, must be considered. And moreover the conduct of the other party to the agreement attempted to be rescinded, as inducing delay, is a very important factor. As was said in *Pitcher* v. *Webber*, 103 Maine, 101, "a vendee is not bound to rescind upon the first discovery or supposed discovery of some one imperfection or misrepresentation. He is entitled to time for inquiries, experiments and tests. He can waive imperfections or misrepresentations first discovered, and yet be afterwards entitled to rescind upon the discovery of others, suggestions from the vendor to make further inquiries or trials would also extend the time for rescission."

Applying the foregoing principles to this case, after a most painstaking study of this question, we think it cannot be said that the ruling of the presiding Justice upon the undisputed facts was erroneous in law. And since the form of the action has been discussed under these exceptions, we add that assumpsit for money had and received is a proper form of action to recover back money paid through fraud or false pretenses, and is appropriate to the claim of the plaintiff in this case. *Emery* v. *Davis*, 17 Maine, 252; *Lord* v. *French*, 61 Maine, 420.

Lastly, the defendant complains under exception 13 of the exclusion of the deposition of one Wiley. The deposition appears to have been taken by the defendant, by a commissioner out of the State, on interrogatories filed under Rule XXIV. In the interrogatories filed by the defendant, the deponent, a competent expert, was asked if he had made any test of coal taken from the Cumberland Plateau, Tennessee, and if so, to state when, for whom, and for what purpose, what was done in making the test, and the result of the test, and to file a copy of his written report thereon as a part of

his answer to the question, and to state whether the report stated the facts truly. The report itself was not filed with the interrogatory, nor does it appear that the plaintiff had ever seen it. In the deponent's answer he stated that he had made tests but gave no details of his examination or tests, except to annex as an exhibit, as requested, a copy of his report to his employer. That report fills ten printed pages in the record, and touches many particulars and details.

We think the presiding Justice, in his discretion, R. S., c. 109, s. 20, might well have excluded the deposition on the ground that the interrogatory filed did not disclose enough of the nature of the testimony sought, fairly to enable the plaintiff to cross examine properly. But the deposition was not excluded on this ground, and we think the case shows that it was not definitely and finally excluded at all.

When the Wiley deposition was first offered, counsel stated that his purpose in offering it was to get in the exhibit, namely, Wiley's report. Objection was made that the Wiley report had never been brought to the plaintiff's attention. The presiding Justice said,— "You may omit it for the present; I will consider it," and the defendant excepted. Later on counsel for defendant offered the Wiley report, annexed to the deposition, saying, "There is additional testimony now that that report was discussed between Mr. Overton and Mr. Hotchkiss or Mr. Potter." After asking the plaintiff's counsel if the plaintiff would be called in rebuttal, and being answered in the affirmative, the presiding Justice said, — "Then I will reserve that; I will see what Mr. Hotchkiss says about his knowledge of it." Neither the deposition nor the report was offered again.

Although only the first ruling is now in question, it is apparent that on neither occasion did the presiding Justice definitely and absolutely exclude the deposition. He merely, in his discretion, excluded it for the time being. To such a ruling exceptions do not lie. In both instances the Justice wished for further light on the matter before ruling, and temporarily withheld his decision upon the admissibility of evidence offered. In such case, if counsel still

wished to introduce the evidence, he should have offered it again, or called the court's attention to the fact that a definite decision was desired. He could thus have brought the matter to a finality, and if prejudiced by the final ruling, have had a remedy by exceptions. The defendant can take nothing by this exception.

This disposes of all questions that have been raised in this case. And the entry must be,

Motion and exceptions overruled.

A. G. MORSE *vs.* CHARLES S. PHILLIPS.

Franklin. Opinion February, 1911.

Deeds. Construction. Intention. Land Conveyed.

In construing a deed, effect should be given to the intention of the parties if practicable as ascertained from all the language, if no principle of law is thereby violated.

The defendant by deed of warranty conveyed to the plaintiff the following described premises: "A certain lot or parcel of land situate in the town of Avon in the County of Franklin, being the home farm of said Phillips, by him occupied for at least thirty years last past, and consisting of two hundred acres more or less, one hundred twenty of which being the part on which the buildings are situate, and eighty acres being on the North farm and adjoining the said one hundred and twenty acres." *Held*, that under the facts as disclosed by the case the deed did not include the south quarter of a certain lot of land containing 40 acres, more or less, which had been previously conveyed by the defendant.

On an agreed statement of facts. Judgment for defendant.

Action of covenant broken and reported to the Law Court on an agreed statement of facts with the stipulation that the Law Court should render such judgment as the law and the material facts required.

The case is stated in the opinion.

D. R. Ross, for plaintiff.

A. L. Fenderson, and Frank W. Butler, for defendant.

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

KING, J. Action for covenant broken, reported to this court on an agreed statement of facts, from which it appears: Nov. 13, 1874, Laura J. Phillips, who was then the wife of the defendant, acquired title to all of lot 2 range 6 in the town of Avon, Franklin County, Maine, containing 160 acres, and the south half of lot 2 range 7, being 80 acres, adjoining lot 2 range 6, on the north. April 4, 1900, she conveyed to the defendant lot 2 range 6, and on March 21, 1904, he conveyed to Albert L. Phillips the south quarter thereof containing 40 acres, more or less, which part was staked off but never separately fenced "and has been ever since owned and occupied by said Albert L. Phillips." Aug. 30, 1906, the heirs at law of Laura J. Phillips conveyed to the defendant the south half of lot 2 range 7, so that he then owned three quarters divided of lot 2 range 6 containing 120 acres. more or less, on which the farm buildings are situated, and the south half of lot 2 range 7 containing 80 acres more or less and adjoining the 120 acres on the north. June 11, 1908, the defendant conveyed to the plaintiff, by deed with full covenants of warranty, "A certain lot or parcel of land situate in the town of Avon in the County of Franklin, being the home farm of said Phillips, by him occupied for at least thirty years last past, and consisting of two hundred acres more or less, one hundred twenty of which being the part on which the buildings are situate, and eighty acres being on the North farm and adjoining the said one hundred and twenty acres." The question presented is the construction of this deed.

It is agreed that the defendant, prior to March 21, 1904, the date of his conveyance to Albert L. Phillips of the south quarter of lot 2 range 6, occupied the entire premises as his home farm, but that since that conveyance he has "occupied only the remaining parts of said lots as his farm," except that he has allowed his cattle to pasture upon the south quarter since his conveyance thereof, the same not having been separately fenced.

The plaintiff claims that the deed from the defendant to him included the south quarter of lot 2 range 6, to which the defendant had no title, having previously conveyed it, hence this action. In support of his claim the plaintiff contends that the language, "the home farm of said Phillips, by him occupied for at least thirty years last past," necessarily includes the south quarter of lot 2 range 6, because that was a part of the farm as occupied, at least from 1874 to May 21, 1904, the date of the deed to Albert L. Phillips, and because thereafter it was apparently a part of the farm as occupied by the defendant, no fence separating it from the rest of the farm. He contends that this language constitutes a general description of property that is plain and definite, and, therefore, that the subsequent words specifying the acreage can not have the effect to control and restrict the general description.

We think the technical rule of construction invoked by the plaintiff, that a general description is not to be limited and controlled by a subsequent particular recital, is not applicable here. In *Moore* v. *Griffin*, 22 Maine, at page 354, this court said: "To give effect to the intention of the parties, general words may be restrained by a particular recital, which follows them, when such recital is used by way of limitation or restriction. But if the particular recital is not so used, but be used by way or reiteration and affirmation only of the preceding general words, such recital will not diminish the grant made by the general words."

In *Pike* v. *Monroe*, 36 Maine, at page 315, speaking of this and other rules of construction laid down in the old books, the court said: "In modern times, they have given way to the more sensible rule of construction, which is in all cases to give effect to the intention of the parties if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all of the provisions of the deed, as well as the situation of the parties to it."

Phelps J. in *Hibbard* v. *Hurlburt*, 10 Vt. 178, said: It is a well settled rule, that the whole instrument must be taken together. Each clause is to be regarded as qualified by others having reference to the same subject, and the intent is to be gathered from the whole.

If, then, by any rational construction, the several parts can be made to harmonize, and consist with the obvious general intent of the maker, there can be no good reason for rejecting any part, or denying to it its legitimate effect."

Applying these principles in construing the defendant's deed, it becomes manifest that the plaintiff's contention is not sustained. The "home farm of said Phillips" at the time of this deed did not in fact include the south quarter of lot 2 range 6, for he had conveyed that part more than four years before. He intended, of course, that his deed should convey the home farm that he then owned. And that intention is ascertainable, we think, from the deed, without violating any principle of law, by taking into consideration all the descriptive language used, and giving each part thereof its proper effect as related to the rest. The words "and consisting of two hundred acres, more or less, one hundred and twenty of which being the part on which the buildings are situate, and eighty acres being on the North farm and adjoining the said one hundred and twenty acres," are of much significance in the construction of this deed. They declare with particularity the acreage of the home farm as it then was, specifying the quantity in each part — that on which the buildings are situated, as one hundred and twenty acres, whereas that part had comprised one hundred and sixty acres, prior to the conveyance of the south quarter thereof.

These words should not be construed as used merely to reiterate and affirm the preceding words of the description, but as used to explain and declare and make certain the "lot or parcel of land" which had been referred to as the home farm.

It is therefore the opinion of the court that the property described as conveyed in the deed of June 11, 1908, from the defendant to the plaintiff does not include the south quarter of lot No. 2 range 6, that having been previously conveyed by the defendant to Albert L. Phillips by deed of Mar. 21, 1904.

Judgment for defendant.

MORTTIER L. THURSTON *vs.* WILLIAM MCMILLAN.

Oxford. Opinion February 23, 1911.

Trespass Quare Clausum. Presumptions. Deeds. Seizin. Evidence.

1. To maintain an action of trespass quare clausum the plaintiff must show that he had either actual or constructive possession of the premises at the time of the alleged acts of trespass. If he claims under a quitclaim deed, he must show that his grantor had possession at the time of the execution of the deed, either actual or constructive, or that he himself has since entered and become possessed of the premises.
2. When one has the legal title, in the absence of proof of actual adverse possession by someone else, the law implies that he has a constructive possession, sufficient to maintain the action of trespass quare clausum.
3. A quitclaim deed, or a deed of "a right, title and interest" in land, is not prima facie evidence of title.
4. Possession alone is a sufficient title against a wrongdoer.
5. The case shows sufficient evidence of possession to enable the plaintiff to maintain an action of trespass quare clausum against a wrongdoer.
6. A warranty deed, or a deed of conveyance, acknowledged and recorded, itself raises a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee. It is prima facie evidence of title. And the same rule applies to a mortgage in the usual form.
7. The presumption of seizin arising from a deed of conveyance is only a presumption, and may be rebutted by showing that the grantor had no title.
8. When the defendant in trespass quare clausum justifies under a title originating in a mortgage deed, and the plaintiff in rebuttal shows that the mortgagor had a paper title, but one which was defective, and nothing else appears, the court, hearing the case on report, infer that the defective title was all the title which the mortgagor had.

On report. Judgment for plaintiff.

Action of trespass quare clausum fregit wherein it was alleged that the defendant with force and arms broke and entered the plaintiff's close in Rumford, "and then and there cut down and peeled fifty cords of soft wood or pulp wood then and there growing, of great value, to wit, the value of two hundred and fifty dollars," etc.

Plea, the general issue, with brief statement that the "defendant claims to justify under Lucinda E. Bean and Martha E. Bartlett, who claimed title to the lot described in the plaintiff's writ."

At the conclusion of the evidence the case was reported to the Law Court with the stipulation that "upon so much of the evidence as is legally admissible the court is to render such judgment as the legal rights of the parties may require, and if judgment be for plaintiff, it is agreed that the damages are to be nominal only; and in any event it is agreed by the parties that the result of this suit shall determine the title to the land upon which the trespass is alleged to have been committed."

The case is stated in the opinion.

H. H. Hastings, and Foster & Foster, for plaintiff.

James S. Wright, and A. E. Herrick, for defendant.

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

SAVAGE, J. Trespass quare clausum. To maintain the action, the plaintiff must show that he had either actual or constructive possession of the premises at the time of the acts of alleged trespass. So, if he claims under a quitclaim deed, he must show that his grantor had possession at the time of the execution of the deed, either actual or constructive, or that he himself has since entered and become possessed of the premises. *Marr* v. *Boothby*, 19 Maine, 150. If he had the legal title, in the absence of proof of actual adverse possession by someone else, the law implies that he had a constructive possession, sufficient to maintain the action. *Griffin* v. *Crippen*, 60 Maine, 270; *Butler* v. *Taylor*, 86 Maine, 17. If he did not have the title, he must show actual possession. For the gist of the action is the invasion of the plaintiff's possession. *Savage* v. *Holyoke*, 59 Maine, 345; *Kimball* v. *Hilton*, 92 Maine, 214.

The plaintiff's claim of title begins in 1850 with the deed of certain persons, styling themselves administrators of the estate of Joseph H. Wardwell, to Jeremiah Martin. The deed lacked the

essentials of an administrator's deed, and did not convey, and did not purport to convey, any estate which had belonged to the intestate. It was a quitclaim deed of the "right, title and interest" of the grantors. And it is not shown that they had any. Therefore this deed conveyed no title. *Coe* v. *Persons Unknown*, 43 Maine, 432.

The succeeding links in the chain are quitclaim deeds of "right, title and interest" merely, until we come to the last one, which is a quitclaim deed of the land, from William H. Foye to the plaintiff, dated June 4, 1909. A quitclaim deed, or a deed of "a right, title and interest" in land, is not prima facie evidence of title, *Butler* v. *Taylor*, supra. From which it appears that Foye had no title by deed to the premises, and conveyed none to the plaintiff. Therefore the plaintiff's claim of constructive possession fails.

There is no evidence that any of the prior grantors were in possession at the time they gave their deeds. But the plaintiff contends that Foye was in actual possession, when he quitclaimed to the plaintiff, and that plaintiff after taking the deed entered and took possession, before the trespass. If so, then the plaintiff was in actual possession, and is entitled to maintain the action, unless the defendant can show that he entered under a better title. Possession alone is a sufficient title against a wrongdoer. *Hunt* v. *Rich*, 38 Maine, 195; *Melcher* v. *Merryman*, 41 Maine, 601. Possession is better than no title. *Moore* v. *Moore*, 21 Maine, 350; *Look* v. *Norton*, 85 Maine, 103.

The premises in question, the title to which seems to have been long in dispute, consist of an unenclosed lot of wild land, numbered 83 in the third division of lots in Rumford. So far as the case shows it has never been cleared, or cut upon, or used in any manner, except that a few trees have been cut under the authority of the parties who claim adversely to the plaintiff, and these were cut, so it appears, for the purpose of bringing the dispute to a head.

The case shows that Mr. Foye, who took a quitclaim deed of his grantor's "right, title and interest" in 1894, went onto the lot to look the timber over in 1895; and again in 1904 to make an estimate of the timber; and again in 1906, having heard that

someone was cutting there; and finally in 1907, apparently moved by a similar reason. Meanwhile, in 1898, Mr. Foye employed an agent, who lived about two hundred rods from the lot, to keep watch of it. And from 1898 until Foye quitclaimed to the plaintiff in 1909, the agent as he says "kept track of what was going on" on the lot, looked the lot over each year for signs of trespassing, went onto the lot at all times when others were chopping, or were prepared to chop, and warned them of the dispute about the title, and there would be "trouble" if they persisted in chopping. As evidence of the character of Mr. Foye's possession, such as it was, it is shown that on two or more occasions he personally forbade men to cut upon the lot. After the plaintiff took his deed, and before the acts of alleged trespass, he went upon the lot, and later went again and took more formal possession in the presence of a witness. The only evidence of any acts of possession by anyone else, during this period, is the fact that a surveyor employed by the parties claiming adversely to the plaintiff run one line of the lot in 1899, and the entries in 1907 and 1909 of persons acting under the authority of the adverse claimants and the cutting of a few trees for the purpose of bringing the dispute to a head.

The first question is, upon this evidence has the plaintiff shown sufficient possession of the lot to be entitled to maintain this possessory action for trespass, unless the defendant defends under a better title? We think he has. We are not concerned now with the character of a possession which would avail after a sufficient lapse of time against the true owner, but of a possession sufficient to entitle the possessor to keep off trespassers. From the nature of things, nothing more could have been expected to be done than was done. There was not only a possession, with continued watchfulness to keep others from entering, but there were open acts of dominion which sufficiently show the nature of the possession.

We turn now to the defense. The defendant justifies under the title of Lucinda E. Bean to two-thirds in common and undivided of the premises, and of Martha E. Bartlett to one-third; and it is admitted that whatever was done by the defendant upon the prem-

ises was done at the direction and under the authority of Mrs. Bean and Mrs. Bartlett. The defendant introduced Mrs. Bartlett's chain of title as follows: quitclaim deed dated January 18, 1890, by John F. Stanley and Frank Stanley to Henry O. Stanley of "right, title and interest" in one-third in common of lot 83; quitclaim deed dated December 31, 1894, by Henry O. Stanley to John S. Harlow, of the same "right, title and interest:" quitclaim deed dated March 10, 1898, by John S. Harlow to Charles P. Bartlett of the same "right, title and interest;" and devise from Charles P. Bartlett to Martha E. Bartlett. The defendant showed nothing as to title of John F. Stanley and Frank Stanley. From this it is evident, for reasons already stated, that Mrs. Bartlett has no title to the one-third claimed for her.

The defendant introduced Mrs. Bean's chain of title, as follows:— mortgage, with covenants, of lot 83, dated February 18, 1892, by John F. Stanley and Frank Stanley to the South Paris Savings Bank; assignment of mortgage, February 15, 1898, by the South Paris Savings Bank to Alpheus S. Bean; foreclosure by Bean in 1898; and devise from Alpheus S. Bean to Lucinda E. Bean.

A warranty deed, or a deed of conveyance, acknowledged and recorded, itself raises a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee. It is prima facie evidence of title. *Blethen* v. *Dwinel*, 34 Maine, 133; *Wentworth* v. *Blanchard*, 37 Maine, 14; *Butler* v. *Taylor*, 86 Maine, 17; *Ward* v. *Fuller*, 15 Pick. 185. A mortgage deed in the usual form is a deed of conveyance, with a defeasance. *Jones* v. *Smith*, 79 Maine, 446. And the same rule as to presumption of seizin applies to title held under a mortgage deed, as to that held under any other deed of conveyance. So that, unrebutted, the evidence for the defendant would show a prima facie title to two-thirds in common of the lot in Mrs. Bean. This would be a better title than the plaintiff's possession, and would defeat his suit.

But the presumption of seizin arising from a deed of conveyance is only a presumption. It is a presumption of fact, and is rebuttable. Such a deed is only prima facie evidence of title. To rebut

the effect of it, it may be shown that the grantor had no title. In this case, after the defendant had introduced the mortgage deed from the Stanleys to the bank, the plaintiff introduced, in rebuttal, a tax deed of the lot, dated January 13, 1886, to one Charles A. Kimball, and a quitclaim deed, dated January 17, 1890, from Kimball to the Stanleys, of his "right, title and interest." The tax deed is admittedly invalid, and conveyed no title. Hence the quitclaim deed, from Kimball to the Stanleys conveyed nothing. If that was all the title the Stanleys had, their mortgage to the bank conveyed nothing, and necessarily Lucinda E. Bean took nothing by her devise.

The defendant, however, contends that the tax deed to Kimball and the quitclaim deed from Kimball to the Stanleys did not have any tendency to rebut the presumption of title arising from their mortgage to the bank. Non constat, he says, that the Stanleys did not have other title. This may be true. But the question recurs whether, if the Stanleys had other title, the defendant should not have shown it, after the invalid chain of title had been traced to them. Practically the question is where was the burden of proof at that juncture in the case. We think the rebutting evidence was enough to meet the presumption, and overcome it. The burden was then on the defendant to show that the Stanleys had other title. If this be not so, the presumption, which is merely a presumption of convenience, to take the place of proof of livery of seizin, *Ward* v. *Fuller*, 15 Pick. 185, might become well nigh impregnable. The sources and instruments of title are presumptively within the knowledge of those who claim under them, rather than with strangers to that title. And if the title exists, failure to show it is significant and probative. When it is shown that the Stanleys had a paper title, though one that was defective, and nothing else appears, we think it should be inferred that that was all the title they had when they gave their mortgage.

We conclude therefore that it is not shown that either of the parties under whom the defendant justifies had any title. The defendant was a trespasser, and as such cannot defend against the plaintiff's possessory title. It is agreed that the damages are nominal.

This case comes up on report, and it was stipulated "that the result of this suit shall determine the title to the land." And we are asked by counsel to make such a determination. Necessarily we have discussed the question of title on both sides, so far as it was necessary to a decision of this action of trespass. But since the record does not show that Mrs. Bean and Mrs. Bartlett have become parties to the suit by assuming the defense, nor that they became parties to the stipulation, we cannot prejudge their rights. It would be manifestly improper to do so.

Judgment for the plaintiff for one dollar.

INHABITANTS OF EDEN *vs.* FLORA PINEO.

Hancock. Opinion February 24, 1911.

Towns. Territorial Extent. Constitutional Law. Mistake. Taxation. Act of Feb. 17, 1789 (Statute Mass. 1788, chapter 75).

1. The body of upland of about seventy acres in extent known as Bar Island, or Rodick Island, in tidewaters in Frenchman's Bay, north of Bar Harbor and something over one hundred rods distant therefrom, is a separate island and not a part of Mt. Desert Island, though there be a bar between the two which is left bare by the tide twelve hours out of every twenty-four.
2. The act of Feb. 17, 1789, incorporating the original town of Mt. Desert described the territory of the new town as "The plantation called Mt. Desert together with the islands called Cranberry Islands, Bartlett's Island, Robertson's Island and Beech Island," no mention being made of Bar or Rodick Island. In the absence of evidence that "the plantation called Mount Desert," included Bar or Rodick Island, it must be held that it was not included in that town, and hence not included in the town of Eden which was set off from the town Mount Desert without mention of the island in question.
3. Even if it be apparent from the situation that the legislature in incorporating the town of Mount Desert intended to include Bar, or Rodick Island, it failed to do so, and the court has no power to supply the omission. It is for the legislature to correct the mistake if any was made.

4. Municipalities in this State are creatures of the legislature and cannot enlarge their boundaries or taxing jurisdiction by mere user, however long continued. The inconveniences or losses, however great, resulting from boundaries established by the legislature, must be borne until the legislature shall correct them.

5. Though all the real estate upon Bar or Rodick Island has for seventy years or more been taxed in the town of Eden as situated in that town, and the taxes so assessed have been paid to Eden without objection, the owners are not thereby barred or estopped from denying the authority of the tax assessors of Eden to tax such real estate.

6. Since in this suit for taxes upon the real estate on Bar or Rodick Island, the town of Eden has failed to show that that Island is within the limits of the town, it fails to show authority to impose the tax and hence cannot recover.

On an agreed statement of facts. Judgment for defendant.

Action of debt, brought by the inhabitants of the town of Eden against Flora Pineo to recover the sum of $591.60 the amount assessed against the defendant, as her proportion of the town, county and state taxes for the year 1909 upon her real estate, being particularly described on the books of allotment and assessment of said Eden as four-fifths of Rodick's Island and buildings thereon. Plea, the general issue. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

John E. Bunker, for plaintiffs.

Charles B. Pineo, for defendant.

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

EMERY, C. J. In Frenchman's Bay, north of the village of Bar Harbor in the town of Eden, is a body of upland of about seventy acres in extent with buildings thereon. It has been known in Bar Harbor as "Rodick Island" but it is named upon the U. S. Coast Survey Chart as "Bar Island" and it is now called by either name. But it was included in the survey of the "Porcupine Islands" made in 1785 by Rufus Putnam for the Commonwealth of Massachusetts, and upon his plan it bears the name "Bar Porcupine." It is something over one hundred rods distant from the shore of Mount Desert Island measuring from mean high water mark on each shore.

It is connected with Mount Desert Island by a bar consisting of clay, gravel and rocks very similar to the general surface of the shores of both islands in the immediate vicinity. This bar is uncovered for about twelve hours out of each twenty-four so that teams and pedestrians can safely pass over.

Is this smaller island within the chartered limits of the town of Eden? It is conceded that it is not unless it was included within the limits of the old town of Mt. Desert from which the town of Eden was later set off. In the act incorporating the original town of Mount Desert, finally passed Feby. 17, 1789, the territory is described as follows: "The plantation called Mount Desert together with the islands called Cranberry Islands, Bartlett's Island, Robertson's Island and Beech Island." No mention is made of what was then known as Bar Porcupine nor of any other island. We have no evidence of the extent of "the plantation called Mount Desert" and in the absence of such evidence we cannot assume that it comprised more than the Island of Mount Desert. Almost simultaneously with the incorporation of the town of Mount Desert, but reaching its final passage a day earlier, was incorporated the town of Gouldsboro with the following territory (after describing a tract on the main land bordering on the East of Frenchman's Bay) "including Stave Island, Jordan's Island, Iron Bound Island and Porcupine Islands (so called) Horn Island, Turtle Island and Scooduk Island."

So far it would seem clear that the legislature not only did not include the seventy acre tract in question within the town of Mount Desert, but did include it within the town of Gouldsboro. Rufus Putnam, who was sent by the Commonwealth to survey the "Porcupine Islands" in Frenchman's Bay, included this tract in his survey and plan as being one of the Porcupine Islands. This was less than four years before the acts of incorporation. The survey and plan were official and presumably were known to the legislature incorporating the two towns.

One avenue of escape from this conclusion is suggested, viz: that a body of land of the character, description and situation of

that in this case in tide waters, more than one hundred rods from the main or a larger island, but connected with it by a bar submerged only half the time is not a separate island, but is part of the main, or of the larger island. No case so holding is cited to us, and after diligent search we have found none. In *Babson* v. *Taintor*, 79 Maine, 368 there was a question whether a two acre parcel was an island or part of the main. The court said (page 371) "Here the parcel is described as containing about two acres and though it consists mostly of rocks and ledges and is unfit for the habitation of man it must be considered as having size and permanency enough to entitle it to the appellation of island,—a right to which might be obtained upon the principles of adverse possession." In that case there was no channel at low water between the island and the main, and the island was within one hundred rods of the main. In the case before us, however, the territory has from time immemorial been called an island, and at the time of the acts of incorporation was known as one of the Porcupine Islands, and its accepted kinship to the other Porcupine Islands is seen in the distinctive name given it, "Bar Porcupine." It was thus early recognized as a separate island, one of the group of islands called Porcupines. We find no evidence that it was at that time regarded as only a part of the island of Mount Desert. We are not to assume that the legislature so regarded it.

It is common knowledge that there are many islands along our coast connected with other islands by bars exposed at low water, and yet each island bearing a distinctive name, so that a deed on one, eo nomine, would not convey the other. Indeed, among these Porcupine Islands, Great Porcupine and Little Porcupine are so connected and yet appear upon the Putnam plan as distinct, separate islands. That one island is much, very much larger than the other does not extinguish the individuality of the smaller island, so long as the smaller island has itself "size and permanency enough to entitle to the appellation of island," as is certainly the case here. One test of the individuality of this island would be to consider the case of a deed of land on the Bar Harbor side opposite, with the side lines described as "running North to the bay," or even

the shore. Could it be held that those lines extended over this island to the bay or shore upon its North side? Clearly the lines would end at low water mark, or the hundred rod limit, on the Bar Harbor side, that being the low water mark or limit of the island of Mt. Desert instead of Bar, or Rodick, Island.

But it is urged that the legislature could not possibly have intended to leave this island out of the act of incorporation of Mount Desert. That may be conceded, but if it was in fact left out the court cannot put it in. It may be quite evident at times that the legislature of a state intended to do a thing it did not do, and did not intend to do what it did do, but it is for the legislature to correct its own errors. As said by the philosopher Hobbes "It is not wisdom but authority that makes the law." In *Bremen* v. *Bristol*, 66 Maine, 355, the legislature was held to have in fact included in Bremen a point of land on the opposite side of the harbor, although, as the court said, it was very evident it did not intend to do so, and although it supposed and believed it was not doing so.

It appears that, nevertheless, taxes have been paid on this island for at least seventy-five years to the town of Eden by the present owners and their grantors. This, however, does not estop them from now denying that their property on the island is taxable in Eden or is within its limits. In *Bremen* v. *Bristol*, supra, it was admitted that the point of land in controversy had been taxed in Bristol since the setting off Bremen, an unusually strong case of contemporary and subsequent construction of an Act of the legislature by the parties interested, yet that fact could not change the line fixed by the legislature. The same was held in *Armstrong* v. *Topeka*, 36 Kansas, 432, 13 Pac. 843.

Neither a town nor a county can acquire jurisdiction over a territory for taxing purposes by prescription. *Russell* v. *C. N. Robinson & Co.*, 153 Ala. 327, 44 So. 1040. They are the creatures of the legislature and their boundaries and jurisdiction are just what the legislature has fixed, no greater, no less, and all inconveniences and absurdities caused thereby must be borne until the legislature shall correct them. For instance, in setting off Brooksville from

Castine and other towns in 1817, a small island called Buck's Island in Buck's Harbor on the south side of the new town and near the main land and almost encircled by it was not included in the description of the territory to constitute the new town and hence remained a part of Castine, though the new town lay between it on the south and Castine on the north.

Although it may have been supposed, and never before been questioned, that Bar Island was within the corporate limits of Eden, an examination of the act of incorporation of Mt. Desert in connection with the contemporaneous act incorporating Gouldsboro, (as is proper, *Hamilton* v. *McNeil*, 13 Gratten, [Va.] 389), shows that the legislature did not in fact include Bar Island in the former town, though it very likely may have intended to do so.

Unexpected as the result may be, in this case as presented judgment must be for the defendant. It is for the legislature to correct the matter if correction be desired.

Judgment for defendant.

In Equity.

THE FIRST NATIONAL BANK OF AUBURN

vs.

EASTERN TRUST AND BANKING COMPANY et als.

Androscoggin. Opinion February 24, 1911.

Chattel Mortgages. Sale by Mortgagor. Following Proceeds. Banks and Banking. Deposits. Trust Fund.

1. When a mortgagor of personal property is entrusted by the mortgagee with the property to sell, with the understanding that the proceeds of the sale are to belong and be paid to the mortgagee, the latter is entitled to the proceeds when the sale is made, and can follow and recover them in the hands of third persons receiving them with notice of their character.
2. When a mortgagor of personal property entrusted to him by the mortgagee to sell and pay over the proceeds, deposits them in a bank to his personal account, and the bank is soon afterward notified of the origin and character of the fund so deposited, it cannot after such notice apply the deposit in payment of the depositor's indebtedness to the bank.
3. The deposit of a particular fund in a bank to the general credit of the depositor does not necessarily destroy the identity of the fund. If it can nevertheless be identified, it, or so much of it as has not been disposed of by the bank before notice, can be recovered of the bank by the person entitled to it.
4. The relation between a mortgagee and the mortgagor of personal property entrusted to the latter to sell and pay over the proceeds to the former is not simply that of vendor and vendee, or creditor and debtor, but is of a fiduciary character, and a bill in equity may be maintained by the mortgagee to recover such proceeds from any person holding them with notice of the mortgagee's title.

In equity. On appeal by defendant bank. Decree below affirmed.

Bill in equity brought by the plaintiff against the Eastern Trust and Banking Company of Bangor, and the trustees in Bankruptcy of the H. J. Willard Company, a corporation, to recover the sum

of $640, which it alleged the defendant bank received as a deposit made for the purpose of securing the discharge of a mortgage on an automobile which was sold in Bangor by said H. J. Willard Company acting as agent for the plaintiff, and praying that the defendant bank be ordered and directed to pay said sum of $640 to the plaintiff bank. The cause was heard on bill, answers, replication and proof, and the Justice hearing the cause ordered, adjudged and decreed that the plaintiff recover of the defendant bank the sum of $640 and interest. The defendant bank then appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

The facts so far as material, are stated in the opinion.

Tascus Atwood, for plaintiff.

E. C. Ryder, for defendant bank.

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

EMERY, C. J. The H. J. Willard Company was engaged in the business of buying and selling automobiles. The plaintiff bank advanced the money to the Willard Company to purchase several automobiles and took a separate promissory note with a bill of sale of each automobile. The bank further authorized the Willard Company to sell each automobile for the purchase of which it had advanced the money and received the bill of sale. The Willard Company sold an automobile with the understanding, implied at least, that enough of the proceeds of the sale should be remitted to the plaintiff bank to pay the amount due the bank on that automobile.

The Willard Company, however, did not remit any of the proceeds to the plaintiff bank, but deposited them to its own credit in the defendant bank with which it had a deposit account. At the time of the deposit the defendant bank had no notice of the title of the plaintiff bank to the money thus deposited, nor of the facts relied upon as showing such title, and simply credited the amount to the Willard Company's deposit account. The next day, or soon after, however, and before it had made any disposition of the money other than to pay some checks of the Willard Company, it received

distinct notice of the plaintiff bank's title and also a demand to pay over to the plaintiff bank so much of the money as had not then been checked out by the Willard Company without notice. Considerably later, the defendant bank applied the balance then appearing on its book to some overdue notes of the Willard Company, and overdue at the time of the deposit.

As between the plaintiff bank and the Willard Company there can be no doubt that in equity, at least, the particular money paid to the Willard Company by the purchaser of the automobile belonged to the plaintiff, at least, to the extent of the amount necessary to repay the bank for its advances.

The case *McLarren* v. *Brewer*, 51 Maine, 402, was a case of a sale of mortgaged property by a mortgagor. The court in sustaining the bill in equity said, page 404, "It is a well settled doctrine that a mere change of property from one form to another cannot in itself divest the owner, or those who have distinct and immediate rights in the thing in its original shape, of their property in it." It is further said on the same page "This doctrine has been applied to agents, factors and trustees where the sale has been rightfully made."

The defendant bank did not acquire any better title to the money than did the Willard Company, except that it was protected in the disposition of the money in the regular course of business made before it had notice of the circumstances and the consequent title of the plaintiff bank. After that, it was bound to pay over to the plaintiff bank or its order what then remained undisposed of. It had no right after such notice to make any other disposition of the money.

Of course, the plaintiff bank could not maintain an action if before notice of its claim the identity of the money had been lost; if it could not be shown that the money, or part of it, in the defendant bank at the time of the notice was the proceeds of the plaintiff's automobile. For instance, if before notice the defendant bank had paid out in the regular course of business all the deposit that was the proceeds of the automobile, and the Willard Company had subsequently deposited other money derived from other sources,

to which money the plaintiff had no title, the plaintiff could not recover that money to satisfy its claim for the first money. As to the later deposit, the defendant would not be the debtor of the plaintiff.

The defendant bank urges that the identity of the money in question was lost when it was deposited. It may be difficult to trace the money after a general deposit of it in a bank to the personal credit of the person who was bound to pay it to someone else, but a deposit of it in a bank does not necessarily destroy its identity. It may still be shown to be money belonging to the plaintiff. *Houghton* v. *Davenport*, 74 Maine, 590; *Cushman* v. *Goodwin*, 95 Maine, 353.

In this case the original amount to the credit of the Willard Company in the defendant bank is known, and no other deposit was made after the one in question. Deducting this original credit and also the checks paid by the defendant bank before notice, the balance was clearly the proceeds of the automobile. It is the fund that is to be identified, not the particular coins or bank bills.

The defendant bank further urges that whatever right the plaintiff bank may have to the deposit made by the Willard Company, the remedy by action at law for money had and received is "plain, adequate and complete," and hence the court has no jurisdiction in equity. But the relation between the plaintiff bank and the Willard Company was not merely that of vendor and vendee, or creditor and debtor. There was a fiduciary relation between them. The Willard Company was not simply bound to pay a debt. It was bound to render an account and pay over the balance of a particular fund, the proceeds of the sale of the plaintiff's property entrusted to it for sale. Further, the plaintiff's title to the fund in the defendant bank was equitable rather than legal. Until notified of the plaintiff's claim, the defendant bank was simply a debtor to the Willard Company for the amount and could dispose of it at pleasure with all the rights of a legal owner. That these circumstances authorize the court to proceed in equity for the enforcement of the plaintiff's right is well settled. *McLarren* v. *Brewer*, 51 Maine, 402; *Houghton* v. *Davenport*, 74 Maine,

590; *Cushman* v. *Goodwin*, 95 Maine, 353; *National Bank* v. *Insurance Company*, 104 U. S. 54; *Union Stockyards Bank* v. *Gillispie*, 137 U. S. 411.

Shortly after making the deposit in question the Willard Company was petitioned into bankruptcy, and the trustees were made parties to this bill, but they make no claim to the fund as against the plaintiff bank.

The decree entered by the sitting Justice being in accordance with the foregoing principles must be affirmed.

Decree affirmed with costs of appeal.

FRANK R. STEWARD et al. *vs.* CHARLES CHURCH AND CARRIE CHURCH.

Somerset. Opinion March 3, 1911.

Husband and Wife. Agency of Husband. Contract by Husband. Implied Promise of Wife. Ratification by Wife. Evidence.

1. Where a husband and wife are living on a farm which the husband is carrying on, the fact that the title to the farm is in the wife does not show that he was carrying on the farm as her agent and does not make her liable for articles purchased by him for use on the farm.
2. Where in such case the husband did not represent himself to be the agent of his wife in making the purchase, she cannot be held liable upon the ground of after-ratification. The doctrine of ratification applies only in cases where a person without authority assumes to have authority to act for another.
3. A promise by the wife to pay the vendor for articles purchased by the husband, cannot be logically inferred from the circumstance that the articles ultimately came into her hands.
4. The fact that the wife authorized her husband to let a farm owned by her does not justify an inference that he was her agent in carrying on the farm.
5. The fact that in making a lease of the farm and farming plant six months after the purchase of a farming implement by her husband the wife included the implement in the lease, does not justify the inference that she authorized it to be purchased on her credit.

On motion by defendant Carrie Church. Sustained.

Action of assumpsit against Charles Church and Carrie Church, his wife, on an account annexed to recover the price of a cream separator, and for which said cream separator the defendant Charles Church had previously given to the plaintiffs his negotiable promissory note of the kind and form known as a Holmes' note. The bankruptcy of the defendant Charles Church was suggested on the docket, and the plaintiffs discontinued as to him by reason of his discharge in bankruptcy. Plea, the general issue. Verdict for plaintiffs against the defendant Carrie Church for $112.25, and she filed a general motion for a new trial.

The case is stated in the opinion.

Walton & Walton, for plaintiffs.

Merrill & Merrill, for defendants.

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

EMERY, C. J. Charles Church on June 25, 1904, purchased of the plaintiff a cream separator for use on the farm on which he lived in Skowhegan and he gave his negotiable note therefor. At the time of the sale the plaintiffs supposed Charles owned the farm and they sold him the separator upon his sole credit, having no intimation or reason to suppose that he was acting as agent for any one. Three years afterward, Aug. 8, 1907, learning that at the time of the sale the title to the Church farm was in Carrie Church, the wife of Charles Church, (having been conveyed by him to her Aug. 10, 1903) the plaintiffs brought this suit against Carrie Church upon account annexed for the price of the separator.

The action cannot be maintained against her upon the doctrine of ratification, as that doctrine applies only in cases where a person without authority assumes to have authority to act for another. A ratification is but the adoption of an act purporting to be the act of the party adopting it. *Keighley & Co.* v. *Durant*, 1901 A. C. 240. Charles Church did not assume to have authority from his wife to make the purchase.

Nor can the action be maintained upon the theory of a partnership between the husband and wife in carrying on a business in

which the separator was to be used. *Haggett* v. *Hurley*, 91 Maine, 542. Further, there is no estoppel to support the action even though the separator may afterward have come into the wife's possession and ownership, the plaintiffs not having been induced by her conduct to make the sale to the husband.

The only ground upon which the action can be maintained is that Mrs. Church did, in fact, authorize her husband to purchase the separator for her upon her credit. In other words, the plaintiffs must prove they sold and delivered the separator to her through her then authorized agent, authorized at the time of the sale.

Of course, the fact of agency can be established by proof of any circumstances from which agency can reasonably be inferred, but the circumstances must be of such nature as logically to authorize such inference. The relation of husband and wife is not enough. Especially is that relation not enough to prove that the husband in his business transactions is the agent of the wife. Nor can a promise by the wife to pay for property purchased by her husband be implied from the circumstance that the property came ultimately into her hands. *Ferguson* v. *Spear*, 65 Maine, 277, page 279. Nor is the fact that the wife owns the plant on which, or with which, the business is carried on, sufficient evidence of authority from her for her husband to make purchases on her credit for use in the business. *Stevens* v. *Mayberry*, 82 Maine, 65. It does not logically follow from a wife's ownership of a farm, or farm animals, that she is carrying on the farming business there, or has made her husband her agent to carry on the business for her.

It remains to consider what other evidence there is of sufficient probative force to establish the proposition that at the time of the sale of the separator by the plaintiffs Mrs. Church, the wife, had in fact made her husband her business agent to the extent of authorizing him to purchase this separator for her, and upon her credit. The following appears to be undisputed, viz: Charles Church having (April, 1902) obtained title to the farm subject to a mortgage, went into occupation of it and farmed it, and in August, 1903, conveyed it to his wife, subject to the mortgage which the wife assumed. Before conveying to his wife he

carried on the farm on his own account, and continued to do so afterward as far as outward appearances went. The neighbors did not notice any change in the management, and there was no evidence that after the conveyance to the wife she gave any directions as to how the farm or the business should be managed, or bought anything for the farm, or paid for anything bought by her husband for the farm, or sold off the farm any of its products or received any pay for them. About January 1, 1905, however, some six months after the purchase of the separator by the husband and when the wife was not living on the farm but at North Jay, a Mr. Kenney talked with her about leasing the farm, inquired of her what she would ask for the use of it, etc. She answered that her husband was sick of staying there and they would let it, that she "had no idea what it was worth" to let, but that any arrangement Mr. Kenney could make with her husband would be satisfactory to her. Mr. Kenney thereupon made an agreement with the husband to take a lease of the whole plant, farm, farming implements, tools, live stock, household goods, etc. The money rental was arranged on the basis of five per cent upon the estimated money value of all the property. A written lease embodying this agreement was prepared by them, Mr. Kenney and Mr. Church, the husband. In this draft Mr. Church included several farming implements unquestionably his own so far as appears, and he also included the separator. The wife did not sign this draft but had another draft made dated January 5, 1905 (six months after the purchase of the separator) which draft she and Mr. Kenney signed. Charles Church was not named as a party in either draft. In the second draft was practically the same enumeration as in the final draft, of farming implements, tools, household goods, etc., including the separator. The only difference in the enumeration was that in the first draft "one cream separator" was named, while in the second the enumeration was of "one cream separator in good running condition."

We do not think that authority from the wife to the husband to buy the separator on her credit is a logical inference from the fact that six months afterward she assured an applicant for a lease of the

farm that any arrangement he could make with her husband would be satisfactory to her. Giving authority to sell or let a plant does not imply that the agent appointed for that purpose had been the agent of the owner to carry on business there in the past. But it does not appear that she did make her husband her agent to lease the farm. He had no directions nor authority to find a tenant. He was simply authorized to make such arrangements for the lease of the farm to Kenney as would be satisfactory to himself. The more reasonable inference would seem to be that, while the title to the farm and some of the stock was in the wife, the business was the husband's, that the leasing the plant was his matter rather than hers. This inference is also supported by her statement to Kenney that "she had no idea what it (the farming plant) was worth," to lease. This quite clearly indicates that she had not been carrying on the farm herself.

Considerable stress is laid by the plaintiffs on the circumstance that the separator was enumerated in the schedule of the personal property included in the lease of the farm. It is argued that this shows that she then claimed to own the separator. In view of all the circumstances even that seems a doubtful inference. The lessee, by his agreement both with the wife and husband, was to have all the personal property, whichever owned it, included in the lease. The inclusion of all the articles in one schedule without specification of the ownership of each would hardly, in view of that agreement, be an assertion that she owned them all and her husband none. Moreover, it appears from the evidence for the plaintiff that several important items enumerated, such as a mowing machine, a horse rake, etc., had been purchased and paid for by the husband, and there is no evidence that he had given or sold them to his wife;— still further it was the husband who included the separator in the enumeration. The wife merely adopted his enumeration.

That the separator was more favorably described in the second draft of the lease hardly implies a claim of ownership. It is entirely consistent with a mere wifely interest in the property and business of her husband.

But, assuming it could be fairly inferred from the circumstances of the lease that she did then claim to own the separator, it does not follow, is not a logical nor legal inference, that she claimed to own it six months before, or that she had authorized its purchase of the plaintiffs. Her claiming to own it six months after its sale by the plaintiffs does not imply that she was the purchaser at that sale. No promise from Mrs. Church to pay the plaintiffs is implicable from the fact (if it were a fact) that the separator was claimed by her, or even became hers, six months afterward. *Ferguson* v. *Spear*, 65 Maine, 277, page 279.

On the other hand, both Mrs. Church and her husband testified positively that she had nothing to do with the purchase of the separator, or with the management of the farm, or with the business for which the separator was purchased. We think the evidence that she did, if indeed there be any, is too slight to sustain a verdict against that denial.

Several cases are cited by the plaintiffs in which the wife was held to have authorized the purchase of materials by her husband for erecting or repairing buildings on her land, it appearing that she knew at the time they were so purchased and used. The difference between those cases and this is manifest. Here there was no addition to the value of the real estate. The case *Merrick* v. *Plumley*, 99 Mass. 566, was an action of trespass by the wife for taking stone from a quarry on a farm the title to which was in her. The defense was a license from her husband. She admitted that she left the management of the quarry to him, and it also appeared that she knew at the time that the stone was being taken and under that license.

In *Jefferds* v. *Alvard*, 151 Mass. 94, the wife admitted that she employed her husband to carry on the farm for her, and the husband testified that his wife told him to buy anything that was needed or that he wanted for the farm. The action was for fertilizers used on the wife's farm. In *Lowell* v. *Williams*, 125 Mass. 439, the action was for fertilizers, farming tools, etc., delivered to the husband for use on the wife's farm on which both resided. The evidence was not reported, the case coming before the court on

exceptions only. Questions of law only were presented and decided. The sufficiency of the evidence to sustain the verdict was not mooted. We have examined all the cases cited by the plaintiff and made some independent research and find no case where the wife was held liable upon evidence as slight as the evidence in this case.

Motion sustained.
Verdict set aside.

BATCHELDER & SNYDER COMPANY *vs.* SACO SAVINGS BANK.

York. Opinion March 3, 1911.

Guaranty. Banks and Banking. Ultra Vires. Letter of Credit. Construction.

The defendant savings bank owned a summer hotel, and on February 16, 1907, issued to one Davis, who was in some way interested in the management of the hotel, the following letter of credit: "You are authorized to contract for material and supplies for Summit Spring Hotel at Poland and the same will be paid for by us." In July, in the same year, the bank contracted to sell the hotel to Davis, who was to manage it on his own account, the bank agreeing to furnish fixtures, furniture and supplies to a limited amount "to get the hotel opened and in running order." The sums paid on these accounts were to be added to the purchase price. Davis operated the hotel during the seasons of 1907 and 1908 under this agreement. Davis showed the letter of credit to the plaintiff's selling agent in 1907, but purchased no goods of the plaintiff that year. In 1908 the plaintiff sold, on the order of Davis, the goods to recover the price of which this suit is brought, and charged them to the "hotel." It claims to have sold them on the credit of the defendant, as evidenced by the letter of credit. It also claims that Davis was in fact the agent of the bank.

Held: 1. That a finding that Davis was the agent of the bank could not be sustained.

2. That a jury would be warranted in finding under the circumstances that the plaintiff might properly rely upon the letter of credit as continuing in 1908, and that an order of nonsuit, which in effect involved a ruling as a matter of law that the letter of credit was good for 1907 only, was erroneous.

3. It is not ultra vires for a savings bank, owning a hotel and wishing to sell it, to expend reasonable sums of money to put it into condition to sell well, nor to agree with the intending purchaser to advance money to get the hotel opened and in running order, nor to issue a letter of credit to effect the same purpose.

On exceptions by plaintiff. Sustained.

Assumpsit on an account annexed to recover the sum of $1092.81 for goods sold and delivered. The writ also contained an omnibus count. Plea, the general issue with brief statement as follows: "That the contracts declared upon in plaintiff's writ were beyond the lawful authority of the defendant to make and were forbidden by law, and the defendant did not and never has received any benefit from said contracts." At the conclusion of the plaintiff's evidence, and on motion of the defendant, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case is stated in the opinion.

McGlauflin & Briggs, and Foster & Foster, for plaintiff.

Geo. F. & Leroy Haley, for defendant.

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

SAVAGE, J. This is an action of assumpsit upon an account annexed to recover for goods sold and delivered. There is also an omnibus count. The case comes up on the plaintiff's exceptions to an order of nonsuit, made after the plaintiff's evidence had been introduced. Other exceptions were taken during the trial, but they do not appear in the bill of exceptions. The question is whether assuming that evidence to be true, the jury would have been warranted in returning a verdict for the plaintiff. If so, the ruling was wrong, and the exceptions must be sustained; otherwise, they should be overruled.

The case shows that the defendant was the owner of the Summit Spring Hotel in the town of Poland. On July 10, 1907, it made a written contract with one George H. Davis to sell him the hotel, for which Davis agreed to pay $100,000, with interest from that time. The contract contained the following clause:—"The bank agrees to furnish the sum of fifteen thousand dollars for the purpose of

erecting a stable, also a garage, and improving the property. This sum of fifteen thousand dollars to be added to the purchase price of the property above mentioned, and to be furnished in such sums as may be required to pay for the improvements now being made on the property, and to furnish fixtures, furniture and supplies to get the hotel opened and in running order. The bank is authorized to charge up to the property and add to the above mentioned purchase price all expenses, including this fifteen thousand dollars, and also including taxes, and it is agreed that the bank is authorized by Davis to carry an insurance on the property equal to the amount of the bank's investments in the property, the premium on said insurance to be also charged up against the property, total to enter into and be a part of the purchase price." There is no evidence that Davis paid any part of the purchase price.

Previously the bank had given Davis the following letter:

"SACO SAVINGS BANK.

Saco Maine, Feb 16, 1907.

GEORGE H. DAVIS, ESQ.

Portland, Maine.

Dear Sir:—

You are authorized to contract for material and supplies for Summit Spring Hotel at Poland and the same will be paid for by us.

Very truly yours,

FRANK W. NUTTER, Treas."

This letter of credit was shown by Davis to the plaintiff's traveling salesman, Baker, in June, 1907, and the substance of it was communicated by the salesman to the plaintiff. No goods, however, were sold by the plaintiff to Davis or for the hotel in 1907.

The hotel was a summer hotel, and was run by Davis during the summer season of 1907. And after July 10 of that year, it must be presumed that it was run in accordance with the written contract of that date between Davis and the bank, Davis being in possession under the agreement to purchase and managing the hotel on his

own account, and the bank being under contract to advance money "to get the hotel opened and in running order," the same to be added to the purchase price.

Davis was still in possession and was managing the hotel through the season of 1908. He testified, and we must assume it to be true, that in 1908 the hotel was run under the same agreement as in 1907. In June of 1908 Davis told Baker that he still had the letter of credit. In July of that year Baker called upon Mr. Nutter, the treasurer of the Bank, and was told by him that "the house hadn't been a very paying proposition the year before, and that he didn't expect any money from the house until the bills were paid." Nothing was said by either about the letter of credit.

The first of the goods, for the price of which this suit is brought, were furnished by the plaintiff August 15, 1908. But Baker had taken an order from Davis in the previous June, and those goods were apparently paid for out of the hotel receipts. On the plaintiff's account the goods were charged to the "Summit Spring House, Poland, Me." But we think the evidence would warrant a finding that they were sold on the credit of the defendant, as evidenced by the letter of credit.

The claim of the plaintiff, as set forth in the bill of exceptions, rests upon one or both of two grounds, namely, (1) that the bank is liable to the plaintiff by reason of the letter of credit, and (2) that in ordering the goods Davis was the agent of the bank, that the bank was itself running the hotel on its own account, with Davis as manager, and so it became liable for debts contracted in its behalf by Davis.

The plaintiff undertook to show the latter proposition by connecting the bank with the actual management of the hotel, but we think the evidence in this respect is insufficient. It is doubtless true that the bank paid close attention to the management of the hotel. There was good reason why it should. It watched the accounts of receipts and expenditures, it prevented or settled attachments, it guaranteed the payment of some bills, it had given at least one letter of credit, the one in this case. But in this there was nothing inconsistent with the relations and rights and obligations

of the bank and Davis under the contract, which Davis, plaintiff's witness, testifies was operative in 1908. The bank owned the hotel. It wanted to sell it. It had put it into the hands of an intending purchaser, without payment of any of the price. Whether the agreement for purchase could be carried out depended upon whether the hotel could be operated profitably. The bank was under obligation to advance money for supplies and other things. All that it furnished only added to the already heavy weight of a doubtful investment, and might be lost if the hotel was unsuccessfully managed. It had a most direct interest in keeping the house open, and in the state of the accounts, in the receipts and disbursements. But we think in view of Davis's testimony that there is no ground for a finding that the bank was operating the hotel on its own account in 1907 and 1908.

The plaintiff also claims a right to recover on the ground that some of the earnings of the hotel, which might otherwise have been used to pay for these supplies, were used to pay for improvements to the property which subsequently enured to the benefit of the bank. But we cannot see any reason for supporting this claim.

We think the plaintiff must rest, if it can rest upon anything, upon the defendant's letter of credit to Davis. The case does not show that the plaintiff, or its salesman, Baker, knew of the contract relations between Davis and the defendant, though Baker testifies that he knew that Davis was "interested" in the property.

It is not denied, that if the plaintiff had sold goods for the hotel in 1907, on the strength of the letter of credit, the bank would have been liable to pay for them, unless the defense of ultra vires, to be noticed hereafter, would avail it. But the defendant contends that the letter of credit was good only for a reasonable time, and that under the circumstances was good only for the year 1907. The plaintiff says it continued to be effective, as to the plaintiff, who had no notice of any revocation, during the year 1908. Upon its face it is unlimited in time. Whether it was intended as a continuing letter of credit, or, what is the same thing in this case, whether the plaintiff could properly rely upon it as continuing, depends not only upon the language used in the letter, but upon the circumstances

and conditions to which it applied. The letter is to be read in the light of those circumstances and conditions. This is familiar law. Each case must depend upon its own conditions.

In this case, on the one hand, as the defendant says, the Summit Spring Hotel was a summer hotel. It was open in the summer time, and closed to the public in the fall, winter and spring. Each year's operation was separate and distinct from that of the year previous. And it is urged that the argument to be drawn from this condition is well nigh conclusive against the plaintiff, not only as to the actual intent of the bank, but as to any inference which the plaintiff might properly draw from the letter. The plaintiff, so it is claimed, ought to have understood it to be applicable only to the season of 1907.

On the other hand, the plaintiff says it was not so limited in terms, that it was never actually revoked, that nothing to indicate a revocation was made known to the plaintiff, that the hotel was run under the same terms and conditions in 1908 as in 1907, that the plaintiff found Davis still in the management in 1908, apparently with the same relations to the property, and with the same powers as to obtaining credit as the year before, and so that there was a continued holding out by the bank of the authority of Davis to buy on its credit.

The question is a close one. The presiding Justice in the course of the trial ruled as a matter of law that the letter of credit was not effective beyond the year 1907, and this appears to have been one of the grounds for the order of nonsuit. But we think that under the circumstances, the letter of credit might properly be deemed continuing, as to the plaintiff, and that a jury would be warranted in so finding. It is not purely a question of law. It calls for the application of the rules of law to the facts to be found, or to be legitimately inferred. This is the province of a jury. The order of nonsuit on this ground was therefore erroneous.

But the defendant further contends that the plaintiff was not injured by the ruling, because it is claimed that it cannot recover in any event. This claim is based upon the doctrine of ultra vires. The argument is this. A savings bank is a corporation with limited powers. Its authority to make investments is limited by statute,

and the kinds of investments it may make are prescribed. It has no authority to go beyond the limits. It has no authority to use the money of depositors in the hazardous and speculative business of conducting a summer hotel, nor to bind itself by letters of credit to pay such money on account of bills contracted in running a hotel business.

It may be conceded that as a general rule the principle stated is the true one. But we think it does not apply to the situation in this case. The defendant Savings Bank had a right to own the hotel, for it might come into the title by the foreclosure of a valid mortgage. Owning it, it might sell it. It had the right to sell it at the best advantage, to get the most for it that it could. That was a duty it owed to the depositors. In order to sell it for all that could be got, we think it had the incidental right to expend reasonable sums of money to put it into condition to sell well. It needs no argument to show that a defunct summer hotel will not sell well. Nothing is more dead than a dead summer hotel. To get an advantageous sale, it must almost necessarily be made into a going concern. The hotel must be operated. Public patronage must be solicited and secured. The accomplishment of the desired result may take one, two, or more years. We think that in this case both Davis and the bank contemplated that it might take more than one year to make the operation successful. The foregoing are plain business considerations. And we think it is not ultra vires for a savings bank to do such things for the purpose of making a good sale of hotel property that it owns. It is an incidental power in aid of an admitted power to sell.

And the same principles apply, if the bank has made a contract of sale at an advantageous price, and the power of the purchaser to complete the purchase and pay the price depends upon his ability to make the hotel business a successful money making operation. In such case the hotel must be opened and operated, or the bank cannot sell. That seems to be this case.

Under such conditions, we think it was not unlawful for the defendant bank to agree to advance money to the intending purchaser "to get the hotel opened and in running order," the same

to be added to the purchase price, nor was it unlawful to issue, or continue, a letter of credit to effect the same purpose. Whether it was a wise exercise of power in this particular case is not the question now. That question is, did the bank have the power? We think it did.

Exceptions sustained.

FRANCES LEATHERS, Petitioner for Annulment of decree of divorce,

vs.

ELIZABETH SMITH STEWART.

Somerset. Opinion March 3, 1911.

Divorce. Decree. Annulment. Fraud. Equity. Laches. Evidence. Revised Statutes, chapter 62, section 4; chapter 79, section 17.

1. When a libellant in a libel for divorce falsely alleges on oath in the libel that the residence of the libellee is unknown to him and cannot be ascertained by reasonable diligence, and thereupon constructive notice to the libellee by publication is ordered and given, the apparent jurisdiction thus induced by fraud is colorable only.
2. The decree of divorce made in such a case may be vacated and annulled on petition of the defrauded party, though the libellant may have contracted a new marriage, or may have died, since the divorce was decreed.
3. On hearing a petition for the amendment of a decree of divorce exceptions lie to rulings in law, though the right of exception was not expressly reserved before the hearing.
4. On hearing a petition for the annulment of a decree of divorce, exceptions lie to a ruling that the petitioner is not barred by laches.
5. While the doctrine of laches is to be applied upon legal principles, the application is nevertheless so far a matter of discretion, dependent upon the facts in the case, that a ruling thereon will not be disturbed unless

shown to be clearly wrong. Upon the record before the court the ruling that the petitioner is not barred by laches is not shown to be erroneous. The evidence is not before the court.

6. "Laches" is negligence or omission reasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and when it would be inequitable to enforce the right.

7. When the evidence is not made a part of the findings of the presiding Justice, nor of the bill of exceptions, it is not a part of the record, and cannot be considered, on exceptions, even if a part or all of it be printed with the case.

8. On hearing a petition for the annulment of a decree of divorce the answer of the respondent is not evidence of the facts stated therein.

On exceptions by defendant. Overruled.

Petition for the annulment of a decree of divorce made in Maine in 1894, on the libel of the petitioner's husband, Llewellyn L. Leathers.

The case is stated in the opinion.

Gould and Lawrence, for plaintiff.

David D. Stewart, for defendant.

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

SAVAGE, J. This is a petition for the annulment of a decree of divorce, which was made in this State in 1894, on the libel of the petitioner's husband, Llewellyn L. Leathers. The material allegations, so far as it is necessary to notice them, are, in substance, that the petitioner was never served with personal notice of the pendency of the libel, and had no knowledge thereof until after the divorce was decreed; that her husband falsely and fraudulently alleged in his libel, under oath, that he had made inquiries and could not by reasonable diligence ascertain the residence of the libellee, the present petitioner, and that her residence was unknown to him; that thereupon constructive notice by publication was ordered and given, that by reason of the false and fraudulent allegation as to residence, the court did not acquire jurisdiction to decree a divorce as against the petitioner; and that the decree was, and is, null and void. It is also alleged that after the decree was entered, a marriage ceremony

was performed between Leathers and the respondent, who was then Elizabeth Smith, and that subsequently Leathers died, in 1903. The petition is dated November 4, 1909.

After due notice, the respondent appeared and filed an answer to the petition. After a hearing the presiding Justice made the following findings of fact and rulings in law:

"The petitioner was married to one Llewellyn L. Leathers in 1861 in Minneapolis, Minnesota, and lived there with him until May 16, 1891, when he left her and came to St. Albans, Maine, leaving her at Minneapolis in the house where they were then living. Mr. Leathers, the husband, filed in the Supreme Judicial Court for Somerset county, at the September Term, 1894, a libel, dated Aug. 9, 1894, for divorce from the petitioner Frances, alleging cruel and abusive treatment as a cause. In the libel Mr. Leathers alleged on oath that the residence of his wife Frances was unknown to him, that he had made inquiries, and could not by reasonable diligence ascertain her residence. Upon this libel and allegation he obtained an order of notice upon his wife by publication in the Pittsfield Advertiser, a local paper of limited circulation. At the following December Term, 1894, the notice by publication was proved as ordered, a hearing had and a decree of divorce made and entered. No other notice was attempted to be given, and the wife had no notice whatever of the libel and decree until some years afterward, in 1897 or 1898.

"Mr. Leathers's said allegation as to the residence of his wife was false and was made for the purpose of preventing his wife having any notice of the libel. He did know his wife's residence or at least knew perfectly well how to find it.

"Some two months after the decree of divorce, Mr. Leathers married the respondent Elizabeth Smith Stewart, who had lived as a domestic in his family in Minneapolis, and lived with her in St. Albans till his death there in 1903, but had no children by her. The respondent was aware of his intention to procure the divorce, and her affidavit in support of the allegation of cruel and abusive treatment was filed in the case. There was no evidence that she instigated

the making of the false affidavit as to the residence of the wife, but she had reason to believe that it could have been easily ascertained.

"Mr. Leathers died in 1903, and the respondent was appointed administratrix upon his estate, and the personal estate was awarded to her as the widow's allowance, in 1903.

"The petitioner, though aware as early as 1898 of the decree of divorce and of the marriage ceremony of Mr. Leathers with the respondent, did not file any petition for the annulment of the decree of divorce until Nov. 13, 1909, before which time not only had Mr. Leathers died, but his counsel (Mr. Josiah Crosby) in the divorce proceedings, and the Justice (Justice WISWELL) who granted the decree, had also died. She did not allege nor prove that the petition could not have been filed earlier.

"Personal service of this petition for annulment was made upon the respondent as claiming to be the widow of Mr. Leathers, but no service was ordered or made on her as administratrix of Mr. Leathers. The only children and heirs of Mr. Leathers are two sons of himself and the petitioner, of age, and who acknowledge notice of the pendency of the petition and make no objection.

"Mr. Leathers was honorably discharged from the military service of the United States and drew a pension as such. His legal widow is entitled to a pension on his account.

"At the hearing the respondent appeared by counsel and filed an answer, not under oath and signed only by her attorney, but did not testify.

"I rule that the answer is not evidence of any statements made therein.

"I further rule that the petitioner is not barred by laches."

A decree of annulment was made.

The facts found by the court below disclose a clear case of fraud upon the rights of this petitioner, and gross imposition upon the court which granted the divorce. By the libellant's false and fraudulent affidavit in the libel as to the libellee's residence and to the inability to ascertain it by reasonable diligence, the court was induced to assume a jurisdiction which it did not in reality possess. R. S., ch. 62, sect. 4, declares that "when the residence of the libellee

can be ascertained it shall be named in the libel, and actual notice shall be obtained, · · · When the residence of the libellee is not known to the libellant, and cannot be ascertained by reasonable diligence, the libellant shall so allege on oath in the libel." And it is only in the latter case that the court has jurisdiction to order constructive notice to the libellee by publication. And unless it be proved at the hearing that the sworn allegations in the libel as to the residence of the libellee are true, the court has no jurisdiction, for want of proper notice, to decree a divorce. The apparent jurisdiction thus induced by fraud is colorable only.

And no doubt exists that in such cases the court may, and in proper cases should, vacate the decree of divorce on the petition of the defrauded spouse. *Spinney* v. *Spinney*, 87 Maine, 484; *Lord* v. *Lord*, 66 Maine, 265. And this may be done though the libellant has contracted a new marriage since the first one was dissolved. *Holmes* v. *Holmes*, 63 Maine, 420; 14 Cyc. 719. So, by the great weight of authority, the power is sustained, in cases where property rights are involved, though the libellant has since died. See note to *Lawrence* v. *Nelson*, 57 L. R. A. 583; 14 Cyc. 719.

This case comes up on the respondent's exceptions "to the rulings of law, particularly to those relating to the laches of the petitioner." The evidence was not made a part of the findings of the presiding Justice, nor was it made a part of the bill of exceptions. The respondent has had a part, at least, of the evidence printed with the case. But not having been made a part of the bill of exceptions, it cannot be considered. *Jones* v. *Jones*, 101 Maine, 447.

In the first place, the petitioner contends that the respondent's exceptions should be dismissed, on the ground that it does not appear that the right of exception was expressly reserved before the hearing. She cites *Frank* v. *Mallett*, 92 Maine, 77. The point taken is not tenable. The rule relied upon applies only to jury-waived cases. It does not apply to cases, like the present one, which can only be heard by the court alone. In the latter class of

cases exceptions lie to rulings in law, although the right is not expressly reserved in advance.

The court below ruled that the answer of the respondent was not evidence of the facts stated therein. In support of the exception to the ruling the learned counsel for the respondent seems to rely upon the old rule in equity practice, that an answer to a bill in equity is evidence. By the old practice the bill called for an answer under oath, and it was held that the answer was evidence and that it took the equivalent of two witnesses to overcome such an answer. But even if the rules of equity practice were applicable to a case like this one, the respondent's position could not be sustained. Answers, even under oath, when an answer under oath is not called for by the bill, are not evidence. *Clay* v. *Towle*, 78 Maine, 86; R. S., ch. 79, sect. 17. Here no answer was called for by the petition, and the answer filed was not under oath. But this is not a bill in equity, and we think the rules of equity procedure do not apply. The answer merely serves to mark out the issues, as well as to limit them. It is in no sense evidence. It is no more evidence than is a brief statement pleaded under the general issue. The ruling was right.

Upon the exception to the ruling that the petitioner is not barred by laches, two questions arise. First, do exceptions lie? It is contended by the petitioner that the ruling was one of discretion, to which exceptions do not lie. We think otherwise. Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and when it would be inequitable to enforce the right. The circumstances in a given case which are claimed to constitute laches are, of course, questions of fact. But the conclusion whether upon the facts it would be inequitable to enforce the right, and whether the claimant is barred by laches, involves a question of law. In proceedings in equity in which the doctrine of laches has been developed, it is commonly held that the defense of laches may be raised by demurrer, that is, assuming the facts stated in the bill to be true, the bill is

not maintainable, *as a matter of law*, because of laches. *Taylor* v. *Slater*, 21 R. I. 104; *Meyer* v. *Saul*, 82 Md. 459; *Coryell* v. *Klehm*, 157 Ill. 462; *Kerfoot* v. *Billings*, 160 Ill. 563; Whitehouse Eq. Practice, sect. 331.

Nevertheless, the decision of the court upon the question of laches is so much a matter of discretion, dependent upon the facts in the case, that it should not be disturbed on appeal or exceptions unless clearly shown to be wrong. 12 Ency. of Pleading and Practice, 840.

The only fact contained in the court's findings which could be a ground for the application of the doctrine of laches is the lapse of time between the discovery of the fraud and the filing of this petition. But mere lapse of time is not enough. "The true doctrine concerning laches," says the author of Pomeroy's Equitable Jurisprudence, Vol. 5, sect. 21, "has never been more concisely and accurately stated than in the following language," used by the Rhode Island court: — "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right." *Chase* v. *Chase*, 20 R. I. 202.

In this case the second marriage occurred about two months after the divorce, and years before the petitioner had any knowledge of the fraud. The delay of the petitioner, after discovery, was in no sense responsible for this change of condition of the respondent. Moreover, the respondent had been a domestic in the family of Leathers before he abandoned the petitioner, and her connection with the divorce proceedings was such as to suggest that she was not an entirely innocent party, and that she was cognizant of the fraud.

But however this may be, it is incumbent upon her now to show that the ruling was clearly wrong. We are limited by the record. And the record before us fails to show that the Justice who heard the case did not exercise the discretion vested in him wisely and according to legal principles.

Exceptions overruled.

JONATHAN CURRIE

vs.

EDWARD L. CLEVELAND AND LELAND O. LUDWIG.

Aroostook. Opinion March 7, 1911.

Evidence. Admissions at Former Trial. Withdrawal of same at Subsequent Trial.

Admissions made for the purposes of one trial are not conclusive upon the party making them in another trial, when such party, before the beginning of the trial, has given notice of his intention to withdraw the admissions and demand proof of the formerly admitted items.

Whatever the parties agree upon in the presence of the court and the jury as to the terms and purposes of admissions, or whatever either counsel asserts, if undisputed, becomes a binding statement of fact.

Admissions on former trials by a plaintiff's counsel concerning a set-off pleaded must be confined to the trials in which they were used, where defendant's counsel stated that they were made for the purposes of the trial, the plaintiff being hostile to any admission, and there was no proof that the admissions were general.

Where admissions by counsel are made for a specific purpose they are to be confined to that purpose.

On exceptions by defendants. Overruled.

Assumpsit on account annexed to recover $1500 cash furnished by the plaintiff to the defendants. The writ also contained a count for money had and received and also an omnibus count. The

defendants filed an account in set-off amounting to $1403.34. Plea, the general issue. Verdict for plaintiff for $224.85. The defendants excepted to certain rulings made during the trial.

The case is stated in the opinion.

Ransford W. Shaw, for plaintiff.

Powers & Archibald, and Ira G. Hersey, for defendants.

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

SPEAR, J. This is an action for money had and received in which an account in set-off was filed by the defendants. This is the third time the case has been tried. Before the first trial counsel for the plaintiff and defendants met in one of their offices and agreed that upon the trial all the items in the defendants' account in set-off were admitted except one large charge of $325. The case was tried upon the issue thus agreed upon with a verdict for the plaintiff. The verdict was set aside. The case was again tried under the same agreement with a verdict for the plaintiff. This verdict was also set aside. Before the third trial plaintiff's counsel informed defendants' counsel that the agreement upon which the two former trials had proceeded would be abrogated and that upon this trial the plaintiff would not admit the validity of any item in the defendants' set-off. It is not in controversy that the agreement between counsel upon which the first two trials proceeded was made in the absence of and without the consent of the plaintiff. The admissions, as above stated, upon which the case was tried at the first and second trials were agreed upon by counsel at the third trial without the introduction of any evidence. The plaintiff's attitude towards the admissions was admitted, and stated by his counsel as follows: "Mr. Currie would not agree with me, and did not authorize me to make an agreement with my brother, but I made it just the same, without his consent. At the second trial I think it was practically agreed, but he testified as you will find in the printed case, that that agreement was unauthorized, and I had no right to make it, and that he forbid me doing it, which he did." The court: "But you still stuck to it?" Mr. Shaw: "I did at

the time. The case came around for trial again. Mr. Currie called my attention to the fact that I had made a mistake. I then told brother Archibald when we had a conversation, that at this trial I would admit nothing." The court: "So it leaves it simply a question of law whether you are bound by the former admission." The presiding Justice sustained the right to withdraw the admissions and subjected the establishment of every item of the account in set-off to the necessity of proof. In his charge he ruled that the plaintiff was not concluded, even though he admitted at the former trials that the account in set-off was all right, and was not barred from trying out the merits of the items. He further instructed the jury that the admission of the correctness of the items was a matter to be weighed by them as to whether they ought not to be allowed and whether the plaintiff himself did not think that they should be allowed. In other words, the admissions were admitted as evidence for the consideration of the jury upon the question of fact touching the merits of the items. To the rulings of the presiding Justice upon the effect of the admissions, the defendants excepted. In view of the admissions at the first trial, the defendants had offered to be defaulted for $150. The plaintiff upon the third trial recovered more than $150, which, of course, affected the question of costs adversely to the defendants.

To discover the precise question raised by the exceptions, it is necessary to determine the true import of the admissions; whether they were made for the purposes of the trial, or generally, with intent to eliminate the items involved from all future consideration. As before observed, the terms and purposes of the admissions were agreed upon by counsel in the presence of the court and jury during the progress of the trial, and assumed the form of an agreed statement upon this particular issue. Whatever they agreed upon, or whatever either counsel asserted, if undisputed, became a statement of fact, by which the parties must be bound and the case decided. *Thorndike* v. *Inhabitants of Camden*, 82 Maine, 39. So far as appears in the statement of counsel upon either side, the only purpose for which the admissions in question were made is found in the recitals of defendants' counsel, in which it twice occurs,

once before the court and once in the presence of the jury. In each of these recitals the purpose of the agreement as to the admissions was expressed by counsel in substantially the same language. In the first he said: "And it appears of record that this admission was made for the purposes of the trial." In the second, before the jury, he used this language: "And that all of the items of the defendants' set-off were admitted for the purpose of the trial except the item of $325., etc." There is no evidence in the case that tends to extend the force of these admissions, as above expressed, beyond the purposes for which the defendants' counsel declared they were made. The attitude of the plaintiff, himself, in opposition to the right of his own counsel to make such an agreement, and his open objection to it upon the witness stand in the second trial, conclusively prove that he never intended the admissions to extend beyond the trial at which by the action of his counsel he seems to have been compelled to submit to their use. In view of the statement of the defendants' counsel, that the admissions were for the purposes of the trial, and the hostile attitude of the plaintiff to any admission at all, without any proof whatever that the admissions were general, we think the evidence requires that they should be confined to the trials in which they were used.

Upon this state of facts upon the approach of the third trial the plaintiff's counsel, as already seen, gave notice that he should withdraw his admissions and demand proof of every item in the defendants' account in set-off. Therefore the precise issue in this case is whether the admissions made for the purposes of one trial are conclusive upon the party making them in another trial when, such party before the beginning of the trial has given notice of his intention to withdraw the admissions and demand proof of the admitted items.

Upon this issue the law seems to be well settled. If not universally so held, the great weight of authority favors the rule that where admissions by counsel are made for a specific purpose they are to be confined to that purpose. *Holley* v. *Young*, 68 Maine, 215, is cited in opposition to this rule; but a careful consideration of the

case will show that the facts were entirely different and that the conclusions do not apply. In this case, as stated by the court, the admission was not limited to the trial in which it was used, but was general. In laying down the rule the court say: "We think no evil results will follow if we adopt the rule that an admission made at the first trial, if reduced to writing, or incorporated into the records of the case, will be binding at another trial of the case, unless the presiding Judge, in the exercise of his discretion, thinks proper to relieve the party from it." The agreement of plaintiff's counsel in the case at bar, to admit certain items against the plaintiff, was in effect precisely like that of counsel in *Pomeroy* v. *Prescott*, 76 Atlantic, 898, 106 Maine, 101, in which counsel by a written admission agreed to strike out certain items from the plaintiff's account annexed, but whose action the plaintiff repudiated before trial. In this case the court held that the agreement was not binding upon the plaintiff. Therefore, if the plaintiff in the case at bar had before the first trial repudiated the agreement of his counsel, the admissions would not have been binding even for that trial; but inasmuch as the plaintiff acquiesced in the first and second trials, it is evident that *Pomeroy* v. *Prescott*, is not a full precedent but is far more applicable in principle than *Holley* v. *Young*.

Perry v. *Simpson Waterproof Mfg. Co.*, 40 Conn. 313, is, however, a complete precedent. In this case the facts show that upon a former trial between the same parties the counsel for the defendant, a corporation, had admitted their incorporation and that certain persons were officers of the company at a certain time. A second trial was had, previous to which counsel for the defendants gave notice of their withdrawal of the admissions at the former trial. The plaintiff contended that the admissions were binding upon the second trial. The court upon this point say: "We are quite prepared to give our assent to the doctrine insisted on by the defendants' counsel, at least so far as to hold that admission of a fact made on and for the purposes of one trial, does not bind the party thus making it, so as to prevent him from disputing that fact at another trial." The defendant raised the further issue that

the admissions were not admissible for any purpose. But upon this contention the court say: "The court admitted the testimony and we think correctly. What occurred at the former trial, so far as it throws light on the question involved in the pending issue made up and to be decided between the same parties, must be admissible in evidence. General rules regulating the admissibility of evidence require it. If at a former trial certain facts were admitted as true, which it becomes important to prove in a subsequent trial, that such admission was made may be proved as a fact." The presiding Justice in the case at bar ruled in perfect accord with the doctrine of this opinion upon both points presented.

To the same effect is *Nowell* v. *Drake*, 28 Kansas, 265, in which Brewer, Judge, later Justice of the Supreme Court of the United States, held that if an admission was made "for the purposes of the trial only, and so understood by the parties at the time, it would not be binding upon the plaintiff now." *Weisbrod* v. *The Chicago & Northwestern Railway Co.*, 20 Wisconsin, 441, is also in point. In this case at a former trial the defendants' attorney made an admission as to the amount of the plaintiff's damages in case he was entitled to recover at all. The case does not show as a matter of fact that this admission was confined to the trial for which it was made, yet the court say: "We think the court mistook the effect of the admission of Mr. Edmonds (the attorney for the defendant) upon the former trial, as to the amount of damages sustained by the plaintiff. Such admissions are frequently made for the purpose of saving time, where counsel are confident of success upon some other point; and when so made they are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." For analogous cases see *Baldwin* v. *Gregg*, 13 Metcalf, 253; *Boileau* v. *Rutlin*, 2 Exch. 665; *Dennie* v. *Williams et als.*, 135 Mass. 28, and cases cited.

An examination of the authorities cited by the defendants will show that they applied to unlimited agreements. *Prestwood* v. *Watson*, 111 Ala. 604, cited in Wigmore, sec. 2593, upon this point excepts limited admissions in this language: "But if by their terms they are not limited, etc., they are receivable on any

subsequent trial between the same parties. To the same effect is *Moynahan* v. *Perkins*, 36 Colo. 481, in which the court confines the admissibility of agreement of counsel to "a general admission without limitation." *Central Railroad* v. *Shoup*, 28 Kan. 394, holds the same. *Oscanyan* v. *Arms Co.*, 103 U. S. 261, was a case in which, when the action was called for trial and the jury was impaneled, one of the plaintiff's counsel stated the issues and the facts which they proposed to prove. Upon the statement of facts made by counsel the defendant moved that the court direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, and the court directed the jury to find a verdict for the defendant. The only issue involved in this phase of the case was whether the admission of counsel under these circumstances was binding. The court held that the presiding Judge had a right to act upon this admission of counsel which if true, and it was so admitted, put an end to the case. This ruling seems to be in accord with the universal practice of the courts. It involved a question of procedure only. If upon the trial, before the jury, the court was willing to act upon the counsel's statement as true instead of calling for proof, it was merely adopting one course of procedure instead of another. It was precisely what was done in the case at bar. Instead of the introduction of testimony to establish the admission, upon which the first two trials proceeded, the court permitted the attorneys to agree upon a statement in open court before the jury and made his ruling upon the strength of it. This method of procedure must have been practiced from time immemorial and is of frequent occurrence in our own experience. We think the irregularity will arise when the appellate court permits counsel in the court below to stake his case upon his own statement of the facts and then relieves him from defeat in the choice of a course upon which he is willing to take the chance of winning.

Under the facts in this case the entry must be,

Exceptions overruled.

MILES H. WYMAN AND ALMON B. SARGENT *vs.* CHARLES N. PORTER.

Franklin. Opinion March 7, 1911.

Real Actions. Writ of Entry. General Issue. Burden of Proof. Color of Title. Right to Recover. Evidence. Mortgages. Transfers. Deed by Mortgagee. Effect. Foreclosure Proceedings. Validity. Executors and Administrators. Foreign Administrators. Powers. Revised Statutes, 1841, chapter 125, section 5.

The general issue in a writ of entry puts the plaintiff's title in issue, and permits the defendant to rebut the plaintiff's proof, set up title in himself or merely show that the plaintiff has no title.

The burden is on the plaintiff in a writ of entry to show the title he has alleged, and he must recover, if at all, on the strength of his own title.

Possession under color of title is better than no title.

If in a writ of entry the plaintiff shows no title, he cannot prevail even though the defendant has no title.

Where the plaintiffs in a writ of entry offered a warranty deed from C. to S. and quitclaim deeds from the heirs of S. to themselves, *held* that this made a prima facie case for the plaintiffs.

Where the defendant in a writ of entry was in possession under color of title afforded by a defective sheriff's deed, *held* that it was incumbent upon the plaintiffs, to entitle them to possession over the defendant, to show a record or prescriptive title.

A deed by a mortgagee out of possession without a transfer of the debt conveys no legal title.

A deed by a mortgagee's assignee under invalid foreclosure proceedings conveys no legal title.

Under Revised Statutes, 1841, chapter 125, section 5, requiring notice of mortgage foreclosure to be published in a paper printed in the county where the premises are situated, foreclosure on a notice not shown to have been given in a newspaper printed as well as published in the county is invalid.

An administratrix appointed by a probate court in another state has no authority to assign a mortgage on land in Maine.

An unsigned certificate of foreclosure invalidates the title of a grantee of the foreclosing mortgagee not in possession.

Johnson v. *Leonards*, 68 Maine, 237, overruled so far as inconsistent with the case at bar.

On report. Judgment for defendant.

Real action to recover the possession of certain lots of land in Eustis, Franklin County. 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.

E. E. Richards, and H. S. Wing, for plaintiffs.

Frank W. Butler, for defendant.

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

SPEAR, J. This case comes up on report. It is a writ of entry for the possession of certain lots of land in the town of Eustis, Franklin County, containing 200 acres more or less, and known as the Robinson Pasture. The defendant pleads the general issue, — did not disseize. This puts in issue the plaintiffs' title. Under this plea defendant may rebut the plaintiffs' proof; set up title in himself; *Rowell* v. *Mitchell*, 68 Maine, 21; or merely show that the plaintiffs have no title except title conveyed by plaintiff under which the defendant does not claim. *Stetson* v. *Grant*, 102 Maine, 222, and cases cited; *Brown* v. *Webber*, 103 Maine, 60. The burden is on the plaintiffs to show the title they have alleged, *Stetson* v. *Grant*; *Brown* v. *Webber*, supra, and must recover, if at all, upon the strength of their own title, *Day* v. *Philbrook*, 89 Maine, 462, *Coffin* v. *Freeman*, 82 Maine, 577, and cases cited. If the plaintiffs show no title, they cannot prevail even though the defendant has none, *Derby* v. *Jones*, 27 Maine, 357. Possession under color of title is better than no title. *Stetson* v. *Grant*, supra. Under these familiar rules of law the evidence in this case is to be considered.

The plaintiffs in support of their title offered a warranty deed from Abner and Philander Coburn to Miles Standish of Flaggstaff and quitclaim deeds from the heirs of Miles Standish of the premises in question. This made a prima facie case for the plaintiffs for 65-108th interest in the premises described in the deed and in the writ. *Stetson* v. *Grant*, supra, and cases cited.

In defeasance of the plaintiffs' title, the defendant says there are no equities in favor of the plaintiffs, inasmuch as the defendant for a valid debt eighteen years previous to the date of this writ had purchased and since been in possession of the locus in question under a sheriff's deed, and supposed he had a good title, until it was discovered by the plaintiffs that there was a defect in the notice of the sale which resulted in a technical defeat of his title, and that since such discovery the plaintiffs had bought in the title from the various heirs of Miles Standish, who held prima facie title from the Coburns. The defect in the defendant's title was due to the failure of the officer in advertising the sale upon levy to post notices in the organized plantations adjoining the town of Eustis, as required by statute.

The defendant by sheriff's deed being in possession under color of title, *Butler* v. *Taylor*, 86 Maine, 17, it is incumbent upon the plaintiffs to entitle them to possession over the defendant to show a record or prescriptive title. The latter they do not claim. The former seems to be beset with the same technical defects that are invoked by the plaintiffs to defeat the execution title of the defendant. The defendant starts out with the advantage that possession under color of title is better than no title. *Stetson* v. *Grant*, supra. The plaintiffs' claim under warranty deed from the Coburns to Miles Standish makes a prima facie case, as already seen. The defendant "may, however, always show that the plaintiff obtained nothing by his deed." *Stetson* v. *Grant*, supra. This the defendant undertakes by endeavoring to show that the Coburns received no title from their grantors and had no title to convey to Standish, and that through the various mesne conveyances the plaintiffs "obtained nothing by their deed," as he says the following records will disclose.

By mesne conveyances from the State of Massachusetts a part of the locus in quo came into the possession of Nathaniel S. Ames of Boston, as assignee of a mortgage. Through Ames the title purports to vest in James B. Robb of Boston as follows: Ames began foreclosure proceedings July 29, 1840, by publication, and before the equity of redemption had expired, died. Maria C. Ames was

appointed administratrix of his estate, in Boston, February 6, 1843. December 12, 1844, after the equity had expired, she as administratrix, assigned the mortgage to James B. Robb. Robb by quitclaim deed in 1844 conveyed his interest in 65-108ths of the locus to various parties, which interest by various quitclaim deeds was acquired by Abner and Philander Coburn. The validity of the Coburns' title, therefore, depended upon the validity of Robb's title. The defendant now contends (1) that the foreclosure attempted by Ames was void and (2) if not void, the equity of redemption had expired and the realty vested in the heirs before the date of the assignment, and (3) that the assignment was ineffectual to convey title even to the mortgage as a chattel; in either event that no title to the land passed to Robb. The foreclosure was clearly defective. It purported to be by publication and the certificate failed to comply with the statute in not stating that the paper was printed in Farmington as well as published there. The statute of 1840, chapter 105, section 5, required that the publication notice should be in the newspaper printed in the county where the premises are situated. Our court have repeatedly decided that foreclosure upon such a notice is invalid. *Bragdon* v. *Hatch*, 77 Maine, 433; *Savings Bank* v. *Lancey*, 93 Maine, 429, and cases cited. The assignment of the mortgage to Robb was made by Maria C. Ames, administratrix of the estate of Nathaniel F. Ames, late of Boston. But Maria C. Ames, appointed administratrix by the probate court in Massachusetts, had no authority to assign a mortgage on real property in the State of Maine. *Brown* v. *Smith*, 101 Maine, 545; *Cutter* v. *Davenport*, 1 Pickering, 81. But the plaintiffs say that the defendant has not shown that ancillary administration was not taken out in Maine. We do not think it was necessary. When he had established the fact sufficient to break the plaintiffs' chain of title, it was then incumbent upon the plaintiffs to rebut it. The defendant, having shown a break in the record title of the plaintiffs, cannot be called upon to repair it. The burden is then imposed upon them to affirmatively overcome the defect.

It would therefore appear that James B. Robb had acquired no legal title to that part of the property in question which he under-

took to convey by his quitclaim deed of 1844 and that therefore no legal title through Robb by mesne conveyances vested in the Coburns. We have no occasion here to consider the equities involved.

Another portion of the locus is claimed by the plaintiff through a title originating in a conveyance purporting to be made from Silvanus Mitchell, and Zenas Keith to Robert Ayer. The source of the grantors' title does not appear; but inasmuch as they took a mortgage from Ayer, and the Coburns' title depend upon the legality of the foreclosure, the source of the original title becomes immaterial. This mortgage was subsequently assigned to Alexander H. Twombley of Boston, who attempted to foreclose it by publication. The foreclosure certificate was invalid for the reasons stated in the Ames foreclosure, supra. There was, however, connected with this attempted foreclosure, another defect which may have been fatal. The certificate of foreclosure contained no signature. Therefore the grantees of Twombley, a mere assignee not in possession, acquired no legal title by their deeds and the Coburns had no legal title to convey to Standish.

The plaintiffs, however, claim that the quitclaim deed by Twombley, although he was only an assignee of the mortgage was effectual to convey title under the doctrine of *Johnson* v. *Leonards*, 68 Maine, 237. But under the facts in this case, there being no evidence that the mortgagee or the assignee had made entry or had transferred the mortgage debt, the rule laid down in *Lunt* v. *Lunt*, 71 Maine, 377, seems to apply.

In *Johnson* v. *Leonards*, the mortgagee in 1862 before entry to foreclose and without possession gave a quitclaim deed to the defendant's predecessor of all his "right and interest" in the mortgaged premises, but did not transfer the mortgage debt. In December, 1863, he assigned the mortgage of the identical premises, embraced in the quitclaim deed, to the plaintiff and delivered to her the note secured thereby. The opinion holds upon this state of facts as follows: "The mortgagee, therefore, having conveyed all his interest in the mortgage premises to Stocking by his quitclaim deed of July 8, A. D. 1862, had no remaining estate therein to pass to the

plaintiff by his assignment of December 29, A. D. 1863." In other words the mortgagee assigned the mortgage, and debt secured thereby to the plaintiff, after having quitclaimed to the defendant, and the latter deed is held, not to operate as an assignment, but to convey the legal title.

In *Lunt* v. *Lunt*, 71 Maine, 377, the assignees of the mortgage by quitclaim deed conveyed to the defendant 2-9ths of the mortgaged premises. This deed so far as we are able to see, conveyed precisely the interest that the deed in the above case purported to convey, and it appears from the opinion that the same question was raised. The court say: "But it is claimed that by the quitclaim deed of Sally Lunt and Timothy G. Lunt to the tenant, of January 25, 1868, an interest in real estate of two-ninths of the Noble lot passed to her. But such is not the law. The interest of a mortgagee before entry, is not real estate but a personal chattel. The interest in land is inseparable from the debt. It is an incident to the debt and cannot be detached from it. *Ellison* v. *Davids*, 11 N. H. 275. The mortgages were not foreclosed. No assignment was made of the mortgage debt or of any portion of the same. The Carter mortgage has been paid in full by the plaintiff. The assignee of the Whiting mortgage was never in possession under his mortgage. The quitclaim deed, did not, under these circumstances convey any title to the real estate, or to a specific portion of the Noble lot." This case is quoted and affirmed in *Hussey* v. *Fisher*, 94 Maine, 301. In neither of these cases is *Johnson* v. *Leonards* in any way referred to. It is conceded that a deed of a mortgagee in possession, *Connor* v. *Whitmore*, 52 Maine, 185, or accompanied by the delivery of the mortgage notes, *Dixfield* v. *Newton*, 41 Maine, 221, passes the mortgagee's title to real estate. But *Johnson* v. *Leonards*, goes further and seems to adopt, as a general principle of law, the rule laid down in *Hunt* v. *Hunt*, 14 Pickering, 374, for the decision of that particular case, and states the rule as follows: "And, in general, when it is the intention of the parties that the quitclaim deed shall be effectual to carry the mortgagee's interest in the estate, it operates as an

assignment of the mortgage without a transfer of the debt and without the possession of the mortgagee at the date of the deed."

But in *Hunt* v. *Hunt*, the case is stated in the syllabus as follows: "The owner of land mortgaged it to V, in 1803, but continued in possession. In January, 1810, he made a deed of the same land to A, and in March, 1810, he made a deed of it to T. The mortgagee, in 1812, conveyed the land to T. by a deed of quitclaim, in the usual form, with a covenant of warranty against himself and any person claiming under him. It was held, that this conveyance to T, who had taken from the mortgagor the second deed of the equity of redemption, did not operate as an extinguishment or merger of the mortgage, so as to give a priority to A, but that it operated as an assignment of the mortgage." As the opinion says: "The great question, therefore, is whether the quitclaim deed from Verry to Thayer with covenants against himself, his heirs, etc., was an extinguishment and discharge of the mortgage, or an assignment and conveyance of the title created by it, ... and we can see no reason why a purchaser of an equity of redemption . . . is in any respect disabled from becoming such assignee." And the force of the opinion is not with reference to what the quitclaim conveyed, but upon the assumption that it operated as an assignment of the mortgage and, upon this assumption, whether the assignment, when united with the equity of redemption in the same person, operated as an extinguishment of the mortgage or as an assignment of it. No such question arose, or could arise in *Johnson* v. *Leonards*. The mortgage, itself, and the secured note, were actually assigned to the plaintiff. The question of assignment was settled by the evidence of the original document. The assigned mortgage and note were admittedly outstanding. Hence *Hunt* v. *Hunt* discussing the question of extinguishment is no precedent for *Johnson* v. *Leonards*.

We think it will appear as we proceed that this case is also in direct conflict with the legal maxim, in case of mortgages, that the security follows the debt. We are therefore convinced that the true rule of law based upon both reason and authority is declared in *Lunt* v. *Lunt* and *Hussey* v. *Fisher*. *Lunt* v. *Lunt* strikes the

key to the situation in the declaration: "The interest of a mortgagee before entry is not real estate but a personal chattel," and that "the interest in the land is inseparable from the debt and cannot be detached from it." Along this same line we find it said in *Wilkins* v. *French*, 20 Maine, 111: "A mortgagor in possession is considered as the owner against all but the mortgagee; and may well sell and convey the fee; the mortgage being considered as only the security for the debt. He has the same rights that he ever had except as against the mortgagee. To the same effect are the early Massachusetts cases.

Ellison v. *Daniels*, 11 N. H. 274, cited in *Lunt* v. *Lunt*, is also an exhaustive opinion and a leading case upon the relation of mortgagor and mortgagee and their grantees, and fully sustains the doctrine enunciated in the cases referred to. In this case the facts show that the plaintiff in 1814 was seized of the demanded premises in fee and conveyed them in mortgage to Joseph Ellison to secure the payment of his promissory note. Joseph Ellison, the mortgagee, in 1820 executed a warranty deed of the premises to Abraham Ellison and Abraham Ellison on March 6, 1826, executed a similar deed of the premises to the defendant. The evidence does not show that the mortgagee or his assignee was in possession at the time the deeds were given, nor a transfer of the note by Joseph Ellison. This action was brought by the plaintiff, the original mortgagor, to recover possession of a tract of land conveyed by him in mortgage to Joseph Ellison while the mortgage still continued outstanding and in full force. The questions raised as stated by the court are: (1) Can the demandant, who is the mortgagor of the premises sought to be recovered, maintain the action where the mortgage remains in force against even a stranger to the title in possession? (2) Is the tenant a stranger to the mortgage title, or is he assignee thereof? This raises the precise question in issue in the case at bar.

In deciding these questions in favor of the plaintiff the court in defining the office of a mortgage adopted the language of Lord Mansfield in *King* v. *St. Michaelis*, Doug. 630: "A mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security" and "that it is an affront to common sense to say

the mortgagor is not the real owner." Upon these general principles of law touching the effect of a mortgage, the court proceed to discuss the nature, character, and extent of the interest of Ellison, the mortgagee, in virtue of his mortgage, as follows: "At law, by the mortgage, a conditional estate in fee simple vests in the mortgagee. And a real action may be maintained by the mortgagee, to recover possession of the mortgaged premises. And in *Southerin* v. *Mendum*, 5 N. H. 420, it is said, that a *mortgage*, in fee passes to the mortgagee, as between him and the mortgagor, all the estate in the land; and he may maintain trespass, or writ of entry, against any one who may disturb his possession, even against the mortgagor himself. And so far as it may be necessary, to enable the mortgagee to prevent waste, and to keep the land from being in any way diminished in value, or to receive the rents and profits, and in short to give him the full benefit of the security, and appropriate remedies for any violation of his rights, he is undoubtedly to be treated as the owner of the land." *Southerin* v. *Mendum* and auth. there cited. *Class* v. *Ellison*, 9 N. H. 69. In all other respects, and for all other purposes, the interest of the mortgagee is treated as a mere personal chattel." And Kent, Chief Justice, in *Jackson* v. *Willard*, 4 Johns: 42, (N. Y.) is quoted to the effect that "until foreclosure, or at least until possession, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. . . . It would be absurd in principle, and oppressive in practice, for the debt and the mortgage to be separated and placed in separate and independent hands." Having referred to these cases, the interest of the mortgagee is then thus defined: "The right of the mortgagee to have his interest treated as real estate, extends to, and ceases at the point, where it ceases to be necessary to enable him to protect and to avail himself of his just rights, intended to be secured to him by the mortgage. To enable the mortgagee to sell and convey his estate, is not one of the purposes for which his interest is to be treated as real estate. . .

The object of the mortgage is the security of the debt; and it is obvious reason, that he only who controls the debt should control the mortgage interest."

Aymer v. *Bill et als.*, 5 Johns. Ch. N. Y. 570, is then referred to with approval, and is a case in which it appears "that the debt was transferred by Crane after the execution of the deed of Bill and Crane to Aymer; yet it was determined in that case that the interest of Crane, the mortgagee, did not pass by his deed to Aymer, but passed to his subsequent assignee of the debt. It was said, in that case, that such a mortgage interest cannot be conveyed as a still subsisting interest, by way of mortgage, 'because that would separate the debt and the pledge; the latter to reside in one person, while the other resided in another.'" This case proceeds upon the theory and distinctly states that the mortgage did not appear to "have been foreclosed or possession taken by Crane under it." The facts in this case are substantially identical with those in *Johnson* v. *Leonards*. From these cases it would appear that "for the purpose of sale, absolute or conditional, the mortgagee is not to be considered as the owner of the land mortgaged, without either foreclosure of the mortgage or entry under it."

Now there are certain circumstances, as already revealed, under which the mortgagee can convey the estate described in the mortgage. If the note secured by a mortgage accompanies the delivery of the deed, there can be no doubt that it transfers the title of the mortgagee in the premises mortgaged. But if the note is not transferred, or is transferred to a person other than the grantee in the deed, the deed conveys no legal title, as against the owner of the debt.

And this raises the question whether a deed which does not mention a transfer of the note is presumptive evidence of such transfer. In *Bell* v. *Morse*, 6 N. H. 205, this question is considered as follows: "And we are of opinion, that it is not enough to show a deed from a mortgagee, in order to prove that the land passed, but it must be made to appear that the debt passed to the grantee:—at least it must appear that the mortgagee had a right to transfer the debt to the grantee. As no account is given

of the debt secured by the mortgage in this case, we think that the tenant is not entitled to hold the land against the demandant." It is therefore evident that a mere deed without any evidence relating to the control of the debt may convey no interest in the land.

From an analysis of these cases it follows that *Johnson* v. *Leonards* is not only in conflict with *Lunt* v. *Lunt* but all the cases cited, and denies the application of the principle that determines the very essence of a mortgage, namely, that the security follows the debt, as the opinion holds in specific terms that the deed operated as an extinguishment of the mortgage "without a transfer of the debt and without possession of the mortgagee." The oversight in this case was the failure to take note of the fact that while the debt secured by the mortgage was outstanding or in the hands of a third party, no legal title to the security could be conveyed by the mortgagee, against such party or in defeasance of the debt.

This rule is fully confirmed by *Jordon* v. *Cheney*, 74 Maine, 359, which in its reasoning seems to be conclusive of the correctness of *Lunt* v. *Lunt* and equally conclusive of the error of *Johnson* v. *Leonards*. The syllabus fairly states the case as follows: "One who takes a mortgagee's title holds it in trust for the owner of the debt to secure which the mortgage was given.

If a mortgage is given to secure negotiable promissory notes and the notes are transferred, the mortgagee and all claiming under him will hold the mortgaged property in trust for the holder of the notes.

In such case it is not necessary that there should be any recorded transfer of the notes or mortgage. Nor is an assignment of mortgage necessary. Nor is a written declaration of trust necessary.

A merger takes place only when the whole title equitable as well as legal unites in the same person."

As the equitable interest follows the debt, only in the owner of the debt can the two titles merge and become a perfected title. See also *Stewart* v. *Welsh*, 84 Maine, 308, and cases cited. A careful examination of the law we think will show that when the title of the mortgagor and the mortgagee have united, that such title, whatever the form of conveyance, is construed to operate as an

extinguishment or assignment of the mortgage as the interest of the party holding the mortgagee's interest may appear. But never has it been held, so far as we are able to discover, except in *Johnson* v. *Leonards*, that a union of these titles should be regarded as an extinguishment of the mortgage when the mortgage itself and the debt secured thereby were actually assigned to another person unpaid and outstanding. On the contrary it is well established that a mortgagee cannot by any act of his own divert the security from the protection of the mortgage debt.

The very ground upon which *Hunt* v. *Hunt* proceeds, is that a conveyance by a quitclaim deed of the mortgagee should be regarded as an assignment for the express purpose of enabling such assignment to follow the debt. On page 383 it is said: "We have already stated that the mortgagee had a perfect right and legal power to assign his mortgage, if he thought fit, and to give to his assignee the same right which he held himself, that is, to receive the amount secured by the mortgage, from any person entitled by contract or by operation of law, to redeem, and to hold the legal estate in security of the debt, till it should be so paid." The last clause states the climax of this whole opinion, namely: "To hold the legal estate in security of the debt." Chief Justice Shaw simply pursued a different course in arriving at the same result declared in *Jordon* v. *Cheney*, supra.

So far as the present opinion is inconsistent with *Johnson* v. *Leonards* the latter must be regarded as overruled.

If we now apply the doctrine of these well settled rules of law to the alleged transfer of title by Twombley, it is then discovered that the evidence necessary to prove such transfer is entirely wanting. Twombley, notwithstanding his attempted foreclosure, held only the title of the mortgagee. There is no evidence that he was in possession or that he transferred, or even had control of the debt; and the deed by which he undertook to convey, shows that it was his intention to convey the premises themselves, and not an assignment of the mortgage. This intention was undoubtedly based upon the fact that Twombley supposed, and had a reasonable right to suppose, that he was the owner in fee inasmuch as the last

publication of the foreclosure proceedings was in February, 1842, and the quitclaim deed by which Twombley undertook to convey was dated in June, 1848, more than five years after the expiration of the equity of redemption if the foreclosure had been legal. It is therefore evident that Twombley conveyed no legal title by his quitclaim deed, there being no evidence to show that he had foreclosed, was in possession, had transferred or was in control of the debt, or intended to convey a mortgagee's interest.

The title to another portion of the locus begins in a deed from Daniel Adams et als., dated in 1833, to Oliver Pierce et als., and a mortgage back to the grantors, through whom the plaintiffs claim by virtue of the mortgage and foreclosure. An attempt was made by the mortgagees to foreclose this mortgage by publication. The certificate of foreclosure recorded is as follows: "This certifies that the above notice has been published in the Chronicle three weeks successively as follows:" This certificate is fatally defective for the reasons already stated. This notice was dated March 12, 1847. On April 1, 1848, the mortgagees by attorney assigned the mortgage, with the benefit of the foreclosure proceedings, and the note thereby secured, to the Coburns.

The plaintiffs contend that, even if the foreclosure proceedings were invalid, the assignment in this case was sufficient to convey the fee in the premises to the Coburns as assignees of the mortgage. This mortgage was originally given to Joseph Clark and Daniel Adams, both of Medford, Massachusetts, and Charles L. Eustice of Dixfield, Maine. The notice of foreclosure, signed by Daniel Adams and Joseph Hartshorn, avers that Hartshorn obtained his interest in the mortgage through an assignment by Clark, dated in 1839, and also "as legally entitled to said Clark's interest in said mortgages, if said assignment had not been made as aforesaid, as the sole executor and residuary legatee in the will of said Clark, who has since deceased." It also appears that Eustice, one of the mortgagees, was not a party named in the Power of Attorney and therefore did not authorize the attorney to convey, nor did he sign the assignment; the Eustice interest was, consequently, not conveyed. No evidence is presented of any assignment of Clark to Hartshorn.

There is no record of such assignment in this State. Nor was any administration taken out on Clark's estate in the State of Maine. Joseph Hartshorn, appointed executor in Massachusetts, as already appears in *Brown* v. *Smith*, supra, acquired no authority to foreclose or assign a mortgage upon lands in the State of Maine. His assignment, therefore, conveyed no interest in the premises described in the mortgage.

But the Adams' interest was legally assigned to the Coburns, who, having the benefit of the foreclosure proceedings already instituted, undoubtedly regarded the legal title as fully vested in themselves inasmuch as the foreclosure was begun in 1847, and their deed upon which the plaintiffs rely was dated in 1872, 15 years later.

For the reasons already given the Coburns' deed conveyed no legal title.

Our conclusion is, whatever the equitable status of the title, the plaintiffs and their predecessors received no legal record title through the conveyances of Robb or Twombley to the Coburns, or from the Coburns of the estate purporting to be assigned to them by Adams, Hartshorn and Eustice. Upon this view a consideration of the subsequent titles becomes immaterial.

Judgment for the defendant.

JOHN H. BRESNAHAN, Collector of Taxes,

vs.

THE SHERWIN-BURRILL SOAP COMPANY.

Hancock. Opinion March 11, 1911.

Taxation. Enforcement of Lien. Proof. Pleading. Amendment. Towns. Meetings. Warrant. Officer's Return. General Issue. Revised Statutes, chapter 4, section 10; chapter 9, section 3; chapter 10, sections 28, 29.

A collector of taxes, suing under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3, must show that the tax was legally assessed, legally committed for collection, and that defendant owned or was in possession of the property described in the writ.

In a suit under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3, proof that the tax was legally assessed was eliminated by an admission that the warrant was in proper form, bond filed, and the tax sued for included in the commitment to the collector.

The defense of non-ownership and non-possession was not open, in a suit under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3.

A constable's return upon warrants for ward meetings is fatally defective, and cannot be made the basis of a legal town or city meeting, where it fails to state that they were posted in public and conspicuous places.

A return purporting to describe the manner in which a warrant for a town or city meeting was posted may be amended according to the facts.

On report, in a suit under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3, to avoid annulling a just tax on account of failure of a constable's return on warrants for the ward meetings at which were elected the aldermen who elected assessors and a tax collector, to show that the warrants were posted in public and conspicuous places, the case will be remanded for an amendment of the return according to the truth, as authorized by section 10 of chapter 4.

Incapacity of a tax collector to sue to enforce a tax lien, on the ground that the vacancy to which he was elected did not legally exist, must be raised by plea in abatement, and cannot, under the general issue, be raised upon the question of proof.

Plea of the general issue, in a suit by a tax collector to enforce a lien, admits his capacity to sue.

On report. Report discharged and case remanded.

Action of debt brought by the plaintiff as collector of taxes, under the provisions of Revised Statutes, chapter 10, section 28, against the defendant to enforce the lien for taxes prescribed by Revised Statutes, chapter 9, section 3, upon the property described in the writ. 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.

R. E. Mason, and F. L. Mason, for plaintiff.

F. C. Burrill, and D. E. Hurley, for defendant.

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

SPEAR, J. This is an action brought by the plaintiff, collector of taxes, under R. S., chap. 10, sec. 28, against the defendant to enforce the lien for taxes prescribed by R. S., chap. 9, sec. 3, upon the property described in the writ. To sustain this form of action it is incumbent upon the plaintiff to establish the following propositions: (1) That the tax was legally assessed. (2) That it was legally committed to an officer for collection. (3) That the defendant was the owner or person in possession of the property described in the writ. Proof of the second proposition is eliminated by the admission that the warrant was in proper form, bond filed, and the tax sued for included in the commitment to the collector. Proof of the third proposition sufficiently appears from the record. Besides this defense of non-ownership and non-possession upon the facts is not open. *Bath* v. *Whitmore*, 79 Maine, 182.

The question upon the legality of the assessment, is raised upon the contention of the defendant that the city records show a de facto and not a de jure board of aldermen who undertook to elect assessors and a tax collector for the city of Ellsworth for the years 1903 and 1904. The only irregularity complained of in the election of the board of aldermen is that the constable in his return upon the warrants for the ward meetings failed to state that they were posted in public and conspicuous places. It requires no citation to show that such a return is fatally defective and cannot be

made the basis of a legal town or city meeting. The constable who posted the warrants and made the return is admitted to have been legally elected and qualified for the years 1903, 1904 and 1910. The plaintiff, conceding the illegality of the meetings, upon the face of the returns, nevertheless contended that the warrants were in fact posted in public and conspicuous places, and that the return, although defective, could be amended by the officer who made it, by stating the omitted facts. That a return, purporting to describe the manner in which a warrant for a town or city meeting was posted, may be amended according to the facts, is well established. But the manner in which the plaintiff undertook to have the return in question amended raises a doubt as to the propriety of the method adopted. He permitted the officer of his own volition without the permission of the court and without any other formality to amend the return in accordance with what the officer claimed to be the fact. But it is not now necessary to pass upon the validity of the officer's act in amending his return, inasmuch as R. S., chap. 4, sec. 10, specifically prescribes the manner in which such amendment may be made, namely: "When omissions or errors exist in the records or tax lists of a town or school district, or in returns of warrants for meetings thereof, they shall be amended, on oath, according to the facts, while in or after he ceases to be in office, by the officer whose duty it was to make them correctly." See also R. S., ch. 10, sec. 29. Since a perfectly regular and legal way for the amendment is prescribed; and since a just tax should not be evaded by an omission in the officer's return, if the omission can be supplied in accordance with the truth; and as it is not intimated or claimed that the warrants in question were not posted in public and conspicuous places; we deem it proper, if no other defects appear, to order the report discharged and the case remanded to nisi for an amendment of the officer's return in accordance with the truth and the above provisions of the statute.

The other aspects of the case will be discussed upon the assumption of an amended return, legal meetings, and the consequent election of a de jure board of aldermen. Upon this assumption no legal objection can be raised to the election of the assessors who assessed

the tax in question, or of the collector, O. W. Tripp, to whom the tax was first committed for collection. The defendant, however, does not place his objection to the maintenance of the action upon the illegality of Tripp's election, but upon the contention that there was no vacancy in the office of collector to which Bresnahan could be elected. Assuming that Tripp was collector de jure it appears from the case that after he had qualified and entered upon the discharge of his duties, on the 17th day of April, 1905, before having completed the collection of the taxes committed to him, among which was included the present tax, he sent to the board of aldermen a written resignation, "owing to the urgency of business," of the office of collector, which was at once accepted. At the same meeting Bresnahan, the present plaintiff, was elected to the office of collector to complete the collections for the year 1904. It is admitted that Bresnahan, if otherwise competent, was duly qualified for the discharge of the duties of the office. The defendant raises no question as to the formalities observed in regard to the resignation of Tripp or the election of Bresnahan, but contends that Tripp, after qualifying and entering upon the discharge of his duties as collector, could not under the statute resign the office, for the reasons given, that the board of aldermen was without authority either to accept his resignation or to elect a new collector in his place. If, for the sake of argument, this is admitted, then upon the assumption of an amended return, which will show the election of the assessors and the assessment and commitment of the tax, to have been legal, the question is not now open to the defendant. The tax was a valid claim upon the property and against the owner of the property upon which it was assessed. It was in a condition to be enforced by the proper form of action. The present action is in proper form and purports to have been brought by the official authorized by law to institute the suit. Inasmuch as a collector is merely an administrative officer, in the scheme of taxation, his duties having no connection whatever with the valuation of the property, or the legality of the assessment and commitment of the taxes, we think that his capacity to sue must be attacked by a plea in abatement and cannot under the plea be raised upon the question of

proof. The plea being the general issue, we can see no reason why the procedure in the case should not be controlled by the rule laid down in *Elm City Club* v. *Howes*, 92 Maine, 211, which was a suit brought by certain persons purporting to be trustees. The objection was raised that they were not trustees in fact. The court held, as is stated in the head note: "The objection that the trustees named are not trustees in fact should be raised by a plea in abatement. The plea of the general issue admits the capacity of the plaintiffs." *Delcourt* v. *Whitehouse*, 92 Maine, 254, is a case in which an infant brought suit in his own name. The court held that this incapacity could be taken advantage of only by plea in abatement. See also *Clark* v. *Pishon*, 31 Maine, 503; *Brown* v. *Nourse*, 55 Maine, 230; *Stewart* v. *Smith*, 98 Maine, 104. No reason appears why the defendant's plea should not be held to admit the capacity of Bresnahan to prosecute the suit in question.

We can discover no possible harm that can result to the defendant in such a course. By such procedure the tax is neither increased nor diminished; the costs are neither more nor less; the defendant is in no way prejudiced; every detail of the procedure would be precisely the same and the judgment in favor of the plaintiff for the tax would be res adjudicata upon the city. *Oldtown* v. *Blake*, 74 Maine, 280. The rule laid down in *Kellar* v. *Savage*, 17 Maine, 444, seems to be pertinent in support of the capacity of the plaintiff to maintain the action in the present case. The court say: "It is objected, that the plaintiff cannot maintain the action, because he was not legally chosen treasurer. A liberal and favorable construction has prevailed to support the proceedings of towns, and this may well be the rule, when no one is injured by it, or deprived of any right; and when the object is only to require one to perform a service, which he has voluntarily assumed."

Not only is there no apparent reason why the capacity of the plaintiff to sue should not be admitted by the plea, but we are unable to discover any requirement of the statute with reference to the appointment or duty of a collector of taxes that should relieve this case from the application of the ordinary rules of pleading. Section 28, referring to an action to enforce a lien on real estate.

says: "Any officer to whom a tax has been committed for collection" (with an exception which is not material to this case and with the requirements of certain acts to be done by the officer preliminary to the right of action) "may bring an action of debt for the collection of said tax in his own name, etc." Then upon the assumption that an action has been commenced and is ready for trial the statute further provides: "If it shall appear upon trial of said action that such tax was legally assessed on said real estate, and is unpaid, that there is an existing lien on said real estate for the payment of such tax, judgment shall be rendered for such tax, interest and costs of suit against the defendant and against the real estate attached, etc." The language of the statute omits to require any statutory qualification of the officer to whom the tax is committed to enable him to maintain suit. It rather assumes that the substantial function of the statute is the legal commitment of a legally assessed tax to the officer for collection, and not whether the officer, who is merely an agent to bring suit, is in all respects technically qualified. In fact the collector of taxes, when he brings suit for the recovery of a tax, is but a nominal plaintiff. He has no interest whatever in the result of the suit, distinct from that of any other citizen. Inasmuch as he has all the facts at hand, he may be more appropriately designated as a plaintiff than any other person. But as a matter of legislative power we can discern no reason why any citizen of the municipality may not be authorized to act as a plaintiff in bringing a suit for the benefit of the town. It therefore becomes immaterial to the defendant whether the plaintiff is technically qualified or not. It cannot affect his rights in the least. The statute then does not relieve the defendant from the duty of contesting the capacity of the plaintiff to sue by plea in abatement.

Nor do we find any opinion relating to the collection of taxes and the duty of collectors, which in any way contravenes this doctrine; but on the other hand the decisions are unanimous in support of it. The courts have always made a sharp distinction between the pleadings and proof required to sustain actions which are intended to work a forfeiture and those which are calculated to secure the

collection of the tax only. Upon this point our court in *Rockland* v. *Ulmer*, 84 Maine, 503, make the distinction in the following language: "Much greater particularity and precision are always required when a forfeiture is sought to be enforced, than when the simple recovery is asked for. The grouping of these three lots of land in one appraisal may, perhaps, prevent a tax lien attaching to either; but it does not increase the valuation nor the burden of the tax payer. The amount of the tax is not affected. The defendant's share of the public burden is the same. The judgment against him in a suit for recovery will be neither more nor less." See also *Charleston* v. *Lawry*, 89 Maine, 582. *Oldtown* v. *Blake*, 74 Maine, 280, discusses the powers of a de facto collector and say: "But if he is acting under his warrant, with no other defect in his authority than that, he is at least an officer de facto, having certain powers. Payment to him would discharge the tax. The fact that the collector to whom the tax had once been paid was not sworn, would not enable the town to collect the tax a second time." It is not necessary to the decision of this case nor do we assume to decide whether the plaintiff was a de facto or a de jure officer nor, if a de facto officer, what would be the effect of a plea in abatement upon his capacity. We do decide, however, that in the present case the plea of the general issue admitted the capacity of the plaintiff.

It is the opinion of the court that the report should be discharged and the case remanded to nisi for an amendment of the constable's return, as herein directed.

So ordered.

INHABITANTS OF GEORGETOWN *vs.* WILLIAM E. HANSCOME.

Sagadahoc. Opinion March 11, 1911.

Taxation. Lumber. Landing Place. Place of Taxation. "Occupy." Statutes. Construction. Intention. Revised Statutes, chapter 9, section 13, paragraph I.

Land abutting upon water, from which water shipments can be made, and leased for that purpose, with privileges of piling lumber, is a landing place, within Revised Statutes, chapter 9, section 13, item I, authorizing taxation of personalty employed in trade where the owner occupies a landing place.

Under Revised Statutes, chapter 9, section 13, item I, providing that personalty employed in trade shall be taxed in the town where it is employed April 1st, if the owner occupies a landing place, etc., employment of lumber in trade and the owner's occupation of a landing place in the town are the distinct facts to be found to make lumber taxable, and in such circumstances lumber located somewhere in a town is taxable, though it be not moved to the landing place until after April 1st.

"Occupy," within Revised Statutes, chapter 9, section 13, item I, providing that personalty employed in trade shall be taxed in the town where it is employed April 1st, if the owner occupies a landing place, etc., means having control in whole or in part, having a special right to use.

In construing a statute, the policy and intent of the legislature is to be ascertained from the whole act, a thing within the letter not being within the statute, if contrary to intention, and manifest intent controls words.

In construing a statute, its history and manifest purpose can be considered.

Words of a statute are to be construed with reference to the subject-matter.

On report. Judgment for plaintiffs.

Action of debt for the collection of a non-resident tax upon certain lumber. 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.

George E. Hughes, for plaintiffs.

F. O. Purington, for defendant.

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

SPEAR, J. This is an action of debt for the collection of a non-resident tax upon certain lumber, and is based upon the allegation that the defendant in 1909 was occupying a landing place in the plaintiff town for the purpose of using the "lumber in trade and selling the same in open market." In the evidence it was stipulated that all the preliminary facts necessary to authorize the institution of the action, had been established. In contemplation of R. S., chap. 9, sec. 13, item I, two questions are raised. (1) Was the lumber taxed employed in trade. (2) Did the owner occupy a landing place. Item I provides: "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment." The evidence affords ample proof of the conclusion that the wharf and premises leased to the defendant by written lease on February 21, 1909, constituted a landing place in the purview of the statute. The lease conveyed to the defendant for the term of one year, for the privilege of piling lumber on and loading the same on vessels, certain tracts of land described by metes and bounds and containing wharf privileges. These premises were situated immediately upon the water from which water shipments could be made, and this was the avowed purpose of the lease.

The undisputed evidence, however, proves that none of the lumber upon which the tax in suit was imposed was actually upon the landing place on the first day of April, 1909. The landing place was not used either for the purpose of selling or piling lumber until October, five months after it was taxable. The question is therefore raised whether under the statutes personal property to be employed in trade for the purposes of taxation must be actually situated upon the landing place on the first day of April, or whether it may be situated in any part of the town in contemplation of being later

conveyed to the landing place for sale or shipment. In other words, in order to become the subject of taxation, was it necessary for the lumber in this case to have actually occupied the landing place on the first day of April, or could it have been situated upon a sticking ground more than half a mile distant, as the evidence shows it was. The language of the statute does not require that, to be made taxable, lumber should occupy the landing place on the first day of April. In its application to this case the phraseology of the statute to make the lumber taxable requires the finding of but two distinct facts: first, that it was employed in trade and language of *Gower* v. *Jonesboro*, 83 Maine, 143, was employed in "any sort of dealings by way of sale or exchange; in commerce; in traffic;" and second, that the owner of the lumber occupied a landing place in the town. "Occupy," as used in this statute, must be construed to mean having the control of in whole or in part; having a special right to use. It is, therefore, quite plain that a literal interpretation of the language of the statute, with respect to whether the lumber was employed in trade and whether the defendant occupied a landing place, brings the case within the statute.

But statutes cannot always be construed with reference to the literal meaning of the language employed. Let us therefore endeavor to discover the purpose of the legislature in enacting this statute, and see if they intended that it should apply to a state of facts presented by the case at bar. The rule of construction, that the policy and intent of the legislature is to be ascertained; that a thing within the letter is not within the statute if contrary to intention; that the history and manifest purpose may be resorted to; that words are to be construed with reference to the subject matter; that the meaning of the statute is to be ascertained and declared even though it seems to conflict with the words; that the intent must be gathered from all parts of the statute; is so well established that citation in unnecessary. The undoubted purpose of the statute under consideration was the adoption of a scheme that would prevent personal property, located in towns other than the residence of the owner, from escaping taxation. The theory of the statute is based

upon the reasonable ground that the municipal officers of the town, where the personal property is located on the first day of April, are more apt to discover it than the municipal officers in the resident town of the owner, which may be many miles away. As was said in *Gower* v. *Jonesboro*, supra, "This statute is to be construed liberally in order to effectuate the object to be accomplished by its provisions; instead of placing such a construction upon it as would leave it in the power of the owner of such property successfully to evade taxation for it anywhere." In view of the purpose and intent of the legislature in enacting this statute, we are unable to discover any reason why "landing place," within the meaning of the statute, should not be classed in the same catagory as "store," "shop" and "mill." But it has been decided that personal property although situated on the first day of April along a river in several different towns, if intended for manufacture and sale at a mill situated in another town, is subject to taxation in the latter town. *Ellsworth* v. *Brown*, 53 Maine, 519; *Farmingdale* v. *Berlin Mills Co.*, 93 Maine, 333.

Our conclusion is that the personal property in this case, although not actually occupying the landing place on the first day of April, when it became taxable somewhere, was embraced within the intent and purpose of the statute calculated to cover this class of property.

It is contended by the defendant, however, that the facts in this case are so nearly identical with those in *McCann et al.* v. *Minot*, 107 Maine, 393, 78 Atl. Rep. 465, that the plaintiff is concluded by the decision of that case. But a careful analysis shows that the facts in the two cases are entirely dissimilar. In the Minot case the defendant had stuck up his sawed lumber in a field, and had performed no other act whatever in regard to it. Upon this single fact the court say: "A field, where lumber is 'stuck up' for seasoning there to remain until sold, then to be hauled to the railroad for transportation, is not a landing place within the meaning of the statute." In the case at bar in addition to a field where the defendant's lumber was "stuck up," he had leased a landing place and wharf for the express purpose of selling and shipping his lumber. Nor does the

case at bar fall strictly within the facts embraced in *Gowen* v. *Jonesboro*, supra. In that case it was admitted that the personal property was upon the landing place on April 1st.

Upon a casual observation the Minot case and the Jonesboro case appear to be similar in facts, although resulting in opposite opinions by the court. But an accurate investigation will disclose that in the Jonesboro case the occupation and use of a "landing at the shore" to which the lumber was hauled was admitted, while in the Minot case the very question to be determined was whether a "landing place" was proven; whether the field where the lumber was necessarily stuck up to dry was a "landing place." The court held as a matter of fact that it was not. In the latter case, at the place of shipment upon the cars, the defendant had no occupancy or control of the shipping facilities beyond that of any other patron of the railroad. He therefore had no distinct landing place, apart from the field, half a mile distant from the railroad, which, by the very necessity of his business, he was obliged to occupy. In other words, the occupancy of a sufficient area for the sticking of manufactured lumber is a necessity, has no tendency, per se, to prove a landing place, and may or may not be held to constitute a landing place, depending upon the facts and circumstances involved in the particular case under consideration. Each case must stand upon its own facts. It is, therefore, highly improbable, in this class of cases, that one decision can be regarded as a complete precedent for another.

Judgment for the plaintiffs.

STATE OF MAINE *vs.* HENRY STICKNEY.

Kennebec. Opinion March, 1911.

Criminal Law. Motion in Arrest of Judgment. Sentence.

1. A motion in arrest of judgment made after sentence, cannot be considered.
2. The judgment on a conviction is the sentence.
3. A motion in arrest of judgment is not a proper remedy to correct errors in a sentence.

On exceptions by defendant. Overruled.

The defendant was arrested and arraigned on a warrant issued by Municipal Court of the City of Augusta, charging a single sale of intoxicating liquors and further alleging that "said Stickney has been previously convicted of a single sale of intoxicating liquors in the Municipal Court of Augusta on the 7th day of January A. D. 1909." Upon conviction in the Municipal Court, he appealed to the Superior Court in the same county, where after trial before a jury he was found guilty and sentenced. After sentence, he filed a motion in arrest of judgment. The motion was overruled and the defendant excepted.

The case is stated in the opinion.

Fred Emery Beane, County Attorney, for the State.

M. E. Sawtelle, for defendant.

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

EMERY, C. J. The respondent was tried and convicted upon a complaint for a single sale of intoxicating liquor and containing an allegation of a prior conviction of a similar offense. He does not appear to have made any objection before verdict to the sufficiency of that allegation, nor does he appear to have brought the question of its sufficiency to the attention of the court before sentence. After

sentence, however, he filed a motion in arrest of judgment upon the ground of the insufficiency of that allegation to warrant the sentence.

The motion cannot be considered. It was filed after judgment, and hence too late. The sentence is the judgment of the court in a criminal case where there is a conviction. A motion in arrest of judgment is not the remedy for the correction of errors in a sentence. *Galeo* v. *State*, 107 Maine, 474, 78 At. 867; *State* v. *Kibling*, 63 Vt. 636; *State* v. *O'Neil*, 66 Vt. 356; *Perry* v. *The People*, 14 Ill. 496; *Territory* v. *Corbett*, 3 Mont. 50; *Com.* v. *Swain*, 160 Mass. 354.

Exceptions overruled.

MARY I. LANCASTER, Trustee, *vs.* AUGUSTA WATER DISTRICT.

Kennebec. Opinion March 15, 1911.

Pleading. Joining Issue. Brief Statement. Amendment. Eminent Domain. Notice. Describing Land. Witnesses. Rule V of Supreme Judicial Court. Private and Special Laws, 1905, chapter 4, section 5. Statute, 1905, chapter 164. Revised Statutes, chapter 84, section 34; chapter 106, section 6.

Under Revised Statutes, chapter 84, section 34, authorizing pleading of the general issue, and the filing of a brief statement of special matter of defense, or a special plea, and providing that the plaintiff must join a general issue and may file a counter brief statement, where the defendant in a writ of entry filed a plea of the general issue and a brief statement and the plaintiff filed a replication, *held* it was not error to refuse to direct the defendant to join issue thereon.

Under Revised Statutes, chapter 106, section 6, entitling the defendant in a real action to plead by a brief statement under the general issue, filed within the time allowed for pleas in abatement, that he was not a tenant

of the freehold, or, if he claimed or was in possession of only a part of the premises when the action was commenced, to describe such part in a statement filed in the case and disclaim the residue, *held* it was proper, in writ of entry, to require the plaintiff to join issue upon defendant's plea of general issue and disclaimer, under a ruling that replication was unnecessary.

Under Supreme Judicial Court Rule V, *held* it was discretionary to permit the defendant, in writ of entry, at the close of the plaintiff's opening statement, to amend by substituting for its claim to the premises a claim of easement.

Owners of land condemned are not entitled to notice or hearing upon the expediency or necessity of taking, but are entitled to be heard on all proceedings subsequent to seizure.

Under Private Laws 1905, chapter 4, section 5, requiring a water district, in condemning land, to file plans of the location of property to be taken, plans so filed impart constructive notice of their subject matter to all persons interested.

Land to be condemned must be so described that the owner will not be deceived as to what land is taken.

Condemnation proceedings *held* not invalid for describing the land as owned by the actual owner's husband; she not being deceived, since he was the former owner.

In an action involving the validity of condemnation proceedings, *held* it was not error to admit on cross-examination of the plaintiff's witness testimony tending to show waiver by and estoppel of the plaintiff; allowance of testimony on collateral cross-examination being discretionary with the presiding Justice.

Under Private Laws 1905, chapter 4, section 5, payment of compensation is a prerequisite to vesting of title to land condemned by a certain water district, but it is not a condition precedent to a taking of possession.

Right to possession of land under an easement is "property" within the law of eminent domain.

On exceptions by plaintiff. Overruled.

Real action to recover possession of certain land in Winthrop. Pleadings filed as stated in the opinion. At the conclusion of the testimony, the presiding Justice ordered a verdict of the form and tenor stated in the opinion. The plaintiff excepted to several rulings made during the trial.

The case is stated in the opinion.

Benedict F. Maher, for plaintiff.

Heath & Andrews, for defendant.

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

PEABODY, J. This is a writ of entry brought by the plaintiff as trustee under the will of Edward Church Williams, deceased, against the Augusta Water District, a corporation created by act of the legislature of the State of Maine, to recover possession of a certain piece or parcel of land, situated in Winthrop in the County of Kennebec, State of Maine.

The defendant corporation filed a plea of the general issue, and a brief statement denying that it was tenant of the freehold or in possession of any portion of the premises described in the plaintiff's writ and declaration, except as to certain specific portions thereof, which it claimed to own when the action was brought, and disclaiming title to all the other parts of the demanded premises.

The case is before the Law Court on the plaintiff's exceptions to the rulings of the presiding Justice, which are, in substance:

1. To the plea of the defendant, the plaintiff filed a replication and requested the court to direct the defendant to join issue thereon. This direction the court refused to give.

2. The court ordered the plaintiff, against her objection, to join issue upon the defendant's plea of general issue and disclaimer, ruling that her replication was unnecessary.

3. At the close of the opening statement of the plaintiff's counsel to the jury, the defendant moved to amend its pleading by striking out its claim to all the premises seized, and substituting therefor a claim to an easement to the premises and the right to the possession thereof, and the court, against the objection of the plaintiff, allowed the amendment.

4. Certain descriptions of the land in question, filed in the registry of deeds for Kennebec county, under an alleged taking by the defendant by right of eminent domain, were allowed in evidence against the plaintiff's objection, that they were but evidence of an attempted compliance with an act which was unconstitutional as irrelevant, and does not give the name of the owner of the property taken.

5. Certain maps of the land in question, filed in the county commissioners' office in Kennebec county under an alleged eminent domain-taking by the defendant, were allowed against the objection of the plaintiff that they were but evidence of an attempted compliance with an act which was unconstitutional, that they were not originals and, therefore, not best evidence and contained no certificate as to the date of filing.

6. The testimony of Stephen S. Lancaster, witness for the plaintiff, recalled by the defendant, was admitted against the objection of the plaintiff, that it was irrelevant and immaterial, and that he could not be cross-examined on subjects other than those to which he testified on direct-examination.

7. At the conclusion of the testimony, the plaintiff moved that the court direct a verdict for her on the grounds set forth in exceptions numbered four and five in the bill of exceptions, and that there being no evidence of payment of compensation for the land taken, the right of possession, if any, which the defendant acquired by the filing of the maps had lapsed; also that payment of compensation to the plaintiff for the land in question was a prerequisite to the vesting of title to the lands in the defendant, which motion was denied.

8. But, on the motion of the defendant, the court directed the jury to render the following verdict: "The jury find that the defendant did disseize the plaintiff of the fee in the land described in her writ and not disclaimed by the defendant, but find that she holds the fee in said land, subject to the easement therein in favor of the defendant and the right to the actual possession thereof created by the taking by the defendant under the right of eminent domain as set forth in its brief statement of defense."

The first exception is to be determined by the provisions of R. S., chap. 84, sec. 34, relating to pleading in civil actions, and the second by the provisions of R. S., chap. 106, sec. 6, giving the defendant in a real action the right of pleading by a brief statement under the general issue, filed within the time allowed for pleas in abatement, that he is not a tenant of the freehold, or if he claimed or was in possession of only a part of the premises when the action

was commenced, to describe such part in a statement filed in the case and disclaim the residue. The defendant's pleading was within the procedure authorized by these statutes. *Potter* v. *Titcomb*, 16 Maine, 423; *Ministerial & School Fund* v. *Rowell*, 49 Maine, 330; *Chaplin* v. *Barker*, 53 Maine, 275; *Pratt* v. *Knight*, 29 Maine, 471.

The third exception is not available to the plaintiff, as the amendment to the brief statement was discretionary with the court. Rule V, Supreme Judicial Court; *Ministerial & School Fund* v. *Rowell*, supra.

The fourth and fifth exceptions involve the constitutionality of the legislative act creating the defendant a public service corporation and authorizing it to take private property for the purpose of its business, by reason of the failure to provide for notice of the proceedings for condemnation of the property under which the defendant claims an easement in the demanded premises, but only for those for determining the compensation to be paid.

The law which governs notice in eminent domain proceedings recognizes equally the right of the public and of the owner, and the requirement of personal notice to the owner in every case of the taking would be inexpedient and unreasonable. The title might be uncertain, the owners absent, numerous or unknown, and their interests in the property different. It has therefore been decided that notice by publication or by posting, is sufficient, even in respect to persons residing within the jurisdiction where the proceedings are pending. *Wilson* v. *Hathaway*, 42 Iowa, 173; *McIntire* v. *Marine*, 93 Ind. 193; but the constitutional requirement will be satisfied by giving a reasonable notice, the standard being that it must be such as to afford the persons interested an opportunity to be heard upon matters affecting their private rights. The owners, being themselves part of the public whose interests are paramount, are not entitled to notice or a hearing upon the expediency or necessity of taking the property for public use; *Moseley* v. *York Shore Water Co.*, 94 Maine, 83; *Brown* v. *Gerald*, 100 Maine, 351; *Holt* v. *Somerville*, 127 Mass. 408; *Old Colony Railroad*, 163 Mass. 356; but after the seizure they are

entitled to be heard upon all proceedings. *Kennebec Water District* v. *Waterville*, 96 Maine, 234; *Windsor* v. *Mac Veigh*, 93 U. S. 274; *Baltimore Belt R. R. Co.*, 75 Md. 94; *Tracey* v. *Corse*, 58 N. Y. 143; *Woodruff* v. *Taylor*, 20 Vt. 64; Cooley Const. Lim. 7 ed. 759. The case of *Appleton* v. *Newton*, 178 Mass. 276, upholds the constitutionality of statutes somewhat similar to those which are the foundation of the proceedings in this case, and the question of notice is there exhaustively discussed. The court, by Knowlton, J., says: "It does not follow that personal service of a paper or a formal notice of any kind is necessary. The taking of land for a public use is strictly a proceeding in rem, the res being within the jurisdiction of the State. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, that there is such a probability as reasonably can be provided for, that those at a distance also may be informed. It is for the Legislature, within proper limitations, to say what means of knowledge will be enough to put upon a landowner the duty, within a prescribed time, to take measures to obtain his compensation if he wishes to save his rights."

"We are of opinion that the Legislature might assume that persons whose lands are taken would have such knowledge on the subject of the taking that the constructive notice by filing an instrument of taking in the registry of deeds would be all that is required to enable them to protect their rights within the three years allowed them for that purpose." *Appleton* v. *Newton*, supra.

The doctrine of that case is confirmed in *Bryant* v. *Pittsfield*, 199 Mass. 530.

It is claimed by the defendant that the plaintiff had legal notice of the condemnation proceedings which vested in it the easement claimed. This depends upon whether there was a compliance with the requirements of the act creating the Augusta Water District as public service corporation in respect to notice.

The Act of 1905, chapter 4, section 5, provides: "In exercising any right of eminent domain conferred upon it by law, said district shall file in the office of the County Commissioners of Kennebec

county and record in the Registry of Deeds in said county, plans of the location of all lands or interest therein, or water rights, to be taken, with an appropriate description and names of the owners thereof."

The evidence shows that plans were actually filed in accordance with the act. This made them originals, and they became matters of record, and as such records they were constructive notice, which was sufficient notice of their subject matter to all persons interested. *Cupp* v. *Commissioners*, 19 Ohio St. 173, 182. It was compliance also with the requirements of the general law applicable to such taking. Pub. Laws 1905, chap. 164.

It is objected also to the sufficiency of these records that the land was not described with the accuracy required by law. The rule for determining this is that the description must be such that the owner is not thereby deceived as to what land is taken. *Chicago, etc., Ry. Co.* v. *Griesser et al.*, 48 Kan. 663. The particular inaccuracy claimed is that the land is described as belonging to a person who is not the owner; but it is not pretended that the plaintiff was in fact deceived as to what land was taken by erroneously giving the name of her husband, who was the former owner of the property, as owner at the time of the seizure. *Knoblauch* v. *Minneapolis*, 56 Minn. 321; *Watkins* v. *Pickering*, 92 Ind. 332; *Brock* v. *Old Colony R. R. Co.*, 146 Mass. 194; *Walpole* v. *Chemical Co.*, 192 Mass. 66; *Woodbury* v. *Marblehead Water Co.*, 145 Mass. 509.

We cannot adopt the plaintiff's view that the ruling of the Justice as presented in the sixth exception was erroneous. The testimony of her witness, recalled by the defendant, given on cross-examination was relevant as bearing upon the alleged waiver of the plaintiff and matters claim to estop her from denying the defendant's right of possession without prepayment of compensation, and from relying upon technical objections to the want of legal notice as distinguished from actual notice. The testimony tended to show that she knew of the granting of the charter, the intention of the defendant to occupy part of her land with its dam, reservoir and pipe line, that she visited the premises as the work progressed, had the com-

pany's plans explained to her, and was aware of the great expense being incurred by the Water District in erecting the structures and laying the lines of pipe over the land in question; *Reichert* v. *St. L. & S. Fr. Ry. Co.*, 51 Ark. 491; *Trenton Water Co.* v. *Chambers*, 9 N. J. Eq. 471; and the allowance of the testimony on collateral cross-examination is not exceptionable because within the discretion of the Justice. *Grant* v. *Libby*, 71 Maine, 427; 3 Wigmore on Evidence, 1883, 1890, 1898, 1899.

It is conceded that payment of compensation was a prerequisite to the vesting of title in the Augusta Water District, but it is not, as claimed in the seventh exception, a condition precedent to its taking possession of its interest in the land. Chap. 4, sec. 5, Laws of 1905; *Cushman* v. *Smith*, 34 Maine, 247; *Nichols* v. *Somerset & Kennebec R. R. Co.*, 43 Maine, 356; *Davis* v. *Russell*, 47 Maine, 443; *State* v. *Fuller*, 105 Maine, 571.

The interest which the defendant claims under its amended pleading in the land taken is an easement therein and the right to the possession thereof. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91. This is property within the purview of the law of eminent domain. 1 Lewis Em. Dom. 262 (a); Randolph Law of Em. Dom. 79.

The eighth exception brings under consideration the entire record. The evidence is not in conflict and has been fully considered in its application to the questions raised in the elaborate bill of exceptions, and in support of the facts relied upon by the defendant to estop the plaintiff from asserting her claim by writ of entry. In view of the conclusions reached on the points presented it must be held that it was not error, but was the duty of the presiding Justice to direct the verdict in the form stated in the record. *Nicholson* v. *Maine Central R. R. Co.*, 97 Maine, 43; *Same* v. *Same*, 100 Maine, 342.

Exceptions overruled.

CHARLES A. AMBACK *vs.* WEBSTER WOOLEN COMPANY.

Androscoggin. Opinion March 18, 1911.

Bills and Notes. Payment. Extension of Time. Consideration. Mutual Promises. Evidence.

An agreement by a stockholder that the time of payment of a note due him from the corporation be deferred until payment of present and future outside creditors is not void as being too indefinite as to duration of the extension.

An agreement by a stockholder that payment of a note due him from the corporation be deferred until payment of present and future outstanding creditors is supported by similar agreements by the other stockholders, who held similar notes.

In an action against a corporation by a stockholder on a note which was not payable until outside creditors of the corporation should be paid, or until the company's assets should equal its liabilities, evidence *held* to show nonfulfilment of either condition.

On motion and exceptions by defendant. Motion sustained.

Action of assumpsit on a promissory note. Plea, the general issue with a brief statement alleging certain special defenses and which sufficiently appear in the opinion. Verdict for plaintiff for $5000. The defendant filed a general motion for a new trial and also excepted to several rulings.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

John A. Morrill, for defendant.

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

KING, J. The defendant corporation was organized July 1, 1889, with a capital stock of $100,000 which was taken and paid for by four stockholders as follows: Robert Bleakie $43,000, John S. Bleakie $32,000, Charles Bigelow $20,000, and Charles A. Amback

(the plaintiff) $5000. Each of these stockholders, at the time of the organization, also loaned the corporation an additional sum equal in amount to his stock, for which the corporation gave its promissory note. Each note was dated July 1, 1889, and was the same in tenor, excepting as to the amount and name of the payee. The note given to the plaintiff was as follows:

$5,000.00 "Sabattus, Maine, July 1, 1889.

For value received, the Webster Woolen Company promise to pay to Charles A. Amback or order, in one year after date, without grace, the sum of Five Thousand Dollars, with interest thereon until fully paid at the rate of eight per cent per annum, payable semi-annually if the principal is so long unpaid. In case this note is not presented for payment when due the payment of the principal sum shall not be enforced thereafter, until thirty days shall have elapsed from the time written notice of the desire for the same has been given to said Company at its office at Sabattus, Maine, either through the mail or by personal service, or delivered in hand to its Treasurer for the time being.

WEBSTER WOOLEN COMPANY
By HENRY W. BUNTON,
Its Treasurer.

Approved,
ROBERT BLEAKIE.
JOHN S. BLEAKIE.
CHARLES BIGELOW.
Directors."

Subsequently, August 1, 1898, there was written across the face of this note the following:—

"The undersigned, owner of this note agrees that its payment shall not be made until the present and future indebtedness of the Webster Woolen Company to persons or corporations, except for notes of a similar tenor to this originally given to a stockholder, has been fully paid.

August 1st, 1898.

(Signed) CHARLES A. AMBACK."

A like agreement was written across the face of each of the other notes and signed by the payee thereof. Interest was regularly paid on the notes according to the tenor thereof to July 1, 1900. At a special meeting of the directors of the corporation held March 16, 1901, it was voted that the interest on these notes "be stopped for a period of three years, or until such time as the debt of the Company (balance to debit of the Profit & Loss account) of $40,026.16, as shown at the last stock taking, be paid from the profits of the business. The same to apply from the first of July, 1900. The consent of all the stockholders to this action having been obtained." No payment of either principal or interest was made on any of the notes thereafter.

This action is upon the $5000 note so given to the plaintiff, and the jury returned a verdict in his favor for the $5000 without interest. The case is before this court on motion and exceptions by the defendant. The defendant raised no question as to giving the note, or as to the thirty days demand before suit, but contended that the note was not payable at the time suit was brought under the agreement of August 1st, 1898, written across its face and signed by the plaintiff.

To justify the verdict it must appear that the evidence authorized the jury to find, either (1) that the plaintiff was not bound by that agreement, or (2) that, if bound by it, the condition therein limiting the time of payment of the note, had been complied with.

I. The plaintiff contended that the agreement was void because too indefinite as to the time the extension was to continue. But the presiding Justice instructed the jury otherwise, hence the verdict cannot be regarded as based on that contention, and accordingly it is not here to be considered.

Further, the plaintiff contended that there was no consideration for his agreement to postpone the time of payment of the note. As to this issue the presiding Justice said to the jury: "And in this case, to bring the question right down to the facts here, if, by a mutual arrangement between all of the parties to these various notes, it was agreed upon and promised by each of them, with the knowledge and assent of the others, so they were all doing the

same thing, and knew that they were doing the same thing for the same purpose — I say if each of them promised to extend the note which he had—postpone its payment—and Mr. Amback as a part of that arrangement entered into it and did the same, then the promise of the other parties to extend their notes would be a sufficient and lawful consideration for his promise to extend his note. And if these were the facts, as claimed by the defendant, then his promise to extend the note would, so far as consideration is concerned, be valid and binding and would prevent him from maintaining any suit upon the note until the conditions arose which this promise contemplates in regard to the payment of the debts." The plaintiff has no cause to complain of the instructions given as to the question of consideration for the agreement of Aug. 1st, 1898, for they were sufficiently favorable to him, and are sustained by the authorities, *Haskell* v. *Oak*, 75 Maine, 519.

After a careful examination of all the evidence the court is constrained to the opinion that the jury would not have been justified in finding that there was not a mutual arrangement between the plaintiff and the other holders of these capital notes to postpone the time of their payment until the other debts of the corporation were paid or provided for, or that when the plaintiff signed the agreement to that effect written across the face of his note he did not do it understanding that he was doing what had been mutually agreed to be done, and because the others had agreed to the same thing. On the other hand we think the evidence leaves no doubt that there was such a mutual arrangement between the holders of the capital notes, and that the plaintiff signed his agreement in execution of that mutual arrangement.

It clearly appears that Mr. Amback, the plaintiff, had knowledge of the financial condition and needs of the corporation on Aug. 1, 1898. He was one of its four stockholders from its organization. He was its clerk from its organization to August, 1910, and one of its directors from 1902 to 1910. He also held the office of auditor of the corporation, and he was superintendent of its business from its beginning to August, 1909. An account of stock was taken each six months down to 1905, in which the plaintiff took an active part,

and received a copy of the trial balance after each stock-taking. The affairs of the corporation were freely talked over between the plaintiff and the other stockholders. Mr. Robert Bleakie, who largely provided the working capital for the corporation, and indorsed its outside notes testified that he and Mr. Amback talked over together the affairs of the corporation thoroughly, and the plaintiff does not contend that such was not the fact.

The trial balance of June 30, 1898, shows liabilities as follows:

Capital	$100,000
Notes Corporation	100,000
Notes payable	119,000
Robert Bleakie Private Acct.	22,000
John S. Bleakie Private Acct.	24,000
Charles Bigelow Private Acct.	20,000
Charles A. Amback Private Acct.	8,001.03
Oelbermann Dommerick & Co.	21,738.75
Cooley, Turnbull & Co.	30,000
Total	$444,739.78

The assets as shown by this trial balance were $39,385.81 less than the liabilities. Mr. Charles Bleakie had indorsed the notes of the corporation, outside the capital notes. With respect to the arrangement to postpone payment of the capital notes Mr. Bleakie was asked if the matter was talked over between him and the plaintiff and he said it was; that he talked with him as to the financial condition of the company as shown by the account of stock taken in the summer of 1889.

Q. Do you remember the talk in regard to making this arrangement of all the stockholders?

A. Yes, sir.

Q. State whether or not it was by mutual arrangement of all the stockholders?

A. By mutual arrangement—every man that held stock.

Q. What was the object of it?

A. The object was that, as we all recognized and knew, that we considered the stock of the company $200,000, that there would be no doubt left of making us solid, $200,000, by having the endorsement put on there.

Q. And was that talked over with Mr. Amback?

A. Yes, sir.

Q. By you personally?

A. By both myself, and I think my brother talked to him too. He knew all about it."

After the agreement was made to postpone the payment of the capital notes Mr. Bleakie retired the outstanding notes of the company with his own funds and carried it in his private account. He also thereafter furnished needed money for the operations of the company which was carried in his private account. He said: "I have furnished it, so that the Webster Woolen Company hasn't for years had a piece of paper on the market." Mr. Charles Bigelow, a stockholder and payee in one of the capital notes for $20,000, testified that the arrangement to postpone payment of those notes was mutual between the holders thereof, and was made "to strengthen our credit in the market." He said that he personally talked with the plaintiff about the matter of the agreement to postpone payment of the notes, the substance of the talk being that it would be for the best interest of the company to do so.

Mr. Amback in his direct examination admitted that he signed the agreement written across the face of his note, and thought he signed it at Sabattus. Asked whether there was a meeting at Sabattus "about the endorsement upon these notes to that effect" he said "not as I remember." In his cross examination he said he did not remember of talking about the agreement with Mr. Robert Bleakie, or with Mr. Bigelow. He did remember that Mr. Bleakie came to Sabattus in the summer of 1898 after the trial balance of June 30, 1898, and talked with him as to the indebtedness of the company and the notes that were out. The following portion of Mr. Amback's cross examination makes it sufficiently evident we think that there was a mutual arrangement between the holders of these capital notes to postpone their payment, and that the plaintiff

entered into that arrangement and made his agreement on his note because and with the understanding that the others had made or would make a like agreement with respect to their notes. He was asked:

"Q. Now what do you recall about the circumstances of making that agreement—I mean the agreement of August 1, 1898, the one that is endorsed on that note?

A. All I remember is that we stopped the payment on the notes. I don't recollect anything about that red writing, but I know it is my signature. . . .

Q. And all your remembrance is now that you alone of those stockholders signed that agreement?

A. Well, I know the others must have signed it if I did, but I didn't see their notes.

Q. Then you knew that the other stockholders signed similar agreements?

A. I couldn't swear to it, but I supposed they would.

Q. You understood that they did, didn't you, as a matter of fact?

A. I didn't understand it so. I only knew that I signed that, but I didn't see their notes.

Q. When you signed that didn't you understand that the other stockholders did the same thing on their notes?

A. I didn't understand it, but I supposed they did.

Q. You were satisfied that they would, weren't you?

A. Sure.

Q. And you signed that at the time satisfied that the other stockholders were doing the same on their own capital notes?

A. Yes, sir.

II. Were the jury justified in the evidence in finding that the condition of the agreement postponing the payment of the note had been fulfilled? We think not. That condition was "until the present and future indebtedness of the Webster Woolen Company to persons or corporations, except for notes of a similar tenor to this originally given to a stockholder has been fully paid."

In his instructions to the jury the presiding Justice made a distinction between debts that might be regarded as temporary—incurred in carrying on the business, for material, etc., which were to be liquidated from the proceeds of the manufactured goods—and the more permanent debts of the company, which were to be carried as a somewhat continuing liability, and not to be paid from the immediate proceeds of goods sold, in which class he included the private accounts of the stockholders, and the notes and accounts payable (except the capital notes) so far as they should appear to be of the character of a standing or somewhat permanent liability of the company. And the jury were instructed that the note in suit was not payable, and the suit was premature, unless such permanent debts had been paid, or unless the company had been in funds which it ought to have applied to the payment of such debts. It is not important to determine here, perhaps, whether such is the correct construction of the language of the agreements to postpone the payment of the capital notes, or whether the more reasonable interpretation of the language used is that the capital notes were not to be payable so long as the assets of the company were less than all its liabilities, including its capital stock and capital notes, and while there was a deficiency. The latter construction, however, seems to be more consistent with what it is reasonably to be inferred the parties intended under the necessities of the situation and circumstances. But under either construction of the agreement it is evident from an examination of the evidence that the jury were not authorized to find that the condition of the agreement had been fulfilled at the time this action was brought.

The trial balance of July 31, 1898, shows $159,000 of "notes payable," outside the capital notes. There is no evidence tending to show that this indebtedness was temporary, but on the other hand the financial affairs of the company prior to that date as disclosed in the evidence, together with the fact that the existence of these outstanding notes bearing the personal indorsement of Mr. Robert Bleakie was the essential element of the necessity for the agreement to postpone payment of the capital notes, and the further fact that thereafter these "notes payable" were taken up by

Mr. Bleakie personally and carried as a debt of the company to him, shows conclusively that a part, at least, if not the whole of the "notes payable" falls within the class of permanent indebtedness which under the ruling of the presiding Justice was within the meaning of the agreement of Aug. 1, 1898. It is plain that that indebtedness (changed though it was from time to time) had not been paid, within the meaning of the agreement, at the time this suit was brought. As above indicated, Mr. Bleakie took up the outstanding notes personally and carried the amount as a debt of the company in his private account, together with such additional sums as he advanced for the company. The trial balances introduced show the private account of Mr. Bleakie to have been as follows: July 31, 1898, $18,000; Dec. 31, 1900, $80,000; June 30, 1905, $180,000; June 30, 1907, $182,000; June 30, 1908, $221,000; June 30, 1909, $220,000; and June 30, 1910, $261,000. We are unable to discover any evidence that the "present and future indebtedness" of the company, so far as it was included in the outstanding "notes payable" July 31, 1898, had "been fully paid" when this suit was brought. On the other hand the conclusion is irresistible that it had not been. From an examination of the evidence a like conclusion follows in respect to the private accounts of Mr. Robert Bleakie and John S. Bleakie. That of the latter is shown by the trial balances to have been as follows: July 31, 1898, $24,000; Dec. 31, 1900, $40,801.98; June 30, 1905, $16,791.98; June 30, 1907, $12,882.15; June 30, 1908, $13,270.54; June 30, 1909, $12,882.15; and June 30, 1910, the same $12,882.15. It cannot be reasonably claimed from the evidence that these private accounts did not comprise indebtedness of the company within the meaning of the agreement of Aug. 1, 1898, or that such indebtedness had been fully paid.

If the other suggested construction of the language of the agreement to postpone payment of the capital notes is applied— that the notes were not to be payable until such time as the assets of the company should equal all its liabilities, in other words, until its deficit was made good— still the evidence shows the condition of the agreement to be unfulfilled. July 31, 1898, there was a deficit of $39,385.81;

Dec. 31, 1900 it was $46,026.16; June 30, 1905, the trial balance shows the deficit to be $13,360.43. It appears that there was no stock-taking at that time, and the trial balance shows "loss for 6 months $4,466.84." From that time there was no stock-taking until June 30, 1910, and accordingly the deficit stands the same $13,360.43, in the trial balances of June 30, 1907, June 30, 1908, and June 30, 1909. But in the trial balance of June 30, 1910, after stock-taking, the deficit appears as $49,756.34. We find no evidence in the case which authorized the jury to find that there was any time after Aug. 1, 1898, when the defendant's assets equaled all its liabilities, or when its capital— including its capital stock and capital notes—was not materially impaired.

In accordance with the foregoing conclusions it is the opinion of the court that the jury were not authorized by the evidence to find in the plaintiff's favor on either branch of the case as submitted to them, and their verdict must be set aside. This conclusion renders it unnecessary to consider the exceptions. The entry will be,

Motion sustained.
Verdict set aside.

JOHN LAMOND *vs.* THE SEA COAST CANNING COMPANY.

Washington. Opinion March 22, 1911.

Fish and Fisheries. Injury to Private Weir. Burden of Proof. Damages. Evidence.

Evidence *held* to show that defendant threw refuse into a river so near plaintiff's fish weir that the refuse was carried into the weir by the tides, preventing fish from entering, and that such result might have been foreseen by reasonably prudent men.

The owner of a fish weir, suing for pollution of the river by defendant's depositing refuse therein, has the burden to show the prospective profits thereby lost to him.

In the absence of definite proof of damage caused plaintiff by pollution of his fish weir through defendant depositing refuse in the river, he is entitled to recover only the cost of removing the refuse.

On report. Judgment for plaintiff.

Action on the case to recover damages alleged to have been caused by the unlawful act of the defendant in dumping into Passamaquoddy bay and the surrounding waters large quantities of decayed and refuse sardines packed in oil in such proximity to a fish weir lawfully maintained by the plaintiff, that the punctured cans were swept by the action of the tide into and around the plaintiff's weir and the fish thereby prevented from going into it. Plea, the general issue. At the conclusion of the evidence the case was reported to the Law Court for determination with authority to assess damages "in case judgment is in favor of the plaintiff."

The case is stated in the opinion.

R. J. McGarrigle, and L. D. Lamond, for plaintiff.

Curran & Curran, and Pattangall & Plumstead, for defendant.

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

WHITEHOUSE, J. In this action the plaintiff seeks to recover damages alleged to have been caused by the unlawful act of the

defendant in dumping into Passamaquoddy bay and the surrounding waters large quantities of decayed and refuse sardines packed in oil in such proximity to a fish weir lawfully maintained by the plaintiff, that the punctured cans were swept by the action of the tide into and around the plaintiff's weir and the fish thereby prevented from going into it. It is alleged in the plaintiff's declaration that between the first day of June, 1906, and August 8, 1907, the date of the writ, the defendant caused a great number of such cans of putrid sardines to be thrown into St. Croix river at different times, and that whereas prior to such unlawful acts on the part of the defendant, profitable fishing was done by the plaintiff's weir, immediately thereafter the water was so polluted by the escaping contents of these cans, that the fish entered the weir, if at all, only in such small quantities that the weir could not be profitably operated until the refuse material was removed.

In support of his contentions the plaintiff introduced evidence that in June, 1906, he removed from the weir 174 cans of refuse sardines some of which were marked "Sea Coast Continental cans," with "No. 24" stamped on the cover of the can; that the Paine Factory packed cans thus marked and numbered; that this factory was sold to the Sea Coast Packing Co. which continued to pack the Continental brand stamped No. 24, and that this company sold a part of the product to the Sea Coast Canning Co. the defendant in this case, and that it required the labor of two men five weeks to remove the decayed sardines and clean out the weir so that fish would enter it.

It further appears from the plaintiff's evidence that on the 13th day of July, 1907, the defendant's steamer G. B. Otis went up the St. Croix river, and when it arrived at the point opposite the plaintiff's weir and about 300 yards distant from it, a large number of loose cans and whole cases of refuse sardines were dumped from the steamer into the river. The next morning many of these cases and cans marked "Sea Coast Continental" were found on the weir, and they had to work four or five weeks to get them all out.

The plaintiff states that during two weeks in May, 1906, prior to the discovery of the refuse sardines in June, he realized from the fish

taken from his weir the sum of $244, and in the two weeks preceding the appearance of the refuse in 1907, the weir yielded $368; but it is claimed that in 1906, no fish were taken for "five or six weeks" after the appearance of the refuse sardines, and that in 1907, the plaintiff had his first good fishing after the refuse was removed, during the first week in September when he realized $384.

It is not in controversy that in 1906-7 some cans of refuse sardines were carried by the tide into the plaintiff's weir and interfered to some extent with the fishing, but it is contended in behalf of the defendant, first, that the defendant cannot be held legally responsible for the appearance of the refuse sardines in the plaintiff's weir, and second, that if he can be deemed liable the evidence utterly fails to afford any reliable data from which the amount of the plaintiff's loss can be determined with any reasonable certainty.

With respect to the first proposition it is admitted that in the year 1906-7, the defendant dumped into the Pembroke river, five or six miles from the plaintiff's weir, between 1500 and 2000 cases containing 100 cans each of refuse sardines; but it is claimed that it could not reasonably be anticipated by any prudent man that cans thrown into the bay at that point would ever be carried into the plaintiff's weir; and the plaintiff himself says, that he does not see "how it would be possible" for cans dumped at that point to get over to his shore.

The defendant strenuously denies, however, that any refuse sardines were dumped into St. Croix river in 1906-7; and the captain and mate of the defendant's steamer G. B. Otis, specifically deny that any cases or cans of sardines were thrown from the steamer into the St. Croix river on the 13th day of July, 1907. Upon this issue there is a sharp conflict of testimony. But after a careful examination of all the evidence, including the identification of the marks upon the cans, it is the opinion of the court that the weight of evidence supports the contention of the plaintiff that large quantities of refuse sardines were thrown into St. Croix river at a point so near the plaintiff's weir that the cases and cans were carried into it by the ordinary action of the tides, and to some extent prevented the fish from entering it, and that under the circumstances

disclosed it might have been anticipated by reasonably prudent men that such would be the result.

But upon the second proposition set up by the defendant, it is earnestly contended that the plaintiff suffered no loss from the failure of the fish to enter his weir during the weeks in question, as the result of the defendant's unlawful acts for which, upon the evidence now before the court the damages can be estimated with reasonable certainty and legally awarded to the plaintiff in this action.

Upon this branch of the case a witness for the plaintiff named Gleason, who operated a weir about half a mile below the plaintiff's on the same shore testified in cross examination that "there are weeks without any oil or rotten sardines to interfere, that fish do not come there in enough quantities to fish it," that "that is true of every weir on the shore there," and that "you can't tell how much a weir would stock in July by figuring what it stocked in June." This testimony was corroborated by the reluctant admissions of the plaintiff himself and by the explicit testimony of Frederick Morrison, who was employed by the plaintiff in 1907 and appeared as a witness in his behalf. Harmon Cook, another witness for the plaintiff who owned and operated a weir about 1500 feet above the plaintiff's stated on cross examination that the plaintiff had good fishing all through the month of June, 1906; that "there are weeks when your weirs don't fish profitably; that they wont fish when there are no herring, and there are weeks when there are no herring."

The burden was upon the plaintiff to establish by evidence the prospective profits of which he claimed to have been deprived by the unlawful act of the defendant. They cannot be estimated by the court without reasonably definite and reliable evidence to justify the finding. In view of the testimony in this case showing the irregularity with which the fish enter these weirs without any apparent reason therefor, the plaintiff himself has not attempted to make any estimate of his damages. The only analogous case to which the attention of the court has been called in which the right of the plaintiff to recover for the loss of profits from his business of fishing

was brought directly in question, is that of *Wright* v. *Mulvaney*, 78 Wis. 89, (46 N. W. 1045).

In that case the plaintiff had a "pot net" or "pound" set in the river, which was injured by the defendant's steam tug. The testimony tended to show that before the injury the plaintiff derived a profit of from $40 to $50 per day every alternate day, and that it would have required about ten days to restore the injured net, had it been restored. No other testimony was introduced bearing upon the question of profits, and the jury assessed the damages for profits at $200. But the court held that such prospective profits were not recoverable upon this evidence. In the opinion it is said: "There was no testimony as to whether the conditions of successful fishing remained for ten days after the injury as favorable as they were immediately before the same,—none to show that the weather continued favorable during the ten days; that storms did not intervene to interrupt the business; that the fish continued to run over the same grounds in equal abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made their assessment of damages of plaintiff's business largely upon mere conjecture. They must have assumed without proof that a business proverbially uncertain in results depending for its success upon numerous conditions which the persons engaged therein cannot control or influence, and the presence or absence of which at a future time cannot be foretold with any degree of accuracy, would have continued after the net was injured to be just as profitable as it was before the injury. Such an assumption under such circumstances, is unwarranted in the law, and probably we should be compelled to reverse this judgment for want of sufficient evidence to support the assessment of damages for profits, even though it should be held that, under proper proofs, the plaintiff might recover prospective profits. But we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reason therefor has already been suggested, which is that under any state of testimony, in view of the character and condi-

tions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture. This feature of the case brings it within the rule of *Bierbach* v. *Goodyear Rubber Company*, 54 Wis. 208, and *Anderson* v. *Sloan*, 72 Wis. 556, and the cases cited in the opinion therein."

See also 13 Cyc. 56, 57; *Ferris* v. *Comstock*, 33 Conn. 513, and *Barton* v. *Erie R. Co.*, 73 N. J., Law 12, (62 Atl. 489).

It will be noticed that in the case at bar there was not only positive evidence from the plaintiff's own witnesses of the uncertainty and irregularity of the weir fishing on that shore but substantially the same absence of testimony described in *Wright* v. *Mulvaney*, supra, showing that the conditions for successful fishing were as favorable immediately after the injuries as they were immediately before. The principle applied in that case must accordingly be accepted as decisive of the question of prospective profits in the case at bar.

But in that case the plaintiffs were allowed by the court to retain the damages awarded them by the jury for the cost of repairing the injured net and the value of the services of the plaintiffs and their employees in resetting it. In the case at bar the plaintiff is entitled to recover as damages the fair value of his own services and that of his "hired man" in their reasonable endeavor to remove the obnoxious refuse from the weir and make the operation of it successful and profitable. It appears from the undisputed evidence introduced by the plaintiff that it required five weeks in 1906 and four weeks in 1907 for himself and his assistant to clean out the weir. But they labored only during those portions of the day when the tide was favorable, and it is the opinion of the court that a reasonable compensation for their services would be $3.00 per day in the aggregate, amounting to $90 for the year 1906, and $72 for the year 1907, and that the plaintiff is entitled to recover these sums with interest from the date of the writ.

The certificate will accordingly be,

Judgment for the plaintiff for $162, with interest from August 8, 1907.

In Equity.

J. MELVIN BARTLETT, Petitioner, *vs.* BERTRAND G. MCINTIRE.

Oxford. Opinion March 23, 1911.

Elections. Recount. Review. Australian Ballot Law. Construction. Marking Ballots. Distinguishing Marks. Misspelled Names. Incomplete Names. Mutilated Ballots. Statutes, 1891, chapter 102, sections 10, 24; 1893, chapter 267. Revised Statutes, 1883, chapter 4, sections 29, 63; 1903, chapter 6, sections 1, 24, 43, 70-74.

In a proceeding under Revised Statutes, chapter 6, sections 70-74, for an election recount, an appeal from a decision of a single Justice is triable de novo; his finding not having the same force as in appeals in equity.

The requirements of Australian ballot law, Revised Statutes, chapter 6, concerning voting should be interpreted broadly and reasonably.

Under Revised Statutes, chapter 6, section 24, requiring a ballot to be prepared by marking a cross in the appropriate margin or place, a ballot is invalidated if all the squares are vacant; if there is a cross in two or more; if a design other than a cross, as a circle, a square, an arrow, a single line, is used.

The question whether a mark on a ballot constitutes a cross within the requirements of Revised Statutes, chapter 6, section 24, is a question of fact to be determined by the tribunal having ultimate authority to count ballots.

Mathematical precision in marking a ballot is not required, and the crosses required by Revised Statutes, chapter 6, section 24, may be of any size, may be made by ink, pencil, and of any color, and a ballot is not invalidated because made by a stub of broken lead, because the lines have been inadvertently extended beyond the square, nor because of the extra lines produced in retracing the lines of a cross.

Revised Statutes, chapter 6, section 43, providing that no ballot shall be received at any election of state or town officers, unless on clean white paper, without any distinguishing marks, but that no vote shall be rejected on account of such marks after it has been received into the ballot box, applies only to the outside of official ballots and to common or open ballots, and does not apply to distinguishing marks on the inside of folded Australian ballots, which cannot be seen by the election officers.

Before a ballot should be rejected on account of a distinguishing mark, it should appear that the mark is such as to distinguish the ballot from others, and that it was made intentionally as a distinguishing mark.

What constitutes a distinguishing mark on a ballot is to be determined by the tribunal whose duty it is to count the ballots.

The rule of idem sonans must be applied to misspelled names on a ballot.

Where the check lists of a county do not contain the name of any other "B. G. McIntire" than a particular candidate, all ballots for "B. G. McIntire" should be counted, and all ballots on which are broken stickers on which appear "rtrand G. McIntire," "trand G. McIntire" should be counted; but ballots containing merely "McIntire" or "Berneed McIntire" should be rejected.

Under Revised Statutes, chapter 6, section 24, requiring a ballot to be marked by a cross, a ballot is not invalidated by the marking of a cross of irregular shape caused by clumsiness, inadvertence, failing sight, trembling, uneven surface, or other similar cause: e. g., an incomplete cross made by one straight line joined by another at right angles; a mark resembling the figure four, often used in algebra and formed at one stroke; a partial or entire double cross, evidently resulting from an attempt to retrace a cross with a third line partially or wholly crossing it, if evidently made as part of the cross; trifling marks evidently made by accident while making a cross mark; nor by a cross made and erased and another made in the same square.

Under Revised Statutes, chapter 6, section 24, requiring a ballot to be marked by cross, one marked by a star, by hieroglyphics resembling nothing, or by a check mark, or by a straight line must be rejected.

Ballots were not invalidated, as bearing distinguishing marks, by placing a cross opposite or a sticker over the name of a candidate for another office, either in the column below the crossed square or in another column; marking a cross under or on either side of the name of a candidate for an office in a column and erasing the name of a candidate for another office in the column voted and placing a cross below the name of the candidate for the same office in another column, erasing such name, writing below the name of the desired candidate, and also erasing this latter name in the other column, placing the cross against the names of one or more candidates in some column where the party square is crossed.

Ballots were *held* invalidated as bearing distinguishing marks by marking two or more distinct crosses in the same square, with no evidence of retracing, by clearly discernible crosses in more than one square, though one of them be partially erased, and by cutting out the name of a candidate for another office.

Mutilated ballots should not be counted.

A ballot is invalidated where the designation of an office is either erased or covered by a sticker; but when a sticker is so placed that enough of the designation remains to see what the office was the vote should be counted.

A ballot must be rejected where, in attempting to vote a split ticket, the voter did not follow either of the statutory methods and failed to erase or

cover the name of one candidate, thereby leaving the names of two candidates for one office.

Curran v. *Clayton*, 86 Maine, 42, and *Durgin* v. *Curran*, 106 Maine, 509, overruled in so far as in conflict with the case at bar.

In equity. On appeal by defendant. Petition sustained.

Proceedings by the plaintiff "as in equity," under the provisions of Revised Statutes, chapter 6, sections 70 to 74, to determine his right to the office of sheriff of the county of Oxford. An answer was filed by the defendant. The matter was heard by the Justice of the first instance who found and decreed that the plaintiff was entitled by law to the said office of sheriff. Thereupon the defendant appealed as provided by section 72 of said chapter.

The case is stated in the opinion.

NOTE. Section 27 of chapter 6 of the Revised Statutes, was amended by the Public Laws of 1911, chapter 72, so that said section 27 as amended now reads as follows:

"Section 27. If a voter marks more names for any one office than there are persons to be elected to such office, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall, except as herein otherwise provided, be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this chapter shall be counted. Ballots not counted shall be marked defective on the back thereof, and shall be preserved, as required by section twenty-five. No marks, other than those authorized by law, shall be placed upon the ballot by the voter, but no ballot, after having been received by the election officers, shall be rejected as defective because of marks other than those authorized by law, having been placed upon it by the voter, unless such marks are deemed to have been made with fraudulent intent, and no ballot shall be rejected as defective because of any irregularity in the form of the cross in the square at the head of the party column unless such irregularity is deemed to have been intentional and made with a fraudulent purpose."

Albert J. Stearns, and Jesse M. Libby, for plaintiff.

Kimball & Son, and McGillicuddy & Morey, for defendant.

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

CORNISH, J. At the State election held on September 12, 1910, the parties to this proceeding were opposing candidates for the office of sheriff of Oxford county, and their names were printed on the official ballot.

By the official returns to the secretary of State it appeared that the petitioner Bartlett had received 3,707 ballots and the defendant McIntire 3716 ballots. The Governor and Council therefore issued a certificate of election to Mr. McIntire, who entered upon the discharge of his official duties on January 1, 1911, and is still in office.

The petitioner afterwards filed a petition in the Supreme Judicial Court for Oxford county, asking that a single Justice make a recount as provided in R. S., ch. 6, sects. 70-74. After due notice and hearing and upon inspection of the ballots, the single Justice found that the total number of legal ballots cast for the petitioner was 3,660, for the respondent 3,657, that the petitioner had received a plurality of all the ballots cast for sheriff and was therefore entitled by law to the office claimed by him.

The case is now before the appellate Justices on the appeal of the respondent from this judgment of the single Justice.

1. *Legal Effect of Appeal.*

The first question to be decided is the effect of the findings of the single Justice upon questions of fact on appeal. Do such findings have the same force as in appeals in equity, that is, reversible only when clearly wrong, *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Jameson* v. *Emerson*, 82 Maine, 359; or does the appeal vacate the proceedings below and transfer the case, as in probate proceedings, so that the appellate Justices are to determine all questions de novo? The procedure is somewhat anomalous. It is true that section 70 of chapter 6 provides that the claimant "may proceed as in equity" by petition returnable before any Justice of the Supreme Judicial Court but it does not say that he shall bring a bill in equity, and the subsequent proceedings bear slight resemblance to those required by the equity rules. Moreover section 72

provides that an appeal from the decision of the single Justice shall set forth the reasons therefor. This is not required in an appeal in equity, but is, in probate appeals; and the appeal itself is taken, not to the Law Court as such, but to the Justices. A careful consideration of the entire statute and its object leads to the conclusion that the purpose of the Legislature in providing for an appeal, was to obtain the decision of the appellate Justices de novo upon all disputed questions both of law and fact, and the clause in the statute, providing that the claimant "may proceed as in equity" was used merely in contradistinction to proceedings on the law side of the court, with its stated terms and more rigid rules of procedure.

The sole question at issue therefore is what ballots should now be counted for Mr. Bartlett and what for Mr. McIntire. Such decision must follow a correct count made under the rules of law and the statutes of this State.

2. *Requirements of the Australian Ballot Law.*

The Australian ballot was adopted in this State by chapter 102 of the Pub. Laws of 1901, and has therefore been in use for a period of twenty years. Under this original Act the ballots were so printed as to leave a blank space at the right of the name of the party designation, and also at the right of the name of each candidate, and the voter was permitted to place a cross (×) opposite the name of the party designation, if he wished to vote for all the candidates named in the group under such designation, or to place such mark opposite the names of the individual candidates of his choice for each office to be filled, or to fill in the name of the candidate of his choice in the blank space provided therefor and place the mark opposite, in which cases he was deemed to have voted only for the individual candidates opposite whose names he had placed the mark. Pub. Laws, 1891, ch. 102, sects. 10 and 24.

This was amended by chap. 267 of the Pub. Laws of 1893, so as to require a square to be placed above each party designation and group, and a blank space to be left after the names of the candidates. The voter is thereby allowed to place the cross within the square if he wishes to vote the entire party ticket; or to erase any printed name or names and under the name or names so erased to fill in the

name or names of his choice. Or if he does not desire to vote for a person whose name is printed on the party ticket he may erase such name and the ballot shall not be counted for such person.

In 1903, a further amendment was enacted whereby the voter was permitted to place and stick on and over the name of any candidate a sticker, bearing thereon the name of the person of his choice. These three acts taken together make up the present Australian ballot law as found in Rev. St., chap. 6.

3. *Its objects.*

The objects of this law are universally recognized to be twofold, the securing of a secret ballot and the prevention of bribery and corruption at the polls. It was not intended to limit or defeat the sacred right of franchise by establishing a method so intricate or complicated as to circumvent the intention of the honest voter. That intention must of course be expressed in compliance with statutory requirements but those requirements are to be interpreted broadly and reasonably. Sec. 27 provides that "if for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for that office." If the converse of this be thereby implied, namely, that all ballots shall be counted where it is possible to determine the voter's choice, a wide latitude would be given to the canvasser. However it must be a legally expressed choice with presumptions in favor of the voter rather than against him.

The difficulty in counting ballots under the Australian system, as it exists in this State, arises for the most part not on the point whether a certain ballot is to be counted for the one candidate or for the other but whether it is to be counted at all or rejected; if it is to be counted there is usually no doubt as to the candidate for whom it should be counted.

Moreover the alleged defects to be considered naturally group themselves in two classes, those where the voter has not complied with the statutory requirement as to marking or changing his ballot, and those that bear distinguishing marks.

We will take these up in their order.

4. *Violation of Statutory Requirements.*

R. S., chap. 6, sec. 24, provides that the voter "shall prepare his ballot by marking in the appropriate margin or place, a cross (×) as follows." Then follows the direction already referred to. These words of the statute do not fit present conditions. They applied to the original statute of 1891, where directions were given for marking in the margin, both opposite the name of the party designation and opposite the names of individual candidates. But the amendment of 1893 rendered them inapplicable in part because since that amendment, marking in the margin is no longer recognized as a legal method, and the only marking now permissible, in order to legally indicate a choice, must be in the square at the head of the party group. Not that marking in the margin opposite a candidate's name necessarily invalidates a ballot, but that alone cannot validate one because it is not a compliance with the statute requirement. In other words the marking must be as the statute commands in a particular place and by a particular emblem. Therefore an entire ballot must be rejected for all candidates if there is no cross whatever in a square, or if the mark, though in a square, cannot fairly be construed to be a cross. To illustrate: A ballot with all the squares vacant must be rejected; a ballot with a cross in two or more squares must be rejected; a ballot with some other design, as a circle or a square or an arrow or one line must be rejected. The Legislature has the right to prescribe the manner of marking and the voter must follow it if he wishes his vote to be counted. This well illustrates what is meant by intention legally expressed. It might be said with much force that the intention of the voter is as apparent when he places a circle as when he places a cross in the square, but the intention is not expressed as the statute demands and therefore such a ballot would be fatally defective.

When however we come to the question of whether the marks placed in the square amount to a cross and meet the statutory requirement, a question of fact is raised which must be determined by the tribunal vested with the ultimate authority to count the ballots. Each ballot must be tested by an honest judgment upon an inspection of the ballot itself and mathematical precision in the

marking cannot be required or expected. Therefore crosses may be made of any size within the square; they may be made by ink or by a pencil mark of any color or even by the stub of a broken lead; the lines may have been extended inadvertently beyond the squares and in retracing the lines of a cross extra lines may appear. All the countless variations must be referred to the one paramount requirement of what answers to a cross in the square.

5. *Distinguishing Marks.*

The last paragraph brings us to the question of distinguishing marks, their nature and effect.

Prior to the adoption of the Australian ballot system, there were no official ballots in this State. At that time the statutes contained this provision which seemed to cover all the requirements under the old system.

"No ballot shall be received at any election of State or town officers, unless in writing or printing upon clean white paper without any distinguishing marks or figures thereon, besides the names of the persons to be voted for and the offices to be filled; but no vote shall be rejected on this account after it has been received into the ballot box." R. S., 1883, ch. 4, sec. 29. R. S., 1883, ch. 4, sec. 63, imposed a penalty upon municipal officers who wilfully received any vote prohibited by the foregoing section.

It is common knowledge that under the old system each political party had its separate ballot consisting of a single sheet on which the names were printed or written. The voter was required to present this ballot to the officers in charge of the box, in such a manner that they could see whether or not it bore any distinguishing marks. The officers were thereby made judges "of what constituted a ballot with distinguishing marks, under a severe penalty in case of an intentional and erroneous decision. The section authorized them to decide what constituted a distinguishing mark. There may have been many marks upon the ballot which may or may not have been distinguishing; the voter may have presented it in good faith and, as such, it may have been received by the town officers, which on subsequent inspection may be determined otherwise and so certified. But the same was received without objection, whereas,

had objection been made before the vote was cast another vote could easily have been substituted and most assuredly would have been, if the voter had been apprised of its illegality by the presiding officers." Opinion of Cutting, J., 54 Maine, 605.

When the Australian ballot law was passed in 1891, no change whatever was made in R. S., 1883, ch. 4, section 29, and no single act has since been passed by the Legislature in terms amending that section. But in the general revision of 1903, the words "the official endorsement" were inserted after the word "besides" by the reviser and, as thus changed, the entire section was reenacted together with all the other general statutes and became sec. 43 of chap. 6, of our present statutes. As it now stands the section reads: "no ballot shall be received at any election of State or town officers, unless in writing or printing upon clean white paper without any distinguishing marks or figures thereon, besides the official endorsement, the names of the persons to be voted for and the offices to be filled; but no vote shall be rejected on this account after it has been received into the ballot box." If the last clause could be read by itself it would seem to compel the counting of all ballots after they have been received into the ballot box whether they have certain distinguishing marks or not. On the other hand when we consider that the Australian ballot is, in fact as well as in name, a secret ballot, that the voter is required to fold it, so that neither the election officers nor any one else can see the face of the ballot, nor the marks thereon, and that a penalty is imposed upon the voter who shall "allow his ballot to be seen by any person with an apparent intention of letting it be known how he is about to vote," sec. 29, it would seem that section 43 and the Australian system are so inconsistent that they cannot stand together and that as the intent of the Legislature to provide a secret ballot was paramount, sec. 43 might be regarded as repealed by necessary implication and that its retention in the revision was not the real Legislative intent, as was said in *Durgin* v. *Curran*, 106 Maine, 509, 77 At. 689.

We do not think, however, that it is necessary to go to either of these extremes and hold either that distinguishing marks can no longer invalidate a ballot, or that section 43 has no longer

any legal force. Another interpretation, midway between these extremes, reconciles both contentions and effectuates the legislative intent.

The Australian ballot law applies only to elections for national, state, district and county officers in cities, towns and plantations and in municipal elections in cities. R. S., ch. 6, sec. 1. It has no application whatever to municipal elections in towns and plantations. Therefore sec. 29 of chap. 4 of the R. S. of 1883, continued to apply to municipal elections in all the five hundred towns and plantations of this State with the same effect after the Australian ballot law was passed as before, and it still is in full force and virtue as to them. It did not and could not, from the very nature of the case, affect the Australian ballot until the revision of 1903, when the provision was inserted whereby election officers were given the same power over the outside of the Australian ballot as over the face of the open ballot. The outside of the Australian ballot must bear the official endorsement and the statute now forbids any distinguishing marks or figures on the Australian ballot "beside the official endorsement." In other words the outside of the Australian ballot and the entire open ballot are both subject to the inspection of the election officers. If either bears what they deem to be distinguishing marks, it can and should be rejected, and the voter should be allowed to take another ballot, but once received into the ballot box it must be counted, so far as marks so placed are concerned. The inside of the secret ballot, however, is still kept secret. The election officers cannot know what marks or figures that may bear until opened and inspected after the polls are closed. And if that is found to contain distinguishing marks it certainly cannot be counted. The fact that it has been received into the ballot box cannot make it countable under section 43, and to hold that no distinguishing mark can invalidate it utterly destroys one of the prime objects of the system. *Curran* v. *Clayton*, 86 Maine, 42. If the purchasable voter can still intentionally place such identifying marks upon his ballot, that it can be recognized as his and yet it must be counted, the law is virtually dead for the spirit has left the body.

The next inquiry is, what shall be deemed such a distinguishing mark as will invalidate a ballot. This is an important question, for upon its answer depends, in many cases, the disfranchisement of a qualified and honest voter.

After a careful consideration of the subject in view of the purpose of the law and the sacredness of the right of franchise, we are of opinion that before a ballot is rejected because of an alleged distinguishing mark, we should be satisfied from an inspection of the ballot itself, which is the only evidence before us, of three things:

First, that the mark is in fact a distinguishing mark, that is a mark or device of such a character as to distinguish this ballot from others.

Second, that it was made intentionally and not accidentally.

Third, that it was intended to be a distinguishing mark. In other words we think no ballot should be rejected on the ground of bearing a distinguishing mark unless it is such a one as fairly imports, upon its face, design and a dishonest purpose.

A mark upon a ballot may be a distinguishing mark in fact, and yet be of such a character as to show that it was accidentally made, or even that it was intentionally made, but for some other purpose than a distinguishing mark, because a distinguishing mark in fact is not necessarily a distinguishing mark in law. For instance, a voter may make a cross in a party square, then erase the name of the county attorney in that party group, and place a cross opposite the name of the candidate for county attorney in another party group. Here the voter made a distinguishing mark, he did it intentionally, but he did not do it with an intention to make it a distinguishing mark, that is with a dishonest purpose. His intention is clear. He wished to vote for the candidate of another party for county attorney instead of his own. His purpose failed and his vote for that office cannot be counted because he did not follow the statutory method of voting a split ticket, but that does not invalidate his whole ballot. He should not be disfranchised as to other candidates when he has followed the statutory directions as to them.

But if a voter has placed such a mark or device or name or initials or figures upon the ballot as seem inconsistent with an honest purpose, such a ballot should be rejected.

We are aware that this is a somewhat narrower rule of exclusion and therefore a somewhat broader rule of inclusion than has been announced by this court hitherto, and in so far as the directions for marking and the rules of rejection contained in *Curran* v. *Clayton*, 86 Maine, 42, and *Durgin* v. *Curran*, 106 Maine, 509, 77 At. 689, are in conflict with this opinion, they are overruled.

What constitutes a distinguishing mark is therefore a question of fact to be determined by the tribunal whose duty it is to count the ballots, but under the broad and liberal rules herein adopted it will be found that few fall within the ban.

6. *Misspelled or Incomplete Names.*

In the case of misspelled names written in the ballot, the familiar rule of idem sonans must be applied.

In the case of incomplete names it was admitted in this case that there is not the name of any McIntire on any of the check lists in the county of Oxford whose initials are "B. G." except that of Bertrand G. McIntire the respondent, and therefore all ballots for B. G. McIntire should be counted. Also all ballots on which were broken stickers on which appear "rtrand G. McIntire," "trand G. McIntire" "rand G. McIntire" and Bertrand McIntire are counted, but ballots containing the single word "McIntire" or "Bernecd McIntire" are rejected.

The books are full of election cases that have arisen in the various States. These differ greatly, the difference being due partly to the peculiar statutes in the several States and partly to the views of the particular court construing those statutes. The case of *Hope* v. *Flentge*, 140 Mo. 390, reported in 47 L. R. A. 806, with a full and interesting note shows the wide variety of questions that have arisen in other jurisdictions together with the rulings of the various courts thereon.

We have not, however, deemed it profitable or practicable to glean from these authorities those that may sustain the conclusions we have reached, nor to distinguish those holding in some respects a contrary view. We are attempting to place a reasonable construction upon our own statute and to evolve workable rules for the conduct of our own elections.

7. With these general rules as guides we will proceed to consider the ballots in this case.

The whole number of ballots purporting to be cast for sheriff was 7,648. Of these the parties agreed that 3,403 should be counted for Bartlett and 3,320 for McIntire. They also agreed that 203 ballots, for various reasons were defective and should not be counted at all, leaving 6,723 undisputed and 722 in dispute, a total of 7,445. All of these disputed ballots have been examined singly by the appellate Justices sitting together, and they have been each counted or rejected in accordance with the rules and principles already stated which were agreed upon before the counting began.

It is of course impracticable with the limits of this opinion to call attention to each individual ballot counted or rejected. We can do no more than to refer to them in groups as they somewhat naturally arrange themselves.

(1.) Cross in the Square Counted.

Under this head are included those ballots where the cross in the square is of irregular shape, caused by clumsiness, inadvertence, accident, failing sight, old age, trembling hand, an uneven board beneath the ballot, or any other similar cause. Thus an incomplete cross made by one straight line joined by another at right angles; a mark resembling the figure 4, often used in algebra and formed at one stroke; a partial or entire double cross, the evident result of an attempt to retrace lines composing a cross; a cross with a third line partially or wholly crossing it, where the extra line is evidently made as a part of the cross; trifling marks evidently made by accident while making the cross mark; a cross made and erased, and another made in the same square; a cross made with ink, lead pencil of any color and the stub of a pencil whose lead was broken. None of these nor like departures or variations should invalidate a ballot. Even the statute itself has not been uniform in its illustration of the design, for the original act of 1891 prescribed the capital X while the mark when transferred to the Revised Statutes was changed to two single light lines, thus (×) and that without any special enactment.

(2.) Marks in Squares Rejected.

Considerable latitude in favor of the voter should be given in all these deviations from the exact cross and that this has been done is evident from the fact that out of the whole number of over seven thousand ballots cast and of the 722 in dispute we reject only nine for insufficient cross in the square. These include ballots with no mark whatever in the square, ballots marked with a star, with hieroglyphics resembling nothing, with a check mark, with a straight line.

(3.) Ballots counted though with alleged distinguishing marks.

These are illustrations: placing a cross opposite or a sticker on or over the name of some candidate for another office either in the column below the crossed square or in another column; making a cross in a square, then erasing it and making another in the same square; a cross under or on either side of the name of a candidate for any office in any column; erasing the name of a candidate for another office in the column voted and placing a cross below the name of the candidate for the same office in another column; erasing such name, writing below it the name of the desired candidate and also erasing this latter name in the other column; placing a cross against names of one or more candidates in the same column where the party square is crossed. In these and similar cases where it is clear that no legally distinguishing mark was intended and that there was an ineffectual attempt to vote a split ticket on some other candidates, the ballots have been counted.

(4.) Ballots rejected because of distinguishing marks.

Only ten ballots fall within this list, and some of these might perhaps be considered as defective because violating the law as to marking in the square. Instances of these defective ballots are: two or more separate and equally distinct crosses in the same square, with no evidence of retracing; ten crosses in one square; eleven crosses in one square; clearly discernible crosses in more than one square although there may have been a partial attempt to erase one: mutilations by cutting out the name of a candidate for another office. Mutilated ballots should not be counted.

(5.) Ballots rejected because the designation of the office was either erased or covered by a sticker.

The designation of office is an indispensable part of any ballot. There must be an office to be filled as well as a candidate to fill it, and if a sticker entirely covers the designation of office, or if the designation be erased, the ballot cannot be counted. But when a sticker is so placed that enough of the top parts of the letters of the designation remain so that the eye can see what the office was the vote should be counted.

Four ballots were rejected on this ground.

(6.) Ballots rejected because of two names for same office.

Six ballots are rejected because in attempting to vote a split ticket the voter did not follow either of the methods prescribed by the statute and failed to erase or cover the name of one candidate, thereby leaving the names of two candidates for the one office of sheriff.

(7.) Names misspelled or incomplete.

Two ballots are rejected because the rule as to misspelled or incomplete names was not complied with, one ballot bearing the name "Bernecd McIntire" and the other simply "McIntire."

This accounts for all the 31 ballots rejected.

Our conclusion therefore is, as follows:

Number of ballots rejected,		31
Number of ballots for J. Melvin Bartlett,		
Undisputed,	3403.	
Of the disputed,	307.	
Total		3710.
Number of ballots for Bertrand G. McIntire,		
Undisputed	3320	
Of the disputed,	384	
Total		3704.
Bartlett's plurality	6.	
Total ballots,		7445.

Following the stricter directions as laid down in *Curran* v. *Clayton*, and *Durgin* v. *Curran*, supra, the single Justice properly rejected as defective a much larger number of ballots than have we under the more liberal rules of this opinion. But it is interesting to note that if either rule, whether strict or liberal, is impartially adhered to, the results are approximately the same, because both candidates are likely to lose by the narrower rule or gain by the broader in practically the same proportion.

For instance the count of the 722 disputed ballots by the single Justice was this.

Bartlett,	257	
McIntire,	337	
Defective,	128	
Total,		722

The count of the appellate Justices is

Bartlett,	307 — gain 50	
McIntire,	384 — " 47	
Defective,	31	
Total		722

So that of the 97 ballots discarded under the stricter rules and counted under the more liberal, one candidate gained 50 and the other 47, and this gain of three has increased Bartlett's plurality from three as found by the single Justice to six as found by us.

It is therefore unanimously held that the petitioner having received a plurality of all the ballots cast for sheriff of Oxford county at the State election held on September 12, 1910, was duly elected sheriff of said county for the term beginning January 1, 1911, and is entitled by law to said office now claimed by him.

Petition sustained with costs.

In Equity.

GEORGE C. PEASE, Petitioner, *vs.* JOHN W. BALLOU.

Sagadahoc. Opinion March 23, 1911.

Elections. Ballots. Marking. Validity. Mutilated Ballots. Revised Statutes, chapter 6, sections 70-74.

A ballot is insufficiently marked where a cross is made and then covered by marks of erasure.

A ballot is invalidated by a mark resembling crossed paddles or a windmill, or where there is a cross in one party square and a sticker with the name of the candidate for another office placed in another party square.

Votes for a particular candidate are invalidated by an erasure of the designation of the office or a covering of it by a sticker; but, if the sticker is so placed that enough of the designation remains to disclose what the office is, the vote should be counted.

A ballot is invalidated where the voter, in attempting to vote a split ticket, leaves two names below the designation of an office.

Ballots for a particular office were invalidated, where the name of the candidate was erased and no other inserted in the party group, and where a sticker was used with the name of a candidate for another office.

A ballot mutilated by cutting out the name of a candidate cannot be counted.

Ballots designed for use in another city cannot be counted.

In equity. On appeal by plaintiff. Petition dismissed.

Proceedings by the plaintiff "as in equity," under the provisions of Revised Statutes, chapter 6, sections 70 to 74 to determine his right to the office of sheriff of the county of Sagadahoc. An answer was filed by the defendant. The matter was heard by the Justice of the first instance who found and decreed that the defendant was entitled by law to the said office of sheriff. Thereupon the plaintiff appealed as provided by section 72 of said chapter.

The case is stated in the opinion.

George E. Hughes, and Arthur J. Dunton, for plaintiff.

Frank L. Staples, for defendant.

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

CORNISH, J. This is an appeal from the judgment of a single Justice rendered in a petition brought under R. S., chap. 6, sections 70-74, to determine whether the petitioner at the biennial State election held on September 12, 1910, was duly elected sheriff for Sagadahoc county for the term beginning January 1, 1911, or whether the respondent was so elected. Both were candidates for the office and their names were printed on the official ballot.

By the official returns to the Secretary of State, it appeared that the respondent Ballou had received 1942 ballots and the petitioner Pease 1935 ballots in consequence of which a certificate of election was issued to Ballou by the Governor and Council. Subsequently the petitioner filed this petition in the Supreme Judicial Court for Sagadahoc county claiming that he had been elected and asking that a recount be had before a single Justice. After due notice and hearing, and upon inspection of the ballots, the single Justice found that the total number of legal ballots cast for the petitioner was 1899, for the respondent 1903, that the respondent had been duly elected by a plurality of 4 and therefore rendered judgment in his favor.

From this judgment the petitioner appealed to the Justices of this Court. In the case of *Bartlett, Petr.*, v. *McIntire*, heard at the same time as the case at bar and reported in 108 Maine, page 161, the rules by which, under our Australian ballot system, ballots should be counted or rejected, either in whole or in part have been fully considered and it is unnecessary to reiterate them here.

By agreement of the parties the total number of ballots is 3888 and of these 1806 ballots are to be counted for Ballou without question and 1838 for Pease. This leaves a balance of 244 all of which have been inspected one by one by the Appellate Justices sitting together and they have each been counted or rejected according to rules which were agreed upon before the counting began. Of these 244 in dispute 185 have been counted, and 59 rejected.

It would be impracticable within the limits of this opinion to call attention to each individual ballot and in view of the fullness with which the case of *Bartlett* v. *McIntire* has been treated both as to counted and rejected ballots and of the fact that substantially the same problems arose in both cases, it is only necessary here to group those that are rejected under their appropriate heads.

(1) Insufficient Marks in Square.

Only one ballot is rejected because of insufficient cross and in that instance the voter made a cross and then destroyed it by covering it entirely over with marks of erasure, leaving no cross in the square as required by statute.

(2) Distinguishing Marks.

These rejected ballots are three in number, one with a mark in the square like crossed paddles, another with a design in the square resembling a windmill and the third with a cross in one party square and a sticker with the name of a candidate for another office placed in another party square. In these instances the entire ballot was invalidated.

(3) Designation of Office erased or covered.

Forty ballots for sheriff are rejected on this account, although of course the entire ballots were not invalidated thereby. The designation of the office is an indispensable part of any ballot. There must be both an office and a candidate. The candidate without an office is like an office without a candidate, and where the designation has been obliterated either by erasure or by sticker, the vote cannot be counted. If, however, a sticker is so placed that enough of the top parts of the letters of the designation remain so that the eye can see what the office was, the vote should be counted.

(4) Two Names for the same Office.

Nine votes are rejected because the voter in attempting to vote a split ticket left two names below the designation of office, having failed to erase or cover the name in the party group.

(5) Erasure of Names.

In two instances the name of the candidate was erased and no other inserted in the party group, and in one instance a sticker was used with the name of a candidate for another office.

(6) Other Causes.

One ballot was mutilated by cutting out the name of a candidate for another office and mutilated ballots should not be counted. Two ballots designed for the city of Bangor were by mistake sent to Bath and found their way into the ballot box. They are rejected. The 59 rejected ballots are thus accounted for. The result is therefore as follows:

Number of ballots rejected,		59
Number of ballots for		
John W. Ballou, Undisputed	1806	
Of the disputed,	115	
Total,		1921
Number of ballots for		
George C. Pease, Undisputed	1838	
Of the disputed,	70	
Total,		1908
Ballou's Plurality,	13	
Total number of ballots,		3888

It is therefore unanimously held that the respondent, John W. Ballou, having received a plurality of all the ballots cast for sheriff of Sagadahoc county at the State election held on September 12, 1910, was duly elected sheriff of said county for the term beginning January 1, 1911, and is entitled by law to the office now held by him.

Petition dismissed with costs for respondent.

CATHERINE KELLEHER, Appellant, *vs.* CHARLIE FONG.

Penobscot. Opinion April 3, 1911.

Landlord and Tenant. Lease. Execution. Evidence. Option to Renew. Renewal.

A landlord is presumed to have understood a lease signed by her, in the absence of fraud or deception practiced upon her.

Evidence *held* to show that a landlord signed a lease, and that it was previously read to her.

A lease to "Eng Fong and his brother," signed by "Charlie Fong" and "Charley Sam," *held* sufficient as a lease to Charlie Fong, on a showing of his identity as Eng Fong.

A lease until a specified time at a fixed rental, with a higher rental after that time, giving occupation as long as the lessee "may want it," gives the right to renew indefinitely.

By continuing in possession on lapse of a particular term, and paying stipulated rent, a tenant sufficiently elected to avail himself of an option to renew.

On report. Judgment for defendant.

Forcible entry and detainer brought by the plaintiff in the Bangor Municipal Court. Plea, the general issue. Judgment for the defendant was rendered in that court and the plaintiff appealed to the Supreme Judicial Court. At the conclusion of the evidence in the appellate court, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Matthew Laughlin, for plaintiff.

Taber D. Bailey, for defendant.

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

WHITEHOUSE, J. This is a process of forcible entry and detainer brought by the plaintiff January 14, 1910, as owner of a certain building on Exchange Street in Bangor, against the defendant

Charlie Fong, who had been in actual occupation of the premises for more than seven years prior to that date. It was not in controversy that the plaintiff had title to the property in fee simple but it is contended in her behalf that the defendant's only estate in the premises was that of a tenant at will and that his tenancy was terminated on the 9th day of January, 1910, by notice in writing given to him thirty days before that date.

It is admitted that judgment was rendered for the defendant in the lower court and the case comes to this court on the plaintiff's appeal. It is admitted that the defendant received from the plaintiff a written notice to quit and deliver up the premises to her on the 9th day of January, 1910, and that this notice was sufficient in form to terminate a tenancy at will. But the defendant denies that his occupation was that of a tenant at will at the time he received the notice to quit. He contends that since the 22nd day of October, 1903, he had been occupying under a written lease or agreement which gave him the right "to have the use and occupation of said store as long as he (they) may want it." This written agreement was introduced by the plaintiff and is as follows:

"This agreement made by and between Catherine Kelleher of Bangor, Penobscot county, Maine, and Eng Fong and his brother of said Bangor, Penobscot County, Maine, hereby agree that Eng Fong and his brother are to have the use and occupation of store at 123 Exchange Street, for twenty ($20) per month during the winter of 1903 and until the beginning of spring, 1904, and after that period are to pay twenty-five ($25) dollars per month for use and occupation of said store; and also agree that they are to have the use and occupation of said store as long as they may want it.

Signed this 22nd day of October, 1903.

Witness,
Mrs. Edith Freese.

Catherine Kelleher.
Charlie Fong,
Charley Sam. "

The defendant accordingly claims that he was occupying as a lessee under a written lease with an option on his part to hold a life estate.

Against this document thus relied upon by the defendant as the foundation for his rights, the plaintiff claims that she is entitled to prevail upon four grounds. She claims,

First, That she did not sign the instrument.

Second, She did not read the document and that although she supposed at the time that the whole of it was read to her by Mrs. Freese, that in fact the last clause stating that the other parties to the instrument should have the use and occupation of the store as long as they might want it, was never read to her and she understood she was signing a simple agreement to accept $25 a month for the rent.

Third. That on the face of the paper there appears to be an uncertainty as to the lessees which is not removed by any evidence in the case; and

Fourth, that in any event the instrument would not have the legal effect to give the defendant a life estate at his option as claimed by him.

The plaintiff testifies that she did not sign this typewritten document introduced in evidence containing the clause in question, but admits that she did sign a paper presented to her by Mrs. Freese. A careful perusal of the plaintiff's testimony however shows it to be evasive, contradictory and uncertain; and in view of her statement that she had since been offered $50 a month for the store, her testimony must be accepted with great caution and qualification. On the other hand, the testimony of Mrs. Freese who attested the document, is that of an entirely disinterested witness. She had been requested by the defendant as his former Sabbath School teacher to get the plaintiff to sign a typewritten paper to the effect that he and his brother should have the use of the place for twenty dollars a month and that she would not let any other Chinamen have the store. The plaintiff was unwilling to sign that paper claiming that she ought to have more rent in the spring if she agreed not to let any other Chinamen have it. Thereupon the plaintiff made a counter proposition to let the defendants have the store until spring for twenty dollars a month and thereafter for twenty-five dollars a month; and Mrs. Freese states that she understood from the

conversation that the plaintiff was willing that the defendant should have the place as long as he wanted it at that rate. Mrs. Freese accordingly went to a lawyer's office, had the document in question typewritten by a stenographer and in the evening presented it to the plaintiff and read it to her, and Mrs. Kelleher made no objection and signed her name on it with a lead pencil, but at the suggestion of Mrs. Freese signed it with pen and ink. She then took the instrument to the defendant and his brother and they signed their names to it and she subscribed her name as a witness. She gives a clear and unbiased account of the transaction and appears to have had no motive whatever to prevaricate. Her testimony is corroborated by an examination of the original document which shows two signatures of the plaintiff written in ink, one in the first line of the body of the instrument under which lead pencil lines are plainly discernible, and the other at the bottom of the instrument, above and beyond which are traces of pencil marks.

But it is unnecessary to give further details of the testimony. It is sufficient to say that it is satisfactorily shown by all of the testimony considered in connection with the plaintiff's conduct in allowing the document to remain unchallenged for seven years and with the probabilities disclosed by the history of the transaction that the whole document was read to the plaintiff and that she signed her name to it. There is an entire absence of any evidence tending to show that Mrs. Freese practiced any fraud or deception upon the plaintiff with reference to the contents of the paper and she expressly states that it has not been changed in any respect since it was signed by the plaintiff. It is fairly to be inferred from all the testimony that the plaintiff understood the terms of the document when it was read to her by Mrs. Freese. Furthermore in the absence of any fraud or deception practiced upon her, she is presumed to understand the document which she signed. *Insurance Co.* v. *Hodgkins*, 66 Maine; 109; *Mattocks* v. *Young*, 66 Maine, 463; *Rogers* v. *Steamboat Co.*, 86 Maine, 261; *Wood* v. *Accident Assoc.*, 174 Mass. 217.

III. Nor is there any practical uncertainty in relation to the lessees or parties to this agreement. It is true the lessees named in

the body of the instrument are "Eng Fong and his brother," and that the signatures appended to it, under the name of the plaintiff, are "Charlie Fong and Charley Sam." It is unnecessary to attempt any solution of the mysteries involved in the peculiar association of English Christian names and Chinese patronymics by which many Chinamen are familiarly known in America. "Charley Sam" who appears to have signed as the brother of Charlie Fong, is not a party to this proceeding, and his rights are not in question here. And the party mentioned in the lease as "Eng Fong" is satisfactorily shown by the testimony, considered in relation to the circumstances, to have been the same party who signed his name to the lease as "Charlie Fong" and the identical person who was then occupying the plaintiff's store in question, and who had for seven years been recognized by the plaintiff as her tenant in that building. It does not appear that "Charley Sam" or any other person known as the defendant's brother, was then occupying, or has ever in fact occupied the plaintiff's store in conjunction with the defendant.

IV. Finally it is contended in behalf of the plaintiff that in any event the instrument in question did not have the legal operation and effect claimed for it by the defendant. It is insisted that at the expiration of the term of five months definitely fixed in the lease, viz. from the date of execution October 22, 1903, "until the beginning of spring," the defendant became simply a tenant at will, and not a tenant under a written lease with an option on his part to hold a life estate as claimed by him.

But the settled law of this State is against this contention of the plaintiff upon this branch of the case. In *Sweetser* v. *McKenney*, 65 Maine, 225, the facts are strikingly analogous to those in the case at bar. There the plaintiffs "agree to lease" the premises to the defendant "for five years and as much longer as he desires at the rate of $50 per year." At the expiration of eleven years from the date of the lease the plaintiffs, after due notice to quit, commenced a process of forcible entry and detainer against the defendant to recover possession of the premises, claiming that the instrument relied upon by him could not be operative as a lease for more than five years, and that it was "void for any longer period

because of its uncertainty and for want of notice from the defendant to the plaintiffs of his election to renew the lease for any further fixed time." But it was held by the court that the plaintiffs were estopped by their agreement from maintaining forcible entry and detainer to oust the defendant from the possession which they gave him, so long as he lived up to that agreement and desired to remain; that effect must be given to the written agreement of the parties according to its "tenor and intent;" that the stipulation that he was to have the premises "as much longer as he desires" was part of the consideration for which he took a lease and paid the $50 annual rent for five years, and that the plaintiffs were precluded by the terms of the lease from asserting that "the plaintiff unlawfully refuses to quit the premises, for they have received during the five years of the original term a certain sum annually which the defendant paid in part in consideration of their written promise that he might occupy the premises not only during those five years, but as much longer as he desired, paying the same rent." In support of this conclusion the court cited *Horner* v. *Leeds*, 1 Dutchie, 106; *Hurd* v. *Cushing*, 7 Pick. 169, and *Cook* v. *Bisbee*, 18 Pick. 527. It is further said in the opinion: "And in *Effinger* v. *Lewis*, 32 Penn. 367, the court recognizes the principle that parties may contract for an estate in land by a lease determinable only at the will of the lessee. In the cases which we have quoted the lease seems to have been under seal; but under our statutes (now ch. 75, sect. 13) a seal does not seem to be essential to their validity as between the parties to them, provided they are in writing and signed by the maker or his attorney." We are not called upon to determine here what might be necessary to make one effectual against any person except the lessor, his heirs, devisees and persons having actual notice thereof." Judgment was accordingly ordered for the defendant.

In *Holley* v. *Young*, 66 Maine, 520, the plaintiffs leased the premises to the defendant for one year at a rental of $75 a year and then added the following: "We further agree to lease to said Young said premises at the price and conditions named as long as he wishes to occupy them." The tenant remained after the expira-

tion of the year, and the court held that his so remaining was an election to continue the tenancy. "The question, whether a written instrument is a lease or only an agreement for a lease, said the court, quoting from *Kabley* v. *Gas Light Co.*, 102 Mass. 392, "depends on the intentions of the parties to be collected from the whole instrument." *Bacon* v. *Bowdoin*, 22 Pick. 401. The form of expression " 'We agree to rent or lease' is far from being decisive on this question, and does not necessarily import that a lease is to be given at a future day." So in *Kramer* v. *Cook*, 7 Gray, 550, the agreement was "to hold for the term of three years, and at the election of the defendant for the further term of two years, and the court said: "The provision in the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease de futuro. . . . all that is necessary to its validity is the fact of election.

In the recent case of *Briggs* v. *Chase*, 105 Maine, 317, the defendant was "to hold for the term of one year with the privilege of renewing on the same rental for any term not exceeding ten years," and after a critical examination of the authorities and full consideration of the question of the intention of the parties as disclosed by the terms of the lease interpreted in the light of all the facts and circumstances, it was held that it was the intent and purpose of the lease to make a demise in presenti to take effect in futuro at the option of the defendant, and that no written notice was necessary on the part of the defendant to establish his election to continue the tenancy under the lease. It will be noted, however, that the precise question now before the court was not involved in the last named case of *Briggs* v. *Chase*.

But it is contended by the learned counsel for the plaintiff that the great weight of authority in other jurisdictions is opposed to the doctrines laid down by the Maine court in the cases above quoted. It has been seen, however, that the decisions of this court in those cases were not influenced by the medievalism of the law or controlled by any arbitrary legal dogmas. It was obviously not the purpose of the court to establish any inflexible rules of law but

simply to reach the conclusion that would effectuate the intention of the parties to the several written agreements there under consideration, without violating any established principles of law or considerations of public policy. And this court is still of opinion that a doctrine which enables the court to give effect to the intention of the parties as shown by the language of the written agreement, the circumstances attending it and the object to be accomplished by it, will be found more consonant with reason and justice than one which compels the court to defeat that intention.

In the case at bar the plaintiff agreed in writing to give the defendant the use and occupation of the premises for $20 a month "during the winter of 1903 and until the beginning of spring 1904," and after that period he was to pay $25 a month and have the store "as long as he may want it." The language of this agreement is simple and direct and easily understood. The plaintiff could not have failed to understand it in fact, as she was presumed to in law. It is immaterial whether under the practical construction placed upon the lease by the parties the "beginning of spring" was understood to be the first day of March or the vernal equinox on the 21st of March. It appears that the defendant has continued to occupy the premises since March, 1904, to the present time, and it is not in controversy that rent at $25 a month has been paid from some date in the spring of 1904 to the satisfaction of both parties.

The language of the last clause stipulating that the defendant may have the store as long as he wants it at $25 a month, reasonably admits of but one meaning and needs no interpretation. In consideration of the preceding term expiring "at the beginning of Spring" and the substantial increase of five dollars a month thereafter, the defendant was to have the right and privilege, at his option, to have the store as long as he wanted it. The instrument was complete in itself and comprised the stipulations for both terms. No formal renewal by a second written instrument was contemplated by the parties. The agreement operates as a lease in futuro of the additional term. Only the lapse of the preceding term and the election of the defendant were required to render it a lease in presenti. The defendant's continued occupation of the store at the

expiration of the first term and for six years thereafter and the payment of the increased monthly rent, affords ample evidence of his election. It would be a contradictory interpretation, destructive of the plain and ordinary meaning of words and of the obvious intention of the parties, to hold that the defendant had the option to continue his occupation of the store as long as he wished after the expiration of the first term, and at the same time that the plaintiff had the option to prohibit him from so doing.

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

Judgment for the defendant.

WILLIAM R. FERGUSON *vs.* THE NATIONAL SHOEMAKERS.

Androscoggin. Opinion April 4, 1911.

Pleading. Declaration. Duplicity.

Under the established rules of pleading the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits, in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court that is to give judgment.

A declaration for an injury to an employee charged to have resulted from dullness of circular saw teeth, irregularity in the set of the teeth, and failure to instruct, is bad for duplicity; each breach of duty being properly the subject of a separate count.

The rule that pleadings must not be double means that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported.

On exceptions by defendant. Sustained.

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

the defendant. A special demurrer to the declaration was filed by the defendant, the demurrer was overruled and the defendant excepted.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

WHITEHOUSE, J. This was an action on the case to recover damages for an injury suffered by the plaintiff while operating a circular saw in the defendant's shoe factory for the purpose of cutting and splitting boards and shooks into narrow strips.

It is alleged in the declaration that the "saw was operated in the regular and customary way by an experienced person by fastening a board with a straight edge along the side of the saw as a sort of guage and at a distance from it equal to the strips to be cut;" that it was "dangerous to press the board against the revolving saw the last eight or ten inches to be cut for the reason that there was spots or places in the boards where the wood was harder than other places and when the revolving saw reached these hard places there was the liability that the board being cut would be thrown up from the saw table with great force and suddenness and that practically the same result would follow if the board used as a guage was not properly fastened; and the same result would also follow if the saw had not been properly sharpened and was dull so that the set of the teeth of the saw were out of order so as to cause the board being cut to bind against the saw blade."

The alleged failure of duty on the part of the defendant is thus set forth in the declaration: "The plaintiff says that at the time he was set to work upon said saw by said defendant as herein stated said saw was dull and had not been sharpened for a long period of time, although the same had been in use, and that the set of the teeth of said saw was irregular and out of order so that there was great tendency and liability that the boards being cut and split thereon would bind against the sides of said saw blade and be

thrown upward as above described, all which was also well known by the defendant but not known by the plaintiff. And the plaintiff says that when he was set to work upon said circular saw as aforesaid he had no knowledge or experience whatever in running or operating the same, all which was well known to the said defendants, and that the said defendant nevertheless gave to the plaintiff no instructions as to how to run and operate said saw and gave him no warning, or information as to the dangers, risks and hazards incident to running and operating the same, to the great carelessness and negligence of said defendant; that the plaintiff in obedience to the orders and directions of said defendant, through its agent, undertook to run and operate said saw to cut and split certain box boards thereon into strips about one inch in width as above stated, that he fastened a straight edge board for a guage near the side of the saw blade and adjusted the same the best he knew how, that he attempted to split a strip off a certain board with said saw as ordered by the defendant, and while he was pressing said board against said revolving circular saw with his hands as hereinbefore stated and when said saw reached a place in said board a few inches from the end thereof next the plaintiff, suddenly and with great force said board was thrown or jumped upwards from the saw table because of the conditions hereinbefore set forth, which then and there existed, and the plaintiff's left hand was thereby with great force and violence thrown upon said revolving saw; and the plaintiff avers that at the time of receiving said injuries he was himself in the exercise of due care and that said injuries were in no way caused by any fault or negligence on his part, but solely because of the negligence of said defendant; and the plaintiff further avers that at the time he was set to work upon said saw by the defendant, through its agent, he was a person without experience in running and operating said saw or any circular saw of any kind and that he was given no instructions or information as to how to run said saw nor was he in any way informed of the dangers incident to the running and operating of said saw and he did not know the same."

To this declaration a special demurrer was filed and overruled and the case comes to the Law Court upon exceptions to that ruling. The causes for the demurrer alleged are as follows:

"1. That plaintiff does not allege wherein the defendant was negligent and thereby caused the injury described in his declaration.

2. That plaintiff does not allege any causal connection between any negligence averred and injury received.

3. That the plaintiff alleging two distinct conditions which he claims might cause the accident, namely that the saw described in the declaration was dull, and that the set of the teeth was irregular and out of order, does not allege which condition actually caused the accident, or that the accident was not caused by his own act described in his declaration in fastening a straight edged board for a guage near the saw blade.

4. That said declaration is double."

It is the opinion of the court that the objection of duplicity in the plaintiff's declaration, raised by the demurrer must be sustained. Under the established rules of pleading the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits, in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations and by the court that is to give judgment. 1 Chitty on Pl. 256; *Dean* v. *Ayers*, 67 Maine, 488-9. As said by the court in *Addison* v. *Railway Co.*, 48 Mich. 155, "a declaration for a railway injury is demurrable if it does not so state the cause of action that the defendant could, with reasonable certainty, ascertain in what respect it is charged with negligence, or if it does not count specifically upon some particular duty and breach thereof, as causing the injury. It is not enough to refer to matters in an uncertain, doubtful and ambiguous manner, as a kind of general drag to meet whatever evidence may be presented." According to the common law rule the plaintiff cannot sustain a single demand by proof of "two or more distinct grounds or matters each of which independently of the other, amounts to a good cause

of action in respect of such demand. 1 Chitty on Pl. 249. The meaning of the rule that pleadings must not be double is that "the declaration must not in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported." Stephen on Pl., page 251. Rule 1. *Boardman* v. *Creighton*, 93 Maine, 17. In *McGraw* v. *Paper Co.*, 97 Maine, 343, the court said: "There may be cases of a complicated machine where it may not be practicable or even possible to allege with certainty the identical defect causing the injury; but even in such cases it may be stated in sufficiently specific terms to indicate to the defendant the charge he is called upon to meet,— or the difficulty may be obviated by several counts with such variations as circumstances may require."

In *Laporte* v. *Cook*, 20 R. I. 261, an action on the case for negligence, the declaration was held bad for duplicity because it set up "several distinct and independent breaches of duty, viz. (1) neglect to furnish proper safeguards for the protection of the plaintiff; (2) neglect to give him suitable instructions, and (3) neglect to provide proper persons to take charge of the work." Each of these allegations, the court said, should be made the subject of a separate count if the plaintiff desired to rely upon it.

In the case at bar it has been seen that the plaintiff's declaration consisting of a single count, sets out three distinct and separate breaches of duty on the part of the defendant, any one of which, if proved, would have been sufficient to support a verdict for the plaintiff. It alleges that the "board was thrown or jumped upwards from the saw table because of the conditions hereinbefore set forth;" and the conditions which had been "hereinbefore set forth . . . to the great carelessness and negligence of the defendant" were, (1) dullness of the saw teeth; (2) irregularity in the set of the saw teeth, and (3) failure of the defendant to give the plaintiff necessary instructions how to operate the saw. Each of these three breaches of duty thus alleged might require a specific and distinct answer, and different evidence to meet it. Each if proven by the plaintiff might constitute a complete cause of action. Each of them should

therefore be made the subject of a separate count if the plaintiff intends to rely upon it. The case of *People's National Bank* v. *Nickerson*, 106 Maine, 502, is clearly distinguishable.

The certificate must therefore be,

Exceptions sustained.
Demurrer sustained.

MAINE FARMER PUBLISHING COMPANY *vs.* SUMNER ROWE.

Kennebec. Opinion April 6, 1911.

Contracts. Construction. Performance. Breach. Remedy.

1. When one makes a contract for services to be rendered another, but stipulates in the contract that the product of the services shall be delivered to himself, a delivery to the person for whom the contract was made is not the delivery stipulated for in the contract, and will not sustain an action on the contract.
2. In such case a subsequent tender of the larger part of the product of the stipulated services, if refused, will not sustain an action for the contract price. The remedy, if any, is an action for the damages sustained by the refusal to accept.

On report. Judgment for defendant.

Assumpsit on an account annexed to recover the sum of $486.45 for printing, binding, etc., certain books called a "Municipal History of Waterville." The declaration also contained a count declaring specially upon a written contract between the plaintiff and the defendant, relating to the same books. 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.

Melvin S. Holway, for plaintiff.

F. W. Clair, for defendant.

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

EMERY, C. J. The evidence shows the following case: Mr. Giveen, having prepared the manuscript for a history of Waterville, began negotiations with the plaintiff's agent, Mr. French, for the printing and binding of the history for him. The plaintiff desired some guaranty or security for the payment for the work, whereupon Giveen arranged with the defendant to make the contract with the plaintiff for the work. The plaintiff accepted the defendant as a responsible party, and they made the following contract:

Augusta, Maine, July 25, 1908.

Being Copy of Agreement between Maine Farmer Publishing Company and Mr. Sumner Rowe, Agent.

It is hereby agreed that said publishing Company shall print and deliver to Mr. Sumner Rowe 1,000 copies of a municipal history, specifications as follows: About 240 pages, size 6″ x 9″, set in 10 point solid type, printed on 25 x 38-60 Antique Book of good quality, and containing 10 halftone inserts; 500 books to be bound in best binding obtainable at 20c each; proof to be read by Mr. Rowe or Mr. Giveen; books to be delivered within a reasonable period of time and as soon as possible after receiving copy; price on basis of 240 pages to be $390 less 10 per cent for cash in 30 days from delivery of books. Extra pages of type matter to be figured at $1.25 per page, any decrease in number of pages below 240 to be figured at $1 per page for each page less than the specified number.

Signed MAINE FARMER PUBLISHING CO.
By GEO. H. FRENCH
Signed SUMNER ROWE, Agent.
By ————————

When the work was done the plaintiff shipped the 500 bound books to Mr. Giveen at Waterville with a bill for the whole work made out to "Sumner Rowe (the defendant) Agent, C. M. Giveen."

Mr. Giveen received the books and began to sell them on his own account. The defendant was not informed at the time of the delivery to Giveen, and only learned of it incidentally after Giveen had sold some 100 copies of the book. He thereupon notified the plaintiff that the books not having been delivered to him as stipulated in the contract, he should have nothing to do with them and considered himself released from the contract. Mr. French, agent for the plaintiff, endeavored to make some arrangement satisfactory to the defendant for the acceptance by him of the bound and unbound books that had not been sold by Giveen, but the defendant persisted in his refusal to accept them. The plaintiff thereupon obtained from Giveen the return of the books he had not sold, and also his agreement to pay for the work done under the contract, and to allow the plaintiff to sell all the books bound and unbound in case he failed to make the agreed payments, the proceeds to be applied to those payments.

Sometime afterward, nothing having been paid either by the defendant or Giveen, the plaintiff brought this action for the full contract price, counting upon an account annexed as for completed work, and also specially upon the contract itself alleging full performance upon the plaintiff's part including the delivery stipulated in the contract.

There is no evidence nor claim that full performance by the plaintiff was waived, but on the other hand it is not questioned that the contract was fully performed by the plaintiff if it made the delivery stipulated for in the contract. The plaintiff claims that it did; that Giveen was the defendant's agent authorized to receive delivery for him, or at least that the defendant held him out to the plaintiff as so authorized. All this the defendant denies. We do not see enough in the evidence to sustain the plaintiff's contention on this vital point. The plaintiff knew that the defendant was not interested in the subject matter of the contract, but was becoming surety for Giveen who was not of satisfactory financial credit. The plaintiff knew, or should have known, that the stipulation for delivery to the defendant was necessary, and made, for the defendant's protection against Giveen's apprehended default. Hence the

delivery to Giveen cannot be regarded as a delivery to the defendant, or the delivery required by the contract. The stipulation for delivery was a material part of the contract and until it was performed by the plaintiff, the defendant was not bound to make the stipulated payments.

The plaintiff, however, claims that it received back from Giveen 385 of the 500 bound books and offered to deliver them, and also the unbound books, to the defendant, but he declared he would not accept them. Such an offer and refusal, however, would not sustain this action. The remedy in such case would be an action for damages caused by the refusal to accept. The plaintiff retained the possession of, and at least a special property in, the books with authority from Giveen, the owner of the manuscript and copyright, to sell them to the extent of its claim.

The defendant would acquire no property in them until acceptance. *Moody* v. *Brown*, 34 Maine, 107.

Judgment for the defendant.

In Equity.

W. R. LYNN SHOE COMPANY

vs.

LUNN & SWEET SHOE COMPANY.

Androscoggin. Opinion May 8, 1911.

Equity. Right to Relief. Adequate Legal Remedy.

When a bill seeking an injunction, profits, and damages has gone to final decree, a bill subsequently filed, praying only for profits and damages alleged to have occurred after the accounting under the first bill, is not a supplemental, but an original bill, and as the complainant's remedy at law is plain, adequate and complete, must be dismissed.

In equity. On report. Bill dismissed.

July 15, 1903, the plaintiff filed its original bill in equity for an injunction, accounting, etc., against the defendant then known as the Auburn-Lynn Shoe Company, its corporate name since that time having been changed to that of Lunn & Sweet Shoe Company, and the cause eventually came before the Law Court and a decision thereon was rendered, which is reported in 100 Maine, 461, under the title "*W. R. Lynn Shoe Company* v. *The Auburn-Lynn Company et als.*," and reference to that report is made for a statement of the original contentions between the parties. Also see *W. R. Lynn Shoe Company* v. *The Auburn-Lynn Shoe Company*, 103 Maine, 334, which is the same cause reported to the Law Court on questions arising after the aforesaid decision. After the decision reported in 103 Maine, 334, the master's report was recommitted solely, however, "for further hearing and report upon the question of what damages, if any, should be awarded to the plaintiff for the losses in its own business, in the production and sale

of its own goods, caused by the wrongful acts of the defendants," and after such hearing the master filed a second report which was accepted. A final decree was then entered, "ordering the defendant company to pay to the plaintiff the sum of $7424.53 and taxable costs, and on August 4, 1909, the sum of $7974.13 was received by said plaintiff corporation, in accordance with the terms of said decree." The master's report covered the period between July 9, 1903, and January 15, 1906, the date when the decree on the original bill was filed enjoining the defendant and appointing a master. April 1, 1910, the plaintiff filed the bill under consideration in the present cause, praying that "an account may be taken of all the profits of said business from said fifteenth day of January, 1906, resulting from the wrongful acts committed by the defendant company in its unfair competition with the plaintiff," etc. The defendant filed an answer with a demurrer therein inserted. The case was then reported to the Law Court for decision.

The pith of the case is stated in the opinion.

Harry Manser, for plaintiff.

John A. Morrill, for defendant.

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

BIRD, J. The bill of complaint is endorsed "supplemental bill" but contains no allegation that it is filed by way of supplement to the original bill referred to therein. After careful consideration, we conclude that we must treat it as an original bill and that as such it is demurrable. It seeks an account of damages and profits independently of any other ground of equity jurisdiction, such as discovery or injunction. It alleges no fraud, no fiduciary relations, no mistake and asks no declaration or establishment of rights or liabilities. The rights of the plaintiff have already been defined by the decree upon the original bill. For profits and damages the remedy of plaintiff at law is plain, adequate and complete. *Titcomb* v. *McAllister*, 77 Maine, 353, 357-358; *Piscataqua, etc., Ins. Co.*

v. *Hill*, 60 Maine, 178, 184; *Caleb* v. *Hearn*, 72 Maine, 231, 232; *Crooker* v. *Rogers*, 58 Maine, 339; *Root* v. *Railway Co.*, 105 U. S. 189; *Haywood* v. *Andrews*, 106 U. S. 672, 678.

If it is desirable for plaintiff to obtain redress for violation of the injunction granted upon the original bill, such may be obtained upon proper proceedings therefor: See Spell. on Inj. &c., §1098.

Demurrer sustained.

Bill dismissed with costs.

WILLARD T. BEEDY et al. *vs.* BRAYMAN WOODEN WARE COMPANY.

Franklin. Opinion May 12, 1911.

Sales. Chattels. Delivery. Acceptance. Statute of Frauds. Revised Statutes, chapter 113, section 4.

At common law, there may be a complete delivery of chattels sold without receipt or acceptance under the statute.

Receipt and acceptance by the buyer of chattels is essential to passing of title.

To pass title under a sale, receipt and acceptance by the buyer need not be contemporaneous with the contract, if made pursuant to it; nor need they be simultaneous.

No act of a seller of chattels can constitute delivery, taking the contract out of the statute of frauds, without receipt and acceptance by the buyer.

Acts by an oral contract buyer of chattels, such as offer to resell all or part of the goods, shows receipt and acceptance by him, taking the contract out of the statute of frauds.

On report. Judgment for plaintiffs.

Assumpsit on an account annexed to recover for 5 tons and 75 pounds of hay at $17.00 per ton, alleged to have been sold and delivered by the plaintiffs to the defendant. Plea, the general issue with brief statement as follows: "That if any such contract was made as alleged by the plaintiffs it was void under a certain statute

of the State of Maine known as the Statute of Frauds, contained in section 4 of chapter 113, which provides, 'That no contract for the sale of goods, wares or merchandise for thirty dollars or more shall be valid unless the purchaser accepts and receives part of the goods or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent,' and the defendant says that if any contract was made between the plaintiffs and themselves such as is mentioned in said plaintiffs' writ, that such contract was for the sale of goods, wares or merchandise for thirty dollars or more, and that the purchaser under such did not accept or receive any part of the goods or give anything in earnest to bind the bargain or any part of the payment thereof; and that no note or memorandum thereof was made and signed by any party to be charged thereby or by their agent."

At the conclusion of the plaintiffs' evidence, the case was reported to the Law Court to render such judgment as the law and the legally admissible evidence required.

The hay for which this suit was brought was a part of a lot of pressed hay in the barn of the plaintiffs. In relation to the trade for the hay, the purchasing agent of the defendant testified as follows: "The final trade was somewheres just about before the 25th of December. I made Mr. Beedy an offer of $17 a ton for five tons to be taken at his barn and he said he would let me know the next day or in a day or two, and the 25th of December, Saturday, Willard Beedy came to my place and said that they would sell me this five tons of hay, and I arranged with him to go up to the barn and put out five tons of hay on the outside so that the teams could get it there; and he went up Monday and put out this hay. I think it was the 27th."

Shortly after the trade for the hay, the defendant discontinued its lumber operation and never removed the hay and it remained outside the barn where it had been placed by the plaintiffs, and there spoiled. In relation to the hay, after the lumber operation had been discontinued, the defendant's purchasing agent testified as follows:

"Q. When you saw Mr. Brayman up in the woods did you have any conversation with him about this hay?

"A. Yes. Mr. Brayman decided that day that he would not operate any longer, and I reminded him again — I had previously reminded him of this hay — that there was some hay down there at Mr. Beedy's that I had purchased that would need to be taken care of.

"Q. Did Mr. Brayman make any reply?

"A. Why, we had some conversation in regard to moving it down I think on the train to Phillips.

"Q. Did you ever have any more conversation either in the woods or in the village at Phillips concerning this hay?

"A. I met Mr. S. M. Brayman on the street, I think in front of the post-office, and had some conversation. I think perhaps I might have mentioned it to him that that hay ought to be taken care of. That was a little later. He asked me if I could not find some one to buy the hay, he said they did not want to lose more than they could help, and I suggested Mr. Beal and he requested me to see him. I did see Mr. Beal and tried to sell him that hay but he didn't care to buy at that time."

The points in the case are stated in the opinion.

J. Blaine Morrison, for plaintiffs.

D. R. Ross, and Frank W. Butler, for defendant.

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

BIRD, J. This action is brought to recover the price of a quantity of hay alleged to have been sold by plaintiffs to defendant. The defense is the statute of frauds. The case is before this court upon report, such judgment to be rendered upon such of the evidence as is legally admissible as the law and evidence require.

There may be a complete delivery at common law without either receipt or acceptance under the statute. The former is the act of the vendor while receipt, which affects the possession, and acceptance, which affects the title, are the acts of the purchaser and both receipt and acceptance are essential. Nor can such receipt and

acceptance be shown by words alone, where such words are part of the alleged oral bargain and sale. But receipt and acceptance need not be contemporaneous with the alleged contract, if made in pursuance of it, nor need they be simultaneous. The former may precede or follow the latter. No act of the vendor alone can be effective to make delivery, without receipt and acceptance, take the case out of the statute. If the vendee does any act to the goods, of wrong, if he be not their owner, and of right, if he be their owner, the doing of the act is evidence that he has accepted them. These principles are so well established as to require no citation of authorities.

In the case at bar, the alleged bargain and sale was not of certain specified goods selected and accepted by the purchaser or its agent but of a certain quantity of goods to be selected by the vendors from a larger mass. The separation of the hay alleged to have been purchased and its deposit outside the barn were the acts of the vendors. Although, from the evidence as to the manner of payment and the subsequent relation of the vendors to the property, we think no lien for the price was retained, it is needless to state that neither receipt nor acceptance can be found from such acts of the vendors: *Edwards* v. *G. T. R. Co.*, 54 Maine, 105, 112; *Shepherd* v. *Pressey*, 32 N. H. 49, 55-56; *Knight* v. *Mann*, 118 Mass. 143, 146. Whether the act of the agent of defendant in directing one of its employees to go and remove the hay after it was placed outside the barn was a receipt by defendant, we need not decide as, even if it were, there was no actual acceptance: See *Howe* v. *Palmer*, 3 Barn. & Ald. 321. The purchaser still had the option to object to the quantity, quality or identity of the goods.

It is uncontradicted that defendant directed its agent to offer the hay for sale to a certain party who refused the offer. Clearly constructive acceptance and receipt may arise from dealing with the goods as owner, as by the purchaser reselling or pledging the goods. The first case of this character is the familiar one of *Chaplin* v. *Rogers*, 1 East, 192, where, a stack of hay being sold by parol to the defendant, he, without paying for it or removing it, resold a part of it to another who took it away. And Kenyon, J., speak-

ing for the Court of King's Bench says, "Here the defendant dealt with the commodity afterwards, as if it were in his actual possession, for he sold part of it to another person." Id. page 194. In Benjamin on Sales, this case is cited as authority for the position that a resale is evidence of a constructive receipt as well as of constructive acceptance; §§ 145, 182. See also *Morton* v. *Tibbett*, 15 C. B. 428. In *Blenkinsop* v. *Clayton*, 7 Taunt. 597, it was held that if a person who has contracted for the purchase of goods offers to resell them, there is evidence of an acceptance and receipt of the goods which should be submitted to the jury. In ex parte Safford, it is said, "The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of ownership have been held sufficient for that purpose (receipt) though the goods remained in the actual possession of the vendor, or of a middle-man. . . . . It may be said that a resale would be a fraud on the vendor, if the goods are not the property of the vendee, and for this reason the latter is estopped; but the true reason is, that such an act is of itself evidence of acceptance and receipt:" (Lowell, J.) 2 Low. 563, 566; 21 Fed. Cases, pages 142, 143. See *Garfield* v. *Paris*, 96 U. S. 557, 563; *Bowe* v. *Ellis*, 22 N. Y. Supp. 369, 371.

Smith v. *Surman*, 9 B. & C. 561, has been relied upon as holding that an offer to sell is not evidence of acceptance and receipt, but there it was distinctly held that it did not appear that the seller had lost his lien for the price. And in *Jones* v. *Bank*, 29 Md. 287, where the goods had not arrived at the place of delivery, it was held that resale of, or offer to sell, goods of the same character was neither an acceptance, nor receipt. *Clarkson* v. *Noble*, 2 U. C. Q. B. 361, which holds that an offer to sell is not such dealing with the goods as to constitute acceptance, is based wholly upon the authority of *Smith* v. *Surman*, ubi supra. And it has been held that an offer by the purchaser to sell certain logs, which were to be manufactured into boards by the seller, was not a constructive receipt and acceptance but upon the ground that the original contract was one for the sale of boards and not of logs: *Gorham* v. *Fisher*, 30 Vt. 428, 431.

In reason we fail to distinguish between a sale and an offer to sell. There is no difference in so far as the act of the alleged purchaser is concerned. He does no more than offer the goods in either case. Whether, when he has made the offer, his offer becomes a sale in fact depends upon the action of a party who bears no relation to the parties, inter se, to the original alleged sale. In either case his act is equally an assertion of ownership.

We conclude that upon the uncontradicted evidence we must find such an acceptance and receipt of the hay as satisfies the requirements of the statute of frauds and that plaintiffs are entitled to recover of defendant the sum of eighty-five dollars and sixty-three cents ($85.63) with interest from the date of the writ, there being no evidence as to the date of demand made by plaintiffs upon defendant before suit brought.

Let judgment be entered for the plaintiffs for the sum of $85.63 with interest from the date of the writ.

LIVERMORE FALLS TRUST AND BANKING COMPANY

vs.

RICHMOND MANUFACTURING COMPANY et als.

SAME *vs.* SAME.

SAME *vs.* SAME.

WALDO PETTENGILL et als., in Equity,

vs.

LIVERMORE FALLS TRUST AND BANKING COMPANY et al.

Androscoggin. Opinion May 9, 1911.

Chattel Mortgages. Intent to Take Possession. Notice. Book Accounts. Mortgagee in Possession. Prior Incumbrances. Foreclosure. Application of Proceeds. Debts Secured by Mortgage. Principal and Surety. Reference. Law Court. Duties. Accounting.

1. The mortgagee in a chattel mortgage of the plant, tools, stock, etc., of a going manufacturing concern is not required by the law to give notice of its intention to take possession of the mortgaged property for breach of condition.
2. Such a mortgagee upon taking possession of the mortgaged property is not required by the law to assume, perform or complete then existing contracts of manufacture made by the mortgagor, however profitable they may be.
3. Though choses in action, like book accounts, are included in a chattel mortgage they are not thereby made subject to the statutes governing chattel mortgages. As to them the mortgage only operates as a pledge or equitable assignment, and the title to them does not become absolute in the mortgagee by a statutory foreclosure of the mortgage. He is not required by the law to collect them and is accountable only for what he actually receives on them so long as he does not acquire an absolute title.
4. A mortgagee is not required by the law to pay off prior mortgages, or existing liens, nor to perform conditions necessary to secure or perfect the title to any of the mortgaged property, even though the property is lost through the omission to do so.

5. Where a mortgage secures several debts due from the mortgagor to the mortgagee, and the mortgaged property is not sufficient to pay all the debts, the mortgagee upon foreclosure may elect to which of the debts the property shall be applied.

6. In such case the bringing suit on some of the debts is an election to apply the mortgaged property to the other debts not put in suit.

7. Where some of the debts secured by a mortgage are also secured by sureties, the latter cannot require the application of the mortgaged property to such debts in preference to those debts secured only by the mortgage.

8. The sureties upon debts also secured by a mortgage cannot require the creditor to foreclose the mortgage upon condition broken, nor, to follow up the foreclosure if begun. The creditor may without their consent allow the debtor more than the statutory time for redemption after foreclosure is begun; and in such case he will be held to account only for the value of the property at the end of the extended time.

9. The Law Court will not act, at least in the first instance, as auditor, master in chancery, or accountant. It was not established for such purposes.

On report. Remitted to nisi prius for further proceedings.

The three first named cases were actions at law on certain promissory notes, while the last named case was a bill in equity brought by the sureties on the notes sued in the actions at law, against the plaintiff in the actions at law and the Richmond Manufacturing Company, praying for an injunction against the suits on the notes and for an accounting by the plaintiff in the actions at law, which had taken possession of certain personal property under and by virtue of certain chattel mortgages given to it by the Richmond Manufacturing Company, and instituted foreclosure proceedings thereon. The general issue with a brief statement of special matter of defense was filed in each of the actions at law, and an answer with a demurrer therein inserted was filed by the Livermore Falls Trust and Banking Company in the equity suit. The four cases were tried together and at the conclusion of the testimony were reported to the Law Court for determination.

The facts, so far as material, are stated in the opinion.

Frank W. Butler, and Heath & Andrews, for Livermore Falls Trust and Banking Co.

Bisbee & Parker, and Newell & Skelton, for defendants in actions at law and plaintiffs in equity suit.

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

EMERY, C. J. From the evidence we find certain material facts to be as hereinafter stated:—

May 5, 1909, the Livermore Falls Trust and Banking Company (hereinafter called the bank) held various promissory notes of the Richmond Manufacturing Company (a corporation engaged in the manufacture of wood novelties and hereinafter called the company) as follows:—

A group of five notes aggregating $25000 dated Feby. 1, 1905 secured by a chattel mortgage, in the usual form, of all its tangible personal property, mills, machinery, tools, unmanufactured stock, manufactured goods, etc., etc.; a group of nine notes aggregating $26000 and of various dates between February, 1905, and July, 1906, secured by a second chattel mortgage covering the same property, but made subject to the prior mortgage of Feby. 1, 1905; and a group of notes dated subsequent to 1906. Nov. 8, 1908, the company gave the bank a third mortgage of all its tangible personal property, and also of all its then existing book accounts, and such accounts as it should acquire from the sale of any of the personal property. The second and third mortgages were conditioned for the payment of all sums that were then or might thereafter be due the bank from the company. The second group of notes, the nine dated between February, 1905, and July, 1906, were signed by various individuals, in form as co-promissors, but really as sureties, as was known to the bank.

The foregoing notes were all unpaid and overdue May 5, 1909, on which day the bank, without giving any notice of its intention, took possession of all the property covered by either of the three chattel mortgages, and on the 15th of the same month began due statutory proceedings for foreclosure of all of them. In the meantime, however, on the 10th of the same month, May, 1909, the bank began actions at law against all the parties on the nine notes signed by the individual sureties and secured by the second and third mortgages. Pending these actions the sureties brought a bill

in equity against the bank alleging that the value of the mortgaged property taken by the bank was enough to pay all the indebtedness of the company to the bank, or would have been if properly cared for and managed by the bank after possession taken; and praying for an accounting by the bank and for an injunction against the suits on the notes. All the suits including that in equity were reported to the Law Court for decision upon the pleadings and evidence.

There was no redemption of the mortgaged property and the title of the bank to all the tangible property subject to any of the mortgages became absolute through completed foreclosure at least as early as Nov. 3, 1909. The main question, therefore, is, how much credit for the mortgaged property the bank must allow upon the indebtedness to it of the company secured by the mortgages, or, more immediately, what credit therefor must be allowed on the nine notes in suit signed by the individual sureties. The amount of such credit, however, will be affected by the solution of several subsidiary questions which are now to be considered.

1. At the time the bank took possession of the mortgaged property, the company had on hand a large amount of unmanufactured stock and also had contracts for the manufacture and shipment of wood novelties, etc. The sureties claim that these contracts, or some of them, were profitable for the company and were such as the bank should have completed, but did not, and hence the bank should be debited with the profit it would have thus made. They also claim that by taking possession of the property, shutting down the mills, etc., the bank caused great depreciation in the value of the property, and that it should be debited with this depreciation.

Without considering other answers to these claims, it is a sufficient answer that the bank, even as mortgagee in possession, was under no legal obligation to carry on the business of the mortgagor. Granting that by taking possession of the mortgaged property, the bank stopped a going concern, prevented the company and the sureties from fulfilling profitable contracts, and generally reduced the market value of the plant, it nevertheless was within its rights

as mortgagee. It had given it the right to take the mortgaged property into its own possession upon the failure of the company and the sureties to comply with the conditions of the mortgages, but it did not have imposed upon it the duty of assuming the burden and risk of carrying on the business for their benefit. If it became trustee, it was for conservation, not for operation. The company and the sureties could have prevented such taking possession and all the consequences complained of by paying the indebtedness secured by the mortgages. To their failure to do so must be attributed the loss sustained.

There is no evidence that the mills, machinery, etc., could have been leased, and hence we do not find that the bank should be debited anything for rents and profits.

2. When the bank took possession of the mortgaged property, it also took possession of the books of the company containing their accounts for merchandise sold, etc. Some of these accounts the bank collected in whole or in part, but did not collect them all, nor did it put any of the uncollected accounts in suit or use other means to enforce payment except by solicitation, etc. What accounts it did not collect it turned over with the books to the trustee in bankruptcy upon his appointment in September following. The sureties now claim that the bank must be debited with the value of those accounts whether collected or not, such value to be fixed by the court from the evidence, as in the case of tangible personal property.

The answer to this claim is that choses in action, such as book accounts, are not within the law governing chattel mortgages. That law applies only to goods and chattels capable of manual delivery. *Emmons* v. *Bradley*, 56 Maine, 333; *Emerson* v. *E. & N. A. Ry.*, 67 Maine, 387; *Marsh* v. *Woodbury*, 1 Met. 436; *McKie* v. *Gregory*, 175 Mass. 505. The inclusion of book accounts in a mortgage of goods and chattels simply operates as a pledge or an equitable assignment of them. The mortgagee does not acquire absolute title to them by a statutory foreclosure of the mortgage as a chattel mortgage. To acquire such title he must have them sold as a pledge or under equity proceedings. It follows that the mort-

gagee is not obliged to give credit for their value upon completion of foreclosure of the chattel mortgage, but only for what he collects of them. *Emmons* v. *Bradley*, 56 Maine, 333; *McKie* v. *Gregory*, 175 Mass. 505. He may proceed with the collection until the indebtedness secured by the assignment is fully paid, but when that is paid the remaining accounts belong to the assignor, as also do any proceeds of collection in excess of the indebtedness. There is no forfeiture as in the case of tangible property under a foreclosed chattel mortgage.

Of course the assignee must not release any of the debtors in such accounts, nor impair any security given for them, but by simply accepting the assignment he does not assume the duty to collect, nor the obligation to incur the expense of suits and the risk of insolvency of the debtors, of counter claims, of uncredited payments, of claims for recoupment, etc., etc. The assignor or his sureties can resume the right to collect on their own account at any time, at least before sale, by paying the indebtedness to secure which the assignment was made.

3. At the time of the bank's taking possession of the mortgaged property, the company had a stumpage permit on timber lands, to preserve which it was obliged to take off a fixed amount of stumpage each year and make payments at fixed dates. The written permit was in the custody of the bank, but the bank did nothing toward complying with the conditions necessary to prevent forfeiture, whereupon the land owner cancelled it. The sureties claim that this permit was a very valuable asset of the company which the bank should have preserved, and not having done so is bound to give credit for its value.

It is quite questionable whether the permit was included in any of the mortgages, but at any rate there was no provision in any of them that the bank was to assume the performance of its conditions. In the absence of such a provision, a mortgagee or pledgee is not bound to pay off any liens, or prior incumbrances, or perform any conditions necessary to perfect title or save from forfeiture. He may do so for his own protection and have credit for what is necessarily paid for such purpose, but he may decline to do so and

let the property be taken under the superior title. Here again, the company or the sureties could have preserved this and all the other assets of the company by paying the indebtedness for which they were mortgaged or pledged. Not having done so they cannot now have credit for it.

4. It is not questioned that the first group of notes, the five dated Feb. 1, 1905, and secured by the first mortgage, are to be paid in full out of the mortgaged property before anything can be credited on the second group, (the nine notes signed by the sureties), since these latter notes are of later date and the mortgage to secure them was expressly made subject to the mortgage securing the first group. A question is raised, however, as to whether any surplus after paying the first group in full is to be applied to the next indebtedness in order of date viz, the nine notes signed by the sureties, or may be applied by the bank to the still later notes secured by the last mortgage but not signed by the sureties, leaving for the nine notes only the balance, if any.

The rule that a debtor in making payments may designate to what debts they shall be credited, only applies to voluntary payments. Further, in this case the company, the principal debtor and mortgagor, gave no direction as to how the value of the mortgaged property, or its proceeds should be applied, even supposing it could do so. The bank, therefore, as between itself and the company, could elect to apply the surplus, if any, to the mortgage indebtedness of a later date than that for which the sureties were liable. It did so elect by bringing suits on the notes signed by the sureties, and none on any other indebtedness secured by the mortgages. *Starrett* v. *Barber*, 20 Maine, 457; *Berry* v. *Pullen*, 69 Maine, 101; *Thorn* v. *Pinkham*, 84 Maine, 101.

The sureties certainly had no greater rights than their principal as to the application of the mortgaged property and proceeds. A surety has the same right as the principal to pay before foreclosure completed all the indebtedness secured by the mortgages, and thereupon he has the right to have delivered to him, instead of the principal, the mortgaged property and its proceeds to the extent of the amount thus paid. But "such previous payment by the surety is

alike essential where there is only one debt and one surety and where there are many debts all of which are equally protected and secured by the property mortgaged, and many several sureties for the several debts; for the chief and primary object of a pledge, or mortgage, to a creditor is his benefit, protection and advantage in reference to each and all of the several debts which it was made or given to secure. And until this object is fully accomplished, no surety can justly or lawfully interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it toward payment of any such debt which he cannot otherwise collect or render available. And if there be one or more debts thus secured for which the debtor is alone responsible, and the amount of which cannot be obtained from on account of his insolvency or pecuniary inability, such proceeds may be applied, so far as necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties upon notes constituting other debts, can have no interest or right in the mortgaged property." *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270, at page 272. In considering the claim of a surety to have the proceeds of mortgaged property applied pro rata to the debt for which he was surety, the Supreme Court of Connecticut said, "What are his (the surety's) peculiar equities that he should claim to direct the application of payments made and received by other parties? The creditor and debtor had the sole right of controlling those payments; and if neither have done this the court must do it as the rights, equities and intentions of the parties seem to demand. The defendant is an indorser, or, at most, a surety; and this constitutes his only relationship to these debts. It has been said that sureties are to be favored in the construction and enforcement of contracts. But we cannot extend such considerations to cases like the present. To do this would be to defeat the object and end of suretyship; it would be to hold that the surety might have the money paid by his principal so applied as to leave the creditor a loser notwithstanding his care and vigilance. This would be inequitable; and we cannot direct the application of this money upon this principle. Indeed this is a case in which, if the creditor had made no application of

the payment, the court upon equitable principles, would apply it upon the precarious debts." *Stamford Bank* v. *Benedict*, 15 Conn. 437, at page 445.

In accordance with the principles above stated, the sureties can have applied to the notes signed by them, only the surplus, if any, after the payment of all the other indebtedness of the company covered by the mortgages.

5. The statutory sixty days time for redemption from the foreclosure began to run May 15, 1909, but before its expiration, the company having been put into bankruptcy, the bank through its attorney without the consent of, or consultation with, the sureties, orally agreed, first with the receiver and then with the trustee in bankruptcy of the company, to extend the time for redemption to Nov. 3, 1909. There was no consideration for this extension, but it was granted at the request of the receiver and trustee to give them time to examine the property to determine whether there was a value in the equity of redemption. They did not redeem however.

The sureties now claim that the amount of the mortgage indebtedness and the valuation of the property to be applied to it should be as of the expiration of the first sixty days, while the bank claims they should be as Nov. 3 following, a difference of some hundred and twenty days.

We think the principles last above stated as to the rights of sureties, are applicable to this claim made by them. The bank was under no obligation to the sureties to begin suits against the company on the notes, or to press the suits to judgment at the return term if begun. *Eaton* v. *Waite*, 66 Maine, 221; *Berry* v. *Pullen*, 69 Maine, 101; *Thorn* v. *Pinkham*, 84 Maine, 101. By parity of reasoning, the bank was under no obligation to the sureties to begin foreclosure of its mortgages immediately upon default, or, if begun, to refuse more than the statutory time for redemption. If the interest was accumulating and the property deteriorating, the sureties had their preventive remedy. They could have paid the mortgage debts and so have saved interest and loss. Without doing so they cannot be heard to complain that the bank did not promptly and rigorously enforce its rights against the principal and the property.

It is not a case of a variation of the contract which the sureties had guaranteed. There was no binding agreement for a consideration for an extension of the time of payment of the indebtedness. The bank could still have prosecuted the suits on the notes to judgment, execution and levy. There was only a voluntary waiver of forfeiture for a limited time. No rights of the sureties were impaired thereby. Their loss, if any, was the result of their own delay in enforcing their own rights of payment and subrogation.

6. The sureties complain that the bank took possession of the mortgaged property abruptly without giving any notice of its intention to do so, and thereby abruptly stopped a going concern, subjecting it to a loss it would not have sustained had notice been given that possession would be taken if payment was not made. Since there was nothing in the mortgages, and no evidence of any agreement, to the contrary, the bank was under no legal obligation to give any notice of an intention to take possession whatever loss it might thereby cause the company or its sureties. Here again the sureties have no legal cause for complaint. As in the other cases, they could have paid the mortgage indebtedness and prevented the loss.

7. It remains to ascertain the amount of the various mortgage notes and other mortgage indebtedness on Nov. 3, 1909, when the bank's title to the mortgaged property became absolute; to ascertain what the bank had received for mortgaged property sold before that date; to ascertain the fair market value at that date of the mortgaged property then remaining unsold; to ascertain the amount collected by the bank from the book accounts and other assets of the company; to ascertain the value of such mortgaged property, if any, as was lost through the bank's fault after taking possession and before forfeiture; to ascertain what amount should be credited the bank for care of the property during that time, watchman, insurance, etc., and for sums necessarily paid to remove prior liens and encumbrances; to compute interest allowances either way; to ascertain what balance, if any, is applicable, as of Nov. 3, 1909, to the notes in suit signed by the sureties after payment of all the other indebted-

ness secured by the mortgages; and to ascertain how that balance should be distributed for the relief of the several sureties.

The parties introduced much and conflicting evidence upon these various questions, and now ask the Law Court to answer them. We must decline the task. The Law Court was not established to act as auditor, master in chancery, or accountant. While the Law Court may properly be called upon to review the work of such officers as to any disputed items, it cannot be required to take their place. As constituted, the Law Court cannot do such work efficiently or satisfactorily. The cases are therefore remitted to the court at nisi prius for the appointment of one or more suitable persons as auditors and masters to perform the work above indicated in accordance with this opinion, and such other work as may be necessary to furnish data for the determination of the issues between the parties and make return of their findings to the court.

So ordered.

A. M. BUMPUS *vs.* AMERICAN CENTRAL INSURANCE COMPANY.

Androscoggin. Opinion May 12, 1911.

Insurance. Fire Insurance. Construction of Policy.

The defendant issued to the plaintiff a policy of insurance on "his one story frame, steel roof building situated on the north side of Bridge Street, and known on the map as Thurston's Planing and Saw Mill, in Livermore Falls, privileged to be occupied as a Planing Mill and Job Shop." The map referred to was "Sanborn's Map," so called, made for the use of fire insurance companies and their agents. The plaintiff had two "one story frame, steel roof buildings" north of Bridge Street in Livermore Falls. In one logs were sawed and boards and dimension lumber were planed, and there was evidence that it was known at one time as Thurston's Planing and Saw Mill. The other building was used more especially as a fitting and job shop, and contained a planer, band saw and other machinery. The latter building was delineated on the map referred to, with the legend "C. H. Thurston, Saw and Planing Mill." The former building was not on the map at all.

Held, that the description in the policy, "building. . . known on the map as Thurston's Planing and Saw Mill" must be construed to refer to the building that was on the map, and not to the building that was not on the map, and that the verdict of the jury which awarded damages for the loss of the building not on the map is not sustainable, as a matter of law.

On motion by defendant. Sustained unless remittitur be made.

Assumpsit on a policy of fire insurance. Plea, the general issue. Verdict for plaintiff for $532.95. Defendant filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

I. B. Clary, and Newell & Skelton, for defendant.

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

SAVAGE, J. In this action on a fire insurance policy, the only question submitted to the jury, and the only one now to be considered

by the court upon the defendant's motion for a new trial, is, which one of the plaintiff's two mill buildings was covered by the policy?

The property of the plaintiff which was insured is described in the policy as "his one story frame, steel roof building situated on the north side of Bridge Street, and known on the map as Thurston's Planing and Saw Mill, in Livermore Falls, Maine, privileged to be occupied as a Planing Mill and Job Shop."

The plaintiff had two "one story frame, steel roof" buildings situated north of Bridge Street in Livermore Falls, about fifty feet from each other, and both were used for various kinds of mill purposes. The one which was destroyed by fire had a circular saw, a butter, a planer for boards and lumber, a shingle machine and a lath machine. In this mill the logs were sawed, and the boards and dimension lumber were planed, when necessary. The other building was used more especially as a fitting and job shop, and contained an edger, a moulder, a cut off saw, a surface planer, a band saw and a turning lathe. Much more planing was done in the former of the buildings above described than in the latter.

The plaintiff contended at the trial that the former building was the one covered by the policy, and introduced much evidence to the effect that that building was used as a planing and saw mill rather than the other, and was generally known as the "saw and planing mill," and "Thurston's saw mill," or "Thurston's saw and planing mill," before the plaintiff came into possession of the premises; while the other was used and known as a "job shop." If the language of the policy were ambiguous with respect to the identity of the building insured, and thus open to construction by explanatory proof of the surrounding conditions and circumstances, it cannot be said that the phrase "Thurston's Planing and Saw Mill" is not fairly descriptive of the building that was burned, and a verdict based upon that conclusion should not be disturbed.

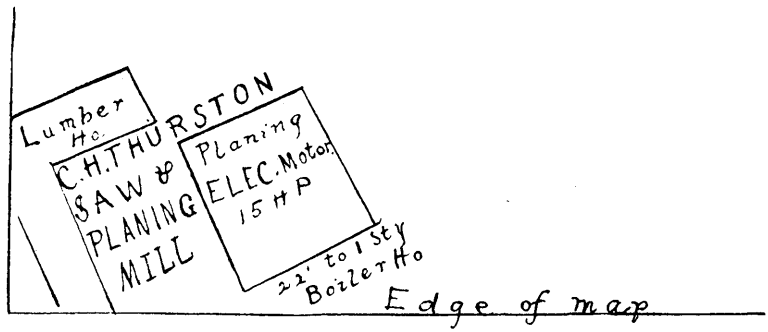
On the other hand, the defendant contends that the policy was intended by it to cover the "job shop," so called, and not the "saw mill." And the evidence is well nigh conclusive that such was the understanding of the local agents who wrote and issued the policy.

It appears that the plaintiff had for several years carried two lines of annual policies from the same agency, one on the saw mill and one on the job shop. When old policies expired, new ones were issued in renewal, without special order, and mailed or handed to the plaintiff. The undisputed testimony is that the policy in suit was so issued in renewal of an unexpired policy on the job shop, and was sent to the plaintiff. But the plaintiff, in fact, as he says, never saw the policy until after the fire. The plaintiff, not conceding the truth of the undisputed testimony, disclaims knowledge of the course of the renewals. He relies solely upon the language of the policy. Further it appears that the New England Insurance Exchange, which regulated and controlled rates at Livermore Falls, had established an annual rate of 7.13% on the saw mill, and 6% on the job shop. The policy in suit was issued at the job shop rate, or 6%. Again, the language in the policy "privileged to be used as a planing mill and job shop" is more appropriate to the job shop than to the saw mill.

But while it is proper to state these contentions, as illustrative of the issues of fact presented to the jury, none of them are necessarily decisive of the case. It is not a question as to what kind of a contract the parties intended to make, but as to the contract they did make; not what property the defendant intended to agree to insure, but what property it did agree, by its contract, to insure. If the contract does not properly express the intention of the parties, it cannot be corrected in this suit. *Martin* v. *Smith*, 102 Maine, 27. Here the defendant can be held only if it is "so nominated in the bond." The contract being in writing, it must be construed, so far as it is unambiguous, according to the plain meaning of its terms.

Upon the face of the contract, the only ambiguity which appears is, what "map" was referred to in the expression "known on the map as Thurston's Planing and Saw Mill?" But the evidence clearly shows that the map referred to was a section of "Sanborn's map," so called, a map showing the location, shape and exposures of buildings in the congested portions of towns, and made for the use of fire insurance companies and their agents. The plaintiff's

saw mill proper did not appear on the section of the map made for Livermore Falls, which was in use at the date of the policy, but the "job shop" did appear, as shown in the following illustration:



The rectangular building on the map is, admittedly, the "job shop." The building which the plaintiff claims is the real "saw and planing mill," and which he claims was insured, lay off the lower side of the map, as reproduced above, and as already stated, it was about fifty feet from the job shop.

It will be noticed that the policy did not, in terms, insure the "Thurston Saw and Planing Mill," but a "building," "*known on the map* as Thurston's Saw and Planing Mill." And the only building to which that description can apply is the "job shop" which is designated on the map as "C. H. Thurston, saw and planing mill." In other words, the policy, by its terms, insured a building that was on the map, and not a building that was not on the map. We cannot stretch the description to a building off the map, without interpolating words which are not in the policy. To do so would be to make a contract for the parties other than the one they have made for themselves. That we cannot do.

It follows, then, that the building which was burned was not within the description in the policy, and the verdict of the jury, awarding damages for its loss, is not sustainable, as a matter of law.

By a stipulation filed before the trial, the parties agreed that if the building destroyed was the one which the plaintiff claims was

insured, the damages should be $500, the amount of the policy; but that if the policy applied to the building which the defendant claims was insured, the damages should be $75, without costs.

Accordingly the certificate will be,

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 $75, motion for a new trial overruled; otherwise, motion sustained.

In Equity.

W. A. ALLEN COMPANY *vs.* MURTON C. EMERTON et al.

Cumberland. Opinion May 17, 1911.

Mortgages. Rights of Parties. Priority. Liens. Statute, 1868, chapter 207. Revised Statutes, 1857, chapter 91, section 16; 1871, chapter 91, section 72; 1903, chapter 93, sections 29, 31.

As between mortgagor and mortgagee, the latter holds the legal estate with all the incidents of ownership in fee, while the mortgagor retains an equitable right under a condition subsequent in the deed.

Under Revised Statutes, 1903, chapter 93, section 29, providing for mechanics' liens, a lien under contract with the mortgagor in a prior recorded mortgage attaches to the equity of redemption only, but such mortgage takes priority over liens only so far as advances under the mortgage were made before the furnishing of the labors and materials for which liens are claimed, though the mortgage be given for a larger amount; the liens otherwise being superior.

In equity. On an agreed statement of facts. Remanded for further proceedings at nisi prius.

Bill in equity brought by the plaintiff to enforce a lien for materials which entered into the construction of a house on the land of the defendant Emerton. The South Portland Loan and Building Association which held a mortgage of the land on which the house

was situate, was made a party defendant. Other bills in equity against the same defendants to enforce liens on the same premises were brought by the Charles M. Hay Paint Company, the Rufus Deering Company, the Emery-Waterhouse Company, Fred M. Leavitt, and William T. Watts. On petition therefor, and under the provisions of Revised Statutes, chapter 93, section 35, these several bills were consolidated into one proceeding. An agreed statement of facts was filed and the cause was reported to the Law Court for determination.

The case is stated in the opinion.

Reynolds & Sanborn, for W. A. Allen Co., and Charles M. Hay Paint Co.

E. H. Wilson, for Rufus Deering Co.

George C. Wheeler, for Emery-Waterhouse Co.

W. K. & A. E. Neal, for F. M. Leavitt.

David E. Moulton, for Wm. T. Watts.

Frank H. Haskell, for W. S. Thurston.

S. L. Bates, for Murton C. Emerton.

Frederick H. Harford, for South Portland Loan and Building Assn.

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

PEABODY, J. This is a bill in equity brought by the plaintiff to enforce a lien for materials amounting to $359.44 which entered into the construction of a house on land of the defendant Murton C. Emerton, the first material having been furnished on June 28, and the last on July 17, 1909.

The plaintiff corporation was one of several corporations and persons who had furnished labor and material for the construction of the same house and had brought their several bills in equity to enforce the liens which they claimed on the premises, and upon its petition an interlocutory decree was made March 1st, 1910, consolidating the several suits into one proceeding. The case is before the Law Court on the agreed statement of facts and stipulations of the parties.

It appears that on the third day of April, A. D. 1909, the defendant Emerton negotiated with the defendant, the South Portland Loan and Building Association, for a loan of $2500, to be used in the erection of a dwelling house upon a lot of land owned by him in South Portland, described in the various bills in equity, and on April 14, 1909, he executed a mortgage of the premises to secure his note in favor of the Association for $2500, which on the next day was recorded in the Registry of Deeds for the county of Cumberland.

The amount of the loan was not paid on the day of the execution of the mortgage deed but was advanced in several payments as indebtedness was incurred by him in building the house as follows: April 27, 1909, $71.40, and $17.50, May 1st, 1909, $500, May 18, 1909, $1000, June 28, 1909, $500, July 31, 1909, $29.40 and $381.70. All of the lienors, excepting the Emery Waterhouse Co., seasonably filed in the office of the city clerk of South Portland the notice provided for in R. S., chapter 93, section 31. All the bills in equity were seasonably filed and duly served. No lien claimant gave any actual notice to the mortgagee of the fact of furnishing material or labor for the building and the mortgagee gave no notice to any of the lienors to prevent the attaching of their liens. The Association knew before any of the liens attached that Emerton was building a house upon the mortgaged premises. Its security committee carefully examined Emerton as to the payment of the bills contracted by him and were assured by him that all were paid and orders were drawn for the amounts paid as stated by him.

The principal question of law involved in the case is whether the defendant, the South Portland Loan and Building Association is, by its recorded mortgage, protected in making the loan of $2500 and advancing the amount in partial payments against the lien claims of the various plaintiffs. The lienors rely upon the provisions of R. S., chapter 93, section 29.

"Whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building or appurtenances, or in constructing, altering or repairing a wharf, or

pier, or any building thereon, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs. If the owner of the building has no legal interest in the land on which the building is erected, or to which it is moved, the lien attaches to the building, and if the owner of the wharf or pier has no legal interest in the land on which the wharf or pier is erected, the lien attaches to the wharf or pier, and in either case may be enforced as hereinafter provided, and if the owner of such land building, wharf or pier so contracting, is a minor married woman such lien shall exist, and such minority or coverture shall not bar a recovery in any proceeding brought to enforce it."

It was decided in *Morse* v. *Dole*, 73 Maine, 351, that a lien acquired by virtue of a contract made with the mortgagor subsequent to the recording of the mortgage does not take precedence of the mortgage; it only attaches to the equity of redemption.

A mechanics' lien under the earlier statute attached to a house, building or appurtenance for labor and materials performed or furnished for erecting, altering or repairing the same by virtue of a contract with the owner and to the lot of land on which it stands or any interest such owner has in the land or in the equity of redemption if under mortgage to secure payment thereof. R. S., 1857, chapter 91, section 16. The statute was subsequently changed so that a lien was given for labor and material furnished under a contract either with or by consent of the owner. Public Laws, 1868, chapter 267.

In this State as between the mortgagor and mortgagee, the mortgagee holds the legal estate in the mortgaged premises with all the incidents of ownership in fee, while the mortgagor retains an equitable right under a condition subsequent contained in the deed. *Howard* v. *Houghton*, 64 Maine, 445; *Gilman* v. *Wills*, 66 Maine, 273. The statute does not in the use of the term "owner" recognize the technical distinction in the respective interests of mortgagor and mortgagee. If in the sense of the law of liens the mortgagee is the owner, the mortgagor is not, and if there is

any ambiguity which requires interpretation we should look to the context of the statute in which a lien for labor and material furnished "by or with consent" of the owner was first given, and it is seen that the clause "or of the equity of redemption if under mortgage" is still retained, and it cannot mean otherwise than if the land is under mortgage that the lien is upon what the mortgagor owns which is the equity of redemption and does not take precedence of a recorded mortgage. *Howard* v. *Robinson*, 5 Cush. 119, 123; *Dunklee* v. *Crane*, 103 Mass. 470.

In the revision of R. S., 1871, the term equity of redemption is dropped and in its place and in subsequent revisions appears "any interest such owner has in the same." This includes in a concise form the interest which the owner has in the land if there is no mortgage also his interest if under mortgage. If the change in the language of the statute is considered to support the theory that as the mortgagee is the owner of the fee his interest is subject to a lien if chargeable with even implied consent to the furnishing of labor and material by a contract with the mortgagor, thus we change the nature of the mortgage as to third persons even after record from a lien of which other lien claimants had constructive notice to ownership in which the mortgagor's equity of redemption is merged and consequently no lien judgment could be as formerly recovered against him. This is a construction which could not have been intended by the Legislature in enacting the present statute.

The practical application of the law of mechanics' liens to the facts of this case is that upon the recording of the mortgage of the Association it became a lien on the mortgaged property to the extent of the amount then due against subsequent lien claims, such liens being enforceable against the mortgagor and his equity of redemption at the time they attached.

The case shows that the Association knew that the house was being erected and that the claimants were furnishing the material and labor for the same. It was bound to know whenever it made any advancement under the mortgage whether the property had become subject to any incumbrances for, if any, these took precedence

over the subsequent advances. Though the advancements diminished the value of the equity of redemption they did not postpone prior lien claims.

With one exception the statutory statements of these claims were regularly filed in the city clerk's office at South Portland but their origin was not such as required this because they were not for material and labor furnished under a contract with a person not the owner of the equity redemption.

The evidence shows that on May 18, 1909, the time when the first items were furnished or work done for which a lien is claimed, there was due to the South Portland Loan and Building Association for cash already advanced the sum of $1588.90. This had priority over the mechanics' liens involved in the consolidated equity proceeding, because it does not appear that the labor and materials were furnished under any contract made before the record of the mortgage which continued in force thereafter during the furnishing of all the labor and materials and under which the lien claimant was obliged to furnish them. *Morse* v. *Dole*, 73 Maine, 351.

The mechanics' liens then followed and attached in chronological order, until the next payment was made by the Loan and Building Association which was on June 28, the sum of $500, and then again in succession according to their respective dates. Each payment under the mortgage being junior to labor and materials furnished prior to such payment, but having priority over labor and materials furnished subsequent thereto. As the record contains no itemized bills it is impossible to ascertain the exact amount due to the various parties on the various dates. The cause is therefore remanded to the sitting Justice to ascertain the amounts and the priorities in accordance with this opinion.

So ordered.

In Equity.

ANNIE G. BROWN *vs.* KENNEBEC WATER DISTRICT.

Kennebec. Opinion May 20, 1911.

Eminent Domain. Delegation of Power. Necessity for Taking Land. Judicial Power. Determination. Payment of Compensation. Pleading. Demurrer. Constitution of Maine, Article I, section 21. Private and Special Laws, 1899, chapter 200, sections 2, 5, 6; 1905, chapter 152.

Private and Special Laws of 1899, chapter 200, as amended by Private and Special Laws of 1905, authorizes the Kennebec Water District to take and hold, by the right of eminent domain, "land and real estate necessary for the purpose of preserving the purity of the water and watershed" of China Lake, its source of supply.

Courts cannot inquire into the necessity for condemning land, in the absence of abuse by officers authorized by the legislature to determine the question.

A landowner has no constitutional right to have the necessity of condemnation determined by a court or jury, and, unless the courts are authorized by statute to determine or revise the question, the decision of the legislature, or of its chosen agents, is conclusive.

Statements that land is so situated as to make its condemnation so manifest a perversion of power as to be null and void, being conclusions of law from facts not stated, are not admitted by demurrer.

Section 21 of Article I, of the Constitution of Maine declares that "private property shall not be taken for public uses without just compensation;" but this does not compel the legislature to require the payment of such compensation to precede the temporary occupation of land "as an incipient proceeding to the acquisition of a title to it or to an easement in it." According to the rule established in Maine, that clause of the Constitution operates to prevent the permanent appropriation of the property without the actual payment or tender of a just compensation for it, and the right to such temporary occupation will become extinct by an unreasonable delay to perfect the proceedings, including the payment of compensation.

Unless compensation is made within a reasonable time for land sought to be condemned, damages may be recovered for the continued occupation and for injuries resulting from the prior occupation.

In equity. On report. Bill dismissed.

Bill in equity praying for an injunction to restrain the defendant from entering in or upon the plaintiff's land and from taking, using or appropriating her land without her consent.

The defendant demurred to the bill and the case was reported to the Law Court upon bill and demurrer.

The case is stated in the opinion.

Benedict F. Maher, and Mark J. Bartlett, for plaintiff.

Harvey D. Eaton, for defendant.

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

WHITEHOUSE, J. In this bill in equity the plaintiff prays for an injunction to restrain the Kennebec Water District, the defendant named in the bill, from "entering in or on the plaintiff's land" therein described "and from taking, using or appropriating said land without the consent of the plaintiff." A preliminary injunction was granted upon the filing of a statute bond in the sum of $500. The defendant demurred to the bill "and for cause of demurrer shows that the plaintiff has not made or stated a case requiring the intervention of the court." The case is reported to the Law Court upon bill and demurrer.

It appears from the allegations in the second paragraph of the plaintiff's bill that on the 12th of May, 1910, the defendant Water District by its trustees, filed in the office of the clerk of courts a certificate of taking declaring that "in accordance with the provisions of chapter 200 of the Private and Special Laws of 1899, as amended by chapter 152 of the Laws of 1905, for the purpose of preserving the purity of the water and water shed of China Lake, the Kennebec Water District hereby takes as for public uses" the plaintiff's land therein described.

It is further alleged in the bill that the defendant district is not authorized by its charter nor by the law of the land, to take the plaintiff's land by the exercise of eminent domain; that the plaintiff's land is so far removed from the intake pipe and otherwise so

situated as to render any attempted taking by the defendant in the exercise of eminent domain, if the defendant possessed such right, for the purposes stated in its certificate, so gross and manifest a perversion of the power, as to be null and void; that the action threatened by the defendant will constitute a continuing trespass upon the plaintiff's property, working irreparable injury to her, for which she has no adequate remedy at law, and finally that the threatened action on the part of the defendant to enter upon and use the plaintiff's land prior to the payment of compensation therefor, will constitute a taking of property without due process of law.

It is contended in behalf of the defendant District that the demurrer to the plaintiff's bill should be sustained for two reasons.

First, because the court does not have jurisdiction in equity but at law by the writ of certiorari, and second, for the reasons that upon examinations of the plaintiff's bill in connection with the legislative acts constituting its charter, the proceedings of the defendant District will be found duly authorized, and in every respect legal and valid.

Assuming without deciding that the court has jurisdiction in equity in this case, it is the opinion of the court that the demurrer to this bill must be sustained.

It is provided by section two of chapter 200 of the Private and Special Laws of 1899, that the defendant district "may take and hold by purchase or otherwise, any land or real estate necessary for erecting dams, power reservoirs, or for preserving the purity of the water and water shed, and for laying and maintaining aqueducts for conducting, discharging, distributing and disposing of water;" and section three of the same act provides that damages sustained by any persons or corporations in their property by the taking of any land whatsoever. . . . may be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in case of damages by the laying out of highways."

Furthermore, chapter 152 of the Private and Special Laws of 1905, amendatory of the original act of incorporation in 1899, prescribes the method of commencing proceedings for condemnation

by the defendant District in terms manifestly designed to be made applicable to section two of the act of 1899 above quoted, as well as to section six: for it appears that in addition to the general authority to "take and hold any land or real estate necessary for erecting dams," etc., granted by section two, special authority was conferred upon the district by section six, to take by purchase or by the exercise of the rights of eminent domain, the entire property and franchises of the Maine Water Company within the District and the towns of Benton and Winslow." And it was held in *American Woolen Company* v. *Kennebec Water District*, 102 Maine, 153, that the authority given to the Water District in its charter was not merely authority to exercise the power of eminent domain, not merely authority to take water after condemnation proceedings for that purpose, but authority to take water from China Lake directly and at once.

It thus clearly appears that the provisions of the defendant's charter not only disclose a manifest intention on the part of the Legislature to confer upon the Water District the power to take and hold, by the right of eminent domain, "land and real estate necessary for the purpose of preserving the purity of the water and water shed" of China Lake, but that the terms employed in these several provisions, construed in relation to each other, are undoubtedly apt and sufficient to effectuate that intention.

It is provided by section 5 of the original charter that "All the affairs of the Water District shall be managed by a board of trustees, composed of five members." The action of these trustees in filing the certificate of taking set out in the plaintiff's bill was clearly authorized by the defendant's charter, and it is not in question that the certificate itself and all of the formal proceedings for the condemnation of the land in question, were in conformity with the mode prescribed by the amended charter.

2. But it inferentially appears from the allegations in the plaintiff's bill that the substantial ground of complaint intended to be set forth is that the taking of the plaintiff's land was not "necessary for the preservation of the purity of the water and water shed" of China Lake.

But the question of the necessity of taking the plaintiff's land for the public purposes specified in the certificate of taking is not open to inquiry by this court. According to the settled law of this State the decision of that question by the trustees of the Water District upon whom the Legislature conferred the power to determine it, is conclusive upon the courts, in the absence of evidence showing a manifest abuse of power or bad faith in its exercise. This rule of law was fully examined and the leading authorities upon it collated in the recent case of *Hayford* v. *Bangor*, 102 Maine, 340, and it was there held that not only is the question of the exigency or necessity for the taking a matter for the Legislature, or those to whom it delegates its authority, but also the extent to which property may be taken, and that the decision of these questions by the tribunal or body upon whom the power has been conferred by the Legislature is not reviewable by the court. There is no constitutional right on the part of the land owner to have the question of the necessity of the taking submitted to a court or jury; and in the absence of any statutory authority for a determination or revision of the matter by the court, the decision of the Legislature or its chosen agents is conclusive. As observed by the court in *Burnett* v. *Boston*, 173 Mass. 176: "So long as the members of this Board act regularly and in good faith, their decisions upon the question of necessity is final." See also *Lynch* v. *Forbes*, 161 Mass. 302; *Old Col. Petitioner*, 163 Mass. 356; Lewis on Em. Domain, sect. 238; Cooley's Const. Lim. 7 Ed., page 77; Dillon's Mun. Corp. sect 600.

In the case at bar it has been seen that there is no distinct averment in the plaintiff's bill that in taking her land there was a manifest abuse of power or bad faith in its exercise, on the part of the trustees of the defendant Water District. The bill neither furnishes any definite information in regard to the actual distance of the plaintiff's land from the defendant's intake pipe, nor contains any specific statement of facts descriptive of the plaintiff's land and its physical conformation with respect to the lake, from which an abuse of power or bad faith on the part of the trustees could be inferred. The statements in the sixth paragraph of the bill that

the situation of the land is "such as to render any attempted taking of it by eminent domain, for the purposes enumerated in the certificate, so gross and manifest a perversion of said power as to be null and void," are obviously conclusions of law from facts not stated, and not allegations of the facts themselves which would be admitted by demurrer.

3. Finally she complains in the bill that the threatened action of the Water District "prior to the payment of compensation for said land will constitute a taking of property without due process of law." But the law has also been settled against the plaintiff's contention on this branch of the case. *Cushman* v. *Smith*, 34 Maine, 247; *Nichols* v. *S. & K. R. R. Co.*, 43 Maine, 356; *Davis* v. *Russell*, 47 Maine, 443; *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91. Section 21 of Article one of the Constitution of Maine declares that "private property shall not be taken for public uses without just compensation;" but this does not compel the Legislature to require the payment of such compensation to precede the temporary occupation of land "as an incipient proceeding to the acquisition of a title to it or to an easement in it." According to the rule established in this State, that clause of the Constitution operates to prevent the permanent appropriation of the property without the actual payment or tender of a just compensation for it, and the right to such temporary occupation will become extinct by an unreasonable delay to perfect the proceedings, including the payment of compensation. Unless such compensation be made within a reasonable time, damages may be recovered for the continual occupation and for injuries resulting from the prior occupation. *State* v. *Fuller*, 105 Maine, 571.

The certificate must accordingly be,

Demurrer sustained.
Bill dismissed with costs.

In Equity.

MARY W. HOUGHTON *vs.* GEORGE E. HUGHES, Trustee.

Sagadahoc. Opinion May 24, 1911.

Wills. Construction. Trust Estates. Technical Words. "Heirs at Law." Statute 1895, chapter 157.

A testator gave property in trust for payment of the net income to a son for life, the principal to go to the son's heirs at law at his death. *Held*, that the principal formed no part of the son's estate; the gift thereof to his heirs being substantive and not substitutional.

A will is to be interpreted according to the laws of the country or state of the domicile of the testator, since he is supposed to have been conversant with those laws.

Where a testator has used technical words or expressions, he is presumed to have used them in the sense that has been ascribed to them by usage and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the context.

Where there was a gift by a testator to his son's "heirs at law" under a will executed before the statute of 1885, chapter 157, establishing a widow's right by descent in her deceased husband's real estate, took effect, *held* that the son's widow was not included as one of "his heirs at law."

In equity. On report. Bill dismissed.

Bill in equity praying for the construction of the fourth item of the last will and testament of Levi W. Houghton, deceased testate. The defendant filed an answer with a demurrer therein inserted. When the cause came on for hearing an agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Edward C. Plummer, for plaintiff.

George E. Hughes, for defendant.

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

KING, J. Bill in equity reported to the Law Court on an agreed statement of facts.

The question presented in this case involves the construction of the fourth item of the will of Levi W. Houghton, which reads as follows:

"Item Fourth: I give, devise and bequeath all the residue and remainder of my property of every name and nature, real, personal or mixed, and wherever situate, unto my children as follows, to wit: to Frank P. Houghton, Sarah Virginia Hall, and Ernestine A. Payne each his or her distributive share of said estate, as determined by the laws of inheritance of the State of Maine, and to Francis Adams, of said Bath, the proportional shares that would go to my two sons, Henry W. Houghton and James M. Houghton, in trust, to hold, manage and control the same according to his, the said Adams' best skill and judgment, paying to said Henry W. and the said James M., quarterly, the net income of his individual share so held in trust, during the term of his natural life, and at his death the principal to go to his heirs at law, and in case the income from the share of either Henry W. or James M. should not equal to their reasonable wants and necessities then I direct that said trustee may annually allow to each a sum not exceeding two hundred and fifty dollars from the principal."

The testator was a citizen of Bath, Maine, at the time the will was executed, January 27, 1895, and died there December 13, 1895. The defendant was appointed and qualified as trustee of the share of Henry W. Houghton in the place of Francis Adams named in the will and is still acting in that capacity. At the time the will was executed the son, Henry W., was a citizen of Boston, Massachusetts, where he continued to reside up to the time of his death, May 16, 1910. He never had any children, but some years prior to the making of his father's will married the plaintiff who survives him as his widow. He died testate, and by the terms of his will duly probated in said Boston the plaintiff is his sole legatee.

I. The plaintiff appears to claim in her bill that under item fourth of the will of Levi W. Houghton, above quoted, Henry W. Houghton took an equitable fee in the corpus of one-fifth of the residue of the estate, the same being put in trust merely to limit the son to the enjoyment during his lifetime of the net income thereof, with an additional allowance from the principal, annually, not exceeding $250, in the discretion of the trustee, and that at the death of Henry W. the trust terminated and the residue of the principal became a part of the estate of Henry W. This claim we think is not maintainable. The language of the will is explicit, and its meaning clear. There is no absolute gift of a share of the estate to Henry W. It was given to the trustee, in the first instance, and the son was to have only the net income thereof during his life, and at his death the principal was "to go to his heirs at law." Henry W. Houghton took under the will only a life estate in the income of the one-fifth share of the residue. *Bradbury* v. *Jackson*, 97 Maine, 449, 460. The heirs at law of Henry W. were not to take the principal of the trust fund at his death by substitution for him, but as persons designated in the will to take in their own right something which he was in no event to take. The gift of the principal to them was a substantive gift, and not a substitutional one. They take by force of the will as purchasers. *Clarke* v. *Cordis*, 4 Allen, 466, 480.

II. But the chief contention of the plaintiff, as stated in the brief of counsel, is, that as widow of Henry W. Houghton, who died without issue, she is entitled to one-half of the balance of the principal of the trust fund as an heir at law of her deceased husband. It has been argued, that the determination of the question whether the plaintiff is an heir at law of her husband should be made according to the laws of Massachusetts, the place of residence of Henry W. Houghton. The real question is, what meaning should be given to the words "his heirs at law" as used by the testator, Levi W. Houghton? In what sense did he employ those words? The general rule, both as to wills of personalty and realty, seems to be that a will is to be interpreted according to the laws of the country or state of the domicil of the testator, since he is

supposed to have been conversant with those laws. In *Harrison* v. *Nixon*, 9 Pet. (U. S.) 483, Story J., in considering the meaning of the words, "heir at law" in the leading bequest of a will said:

"The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion." See also Schouler on Wills, 2nd Ed. sec. 469. The case of *Lincoln* v. *Perry*, 149 Mass. 368, 373, is directly in point on this question. In that case the testator provided that a share of his estate which he gave to Judith Perry for her life should, at her death, go to "her heirs at law." The testator was domiciled in Massachusetts at the time the will was made and thenceforth until he died. It was contended that the term "heirs at law" should be interpreted according to the laws of New Hampshire, the residence of Judith at the time of her death. The court held otherwise, saying: "But the question after all is, what is the meaning of the testator's words? and we are brought to the conclusion that the true meaning is to designate a set of persons who were to take the estate upon Judith's death, and that those persons are styled her heirs at law. This set of persons would not fluctuate with any changes of residence that she might make. The testator would probably not be familiar with the laws of different States. He lived here, his will was drawn here by a Massachusetts lawyer, and it was executed here. The laws of Massachusetts are those with which presumably he would be best acquainted. . . . . In speaking of heirs at law, he probably meant those who would be heirs at law here." The language of the Massachusetts court is precisely applicable to the case now before us. Levi W. Houghton lived and died in Maine. His will was made and executed in Maine. It is not probable that he was familiar with the laws of any other State, but he is presumed to know the laws of Maine, and it should be assumed, we think, that he used the words "heirs at law" in his will in the sense which those words then had according to the laws of the State of Maine,

and as judicially construed by the courts of Maine, there being nothing in the language used which repels or controls such conclusion.

Where a testator has used technical words or expressions he is presumed to have used them in the sense that has been ascribed to them by usage, and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the context. The term "heirs at law" had a well recognized significance according to the laws of this State at the time the testator made his will, January 27, 1895. Many years previous this court had declared that a widow was not an heir of her deceased husband, *Lord* v. *Bourne*, 63 Maine, 368. And the learned counsel for the plaintiff in his brief says: "Prior to the law of 1895 it is evident that the Maine widow was not an heir at law" of her deceased husband, "but now" he continues "it is respectfully submitted that she is an heir even under the definitions of those old decisions." But the plaintiff seems to have lost sight of the important consideration that even if it were held, under the law of 1895, which established the widow's right by descent in her husband's real estate, that the widow is now an heir of her deceased husband, contra to the view expressed in *Golder* v. *Golder*, 95 Maine, 259, and *Herrick* v. *Low*, 103 Maine, 353, such conclusion could have no application to the question here presented. The law of 1895 was approved March 26, 1895, and did not take effect as to persons then married till January first, 1897. Accordingly when the will of Levi W. Houghton was executed, the law of 1895 had not been enacted, and at the time of his death, December 13, 1895, that law was not in force except as to persons married after May first, 1895.

It will, therefore, be seen that the question now before us is not, whether the term heirs at law used in a will made since the law of 1895 was enacted and in force might not have been used by the testator to include the widow of the person whose heirs at law are referred to, but the question here is, whether the words "heirs at law" used in the will of Levi W. Houghton, which was made before the law of 1895 was passed, and when, according to usage and the judicial decisions of this State, a widow was not an heir of her

deceased husband, should be interpreted to include the widow. There is nothing in the language of the will indicating that this testator did not use the expression "his heirs at law" according to its then recognized and defined import, and as not including the widow of his son.

The court is, therefore, constrained to the conclusion that the term "heirs at law" used by the testator in the fourth item of his will to designate those who were to take the principal of the trust property at the death of his son Henry W., must be interpreted as used with the effect and meaning then ascribed to it under the laws of this State, and as judicially defined, with which he is presumed to have been familiar.

Accordingly it is the opinion of the court that the plaintiff, as the widow of Henry W. Houghton, is not entitled to share in the property now held in trust by the defendant under the provisions of the fourth item of said will and which at the death of Henry W. Houghton was "to go to his heirs at law."

The entry must, therefore, be that the relief asked for by the plaintiff is denied, and the bill is dismissed.

So ordered.

STATE OF MAINE *vs.* HERBERT SIMMONS AND FRANK MURPHY.

Knox. Opinion June 9, 1911.

Indictment. Allegations. Obstructing Officers. Fish Warden. Revised Statutes, chapter 123, sections 21, 22.

1. Section 21 of chapter 123, Revised Statutes against obstructing officers is limited to cases of obstructing officers in the service of some process and does not support an indictment not containing an allegation that the officer was obstructed in the service of some process.
2. Section 22 of the same chapter is limited to the particular officers therein named and does not include fish wardens, and hence does not support an indictment for obstructing a fish warden.
3. An indictment at common law for obstructing a fish warden in the execution of his duty is invalid if it contain no description or specifications of the acts relied upon as constituting an obstructing, opposing or hindering him.

On exceptions by defendants. Sustained.

The defendants were indicted for assaulting an officer, to wit, a fish warden, and obstructing him in the execution of his official duty. The indictment was nolle prossed as to the assault. The defendants then filed a demurrer which was overruled and the defendants excepted.

The case is stated in the opinion.

Philip Howard, County Attorney, for the State.

Edward K. Gould, for defendants.

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

EMERY, C. J. Exceptions to overruling a demurrer to an indictment. The indictment originally was for assaulting a fish warden and obstructing him in the execution of his official duty. The county attorney, however, entered a nolle prosequi as to the assault, so that the indictment now charges only that the defendant "did then and there unlawfully and knowingly obstruct, oppose and

hinder" the fish warden in the execution of his office, etc. It contains no description or specification of any acts of obstruction, opposing or hindering. The want of such description or specification is urged in support of the demurrer.

The indictment is not supported by any statute cited by the prosecution. Section 21 of chap. 123, R. S., is limited to the obstruction of an officer in the service of some process. There is in this indictment no allegation of such obstruction. Section 22 of the same chapter, is limited to the officers therein specified, and does not include fish wardens who are not named. The indictment therefore must be sustained by the common law if at all.

But the common law requires statements of facts, not of conclusions. In this case it requires a statement of the acts claimed to constitute the offense of obstructing, opposing or hindering an officer; and for two reasons, viz: (1) that the court may see at the outset whether the acts do constitute the offense, and (2) that the defendant may know what he is to meet, and, if again prosecuted for the same offense, may avail himself of the conviction or acquittal in this case, in bar. *State* v. *Bushey*, 96 Maine, 151; *State* v. *Downer*, 8 Vt. 424; *State* v. *Maloney*, 12 R. I. 251; *People* v. *Hamilton*, 71 Mich. 340.

Exceptions sustained.
Demurrer sustained.

RUMFORD NATIONAL BANK *vs.* ROBAIN ARSENAULT et als.

Oxford. Opinion June 9, 1911.

Nonsuit. Variance. Amendments. Revised Statutes, chapter 84, section 98.

1. Where the declaration describes a note signed by four and the note put in evidence is signed by only three, the variance is cured by a discontinuance as to the defendant who did not sign the note, and then is not cause for a nonsuit.
2. In an action upon a several contract against three, the fact that the evidence against one of the three does not show him to be liable is not cause for a nonsuit. The plaintiff might still be entitled to a verdict against the others under Revised Statutes, chapter 84, section 98.
3. As a general rule, variances that are remediable by allowable amendments or discontinuances are not grounds for nonsuit.

On exceptions by plaintiff. Sustained.

Assumpsit on a promissory note against the defendant Arsenault, Richmond Manufacturing Company, a corporation, Edwin Riley, and John H. Maxwell. The note was payable to the order of the defendant Arsenault and by him was indorsed and delivered to the plaintiff, but he was joined in the suit as a maker of the note. Plea, the general issue with a brief statement on the part of the Richmond Manufacturing Company alleging that the note "was never made by it," and also a brief statement on the part of Riley and Maxwell alleging that they had been induced to sign the note "by reason of certain inducements and promises held out to them" by Arsenault, and "that said promises and inducements" had not been kept by Arsenault, and that "by reason of the failure to keep said promises and agreements" there had been a total failure of consideration, etc.

At the conclusion of the evidence, a nonsuit was ordered and the plaintiff excepted.

The case is stated in the opinion.

L. W. Blanchard, for plaintiff.

M. McCarthy, for defendant Arsenault.

Bisbee & Parker, for other defendants.

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

EMERY, C. J. This was an action against the Richmond Manufacturing Company and three individuals, Riley, Maxwell and Arsenault, as promissors upon a promissory note payable to the order of Arsenault, and by him endorsed and delivered to the plaintiff bank. The note offered and admitted in evidence, however, was signed as promissors only by the Richmond Company, Riley and Maxwell. Arsenault had merely endorsed it as payee and endorser. The defendants asked for an order of nonsuit because of this variance, whereupon the plaintiff by leave of court discontinued as to Arsenault. The court nevertheless then ordered a nonsuit and the plaintiff excepted.

1. The discontinuance as to Arsenault left the action as if originally brought against the other three defendants only, so that at the time of the nonsuit there was no variance as to defendants between the note declared on and that put in evidence.

2. The note was subscribed by Riley and Maxwell personally, and also bore the subscription "Richmond Manufacturing Company by Edwin Riley, Pres. J. L. Cummings Treas." There was no other evidence that the note was that of the company. This lack of evidence is also urged as sufficient ground for the nonsuit. But the nonsuit cannot be maintained on that ground, The note was admittedly the note of Riley and Maxwell, the individual defendants, since they had not denied their signatures as required by Court Rule X. As the case stood, the plaintiff was entitled to a verdict against them, even if not against the company, R. S., ch. 84, sec. 98. The insufficiency of the evidence against the company, (if it was insufficient) might have required a direction for a verdict in its favor if asked for, but did not require, nor authorize, a nonsuit as to the other defendants.

3. In the declaration the note was described as bearing interest while the note in evidence did not bear interest. This variance, however, was not urged at the trial as ground for the nonsuit,

and is easily remedied by amendment of the declaration. Hence it cannot be admitted here as ground for sustaining the nonsuit.

4. As a general rule variances that are remediable by allowable amendments or discontinuance are not grounds for a nonsuit unless the plaintiff refuses to make the necessary amendments.

Exceptions sustained.
Case to stand for trial.

CHESTER H. HAYNES, pro ami.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion June 10, 1911.

Master and Servant. Railroads. Fellow Servants. Train Dispatcher. Negligence. Evidence.

A train dispatcher and the enginemen over whose movements he has direction are not fellow servants; he being a vice principal to such employees.

The duty of a train dispatcher is not fulfilled by giving an order. When he knows, or in the exercise of due care, ought to know that danger may arise from the execution, negligent or otherwise, of an order, he must act and act promptly.

The master is liable for injuries suffered by his servant arising from the former's own negligence, although the negligence of fellow servants of the latter may have contributed in causing the injury.

Evidence in an action for injury to a railway fireman in a collision *held* to warrant a finding that a train dispatcher was negligent.

On motion and exceptions by defendant. Motion sustained unless remittitur be made. Exceptions not considered.

Action on the case to recover damages for personal injuries sustained by the plaintiff, a minor, while acting as fireman upon one

of the defendant's locomotives in a head on collision with another locomotive of the defendant railroad. Plea, the general issue. Verdict for plaintiff for $12,821. The defendant excepted to several rulings made during the trial and also filed a general motion for a new trial.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Forrest Goodwin, for defendant.

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

BIRD, J. This action on the case, in which the plaintiff seeks the recovery of damages for injuries sustained by him while acting as fireman upon one of defendant's locomotives in a collision with another locomotive of defendant, is before this court upon general motion of defendant for a new trial and on exceptions.

The plaintiff claims that one of the causes of the collision was the negligence of the train dispatcher of the defendant. The greater weight of authority is to the effect that a train dispatcher and the engineers and firemen of the trains over whose movements he has direction are not fellow servants but that as to such employees he is a vice principal. While the precise question has, perhaps, never been directly determined in this State, an affirmative answer is indicated by several decisions: *Donnelly* v. *Granite Co.*, 90 Maine, 110, 115, 116; *Hall* v. *Emerson-Stevens Co.*, 94 Maine, 445, 450; *Small* v. *Manufacturing Co.*, 94 Maine, 551, 555; *Hume* v. *Power Co.*, 106 Maine, 78, 82; *Lasky* v. *Railway Co.*, 83 Maine, 461, 472. It is directly so held in *Ricker* v. *Central R. R. Co.*, 73 N. J. L. 751; See same case 9 Ann. Cas. 785 and note, pages 788-790, where the authorities are collected. Upon the undisputed facts of this case we must hold as matter of law the train dispatcher was a vice principal: See *Lasky* v. *Railway Co.*, ubi supra. In that case the facts as to the relation between the superintendent and the train dispatcher are substantially identical with the facts of this case.

The conductor and engineer of the train upon which plaintiff was fireman, having received the train dispatcher's order, signed the train register in the office of the latter at 2.40 P. M. and at the same time indicated thereon the same hour as the time of departure. The train register, as well as the train sheet and time table, lay upon the desk of the train dispatcher and it was his duty to enter the hour of the departure of all trains at once upon the train sheet but it is not necessary to determine his care or want of care in failing to do so. At 2.45 P. M. which, upon the evidence, the jury would be warranted in finding the latest moment at which he had actual knowledge that the entry of the departure of train 301 was 2.40 P. M. and that that train might have departed in violation of the rule requiring it to await the arrival of train 28, the latter was still at West Benton and no report of its departure had been received at Waterville. It did not leave there until 2.48 P. M. Ample time was afforded him to send a telegraphic message or order to West Benton delaying the departure of train 28 until further order. Instead of so doing, after some delay he telephoned to the yard at Waterville and ascertained, about 2.55 P. M., that train 301 had departed. At that time the collision had already occurred. The duty of the train dispatcher is not fulfilled by giving an order. When he knows, or in the exercise of due care, ought to know that danger may arise from the execution, negligent or otherwise, of an order, he must act and act promptly. In this case, there had been "brought to him, considering his position and the responsibilities upon him, a demand for a care which he omitted to observe:" *Santa Fe Pacific R. R.* v. *Holmes*, 202 U. S. 438, 445. His negligence being that of defendant, albeit the negligence of the conductor and engineer were concurrent, we find no occasion to disturb the finding of the jury as to the liability of defendant.

The jury awarded the plaintiff damages to the amount of $12,821. He was a young man of nineteen years of age, of exceptional physical development and condition. His injuries were severe. His right eye was so injured as to require removal and the upper surface of the lower portion of the orbit was shattered; the upper jaw was fractured, one tooth was lost and another was broken; the

face was cut from a point over the right eye through the nose and upper lip to the chin and the knee was wrenched. At the end of two or three months the health of plaintiff was practically, if not entirely, restored and all external wounds were then long since healed. At the time of trial there was still a discharge of natural secretions from about the eye which was disagreeable and offensive and the nose was disfigured and unsightly. But it is apparent from the evidence that the discharges from the eye socket can be obviated and the appearance of the nose greatly improved by minor surgical operations. The disfigurement from loss of the eye itself can obviously be greatly lessened. The visual sense must of course be considerably impaired and the danger by accident of complete blindness much increased. It is questionable, while his physical powers seem re-established, if he be capable of earning as much wages as before the accident. Upon a careful examination of the evidence we are reluctantly forced to conclude that the verdict is excessive. Scrupulously regarding all the elements of damage, we must order a new trial unless the plaintiff remits all of the verdict in excess of $7500.

It becomes unnecessary to consider the exceptions, in view of the conclusions reached upon plaintiff's motion.

Motion sustained. New trial ordered unless plaintiff within sixty days after receipt of the certificate of decision of this court remits all of the verdict in excess of $7500.

FOREST L. MOTT, pro ami, *vs.* JOHN N. PACKARD et als.

Androscoggin. Opinion June 19, 1911.

Master and Servant. Dangerous Machinery. Assumption of Risk. Minors. Presumptions. Care Required.

Where the plaintiff, a minor between 16 and 17 years of age, was the operator of a breaking machine in a cracker factory and was injured by getting his hand caught between the revolving cylinders of the machine, which were in plain view and unguarded,

Held: 1. That he assumed the risk of the employment, unless his age or inexperience prevented him from fully understanding and appreciating the danger of his hand coming in contact with the revolving cylinders.

2. That the plaintiff being of ordinary intelligence and understanding, and the dangers of operating the machine being obvious and apparent, he is presumed to have assumed the risk of operating the machine as it was, without any guard to protect his hands from being drawn between the cylinders.

In the absence of anything to show the contrary, a boy who is a minor and an employee in a factory, is presumed to possess the intelligence and understanding ordinarily possessed by boys of his age.

The operator of a machine is bound to exercise due care to avoid injury to himself.

Where the plaintiff was injured by getting his hand caught between the revolving cylinders of a machine which he was operating and the accident was caused by his own negligence, and there was a delay of one or two seconds in stopping the machine and releasing his hand because a fellow servant was unable to shift the driving belt which was fastened by a wire, *held* that even if it were possible to determine how much of the injury was received during the time his fellow servant was prevented from shifting the belt yet the plaintiff could not recover.

On exceptions by plaintiff. Overruled.

Action on the case brought by the plaintiff, a minor, to recover damages for personal injuries sustained by him while in the employ of the defendants and caused by the alleged negligence of the defendants. Plea, the general issue. At the conclusion of the plaintiff's evidence the presiding Justice ordered a nonsuit, and the plaintiff excepted.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Newell & Skelton, for defendants.

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

HALEY, J. This is an action brought by Forest L. Mott, a minor, by his father as next friend, against John D. Packard et als. to recover for personal injuries received by him while in the employ of the defendants. The plaintiff, at the time he received the injuries complained of, was between sixteen and seventeen years of age, and was employed by the defendants in their cracker factory at Auburn, operating a machine known as a breaking machine.

Before the plaintiff came to Maine his father was employed in a cracker factory in Massachusetts upon practically the same kind of a machine, and at times the plaintiff was accustomed to operate the machine for his father, so that when he was placed at work by the defendants upon the machine that caused the injury he had some knowledge of the nature of the machine, and he had been operating the machine upon which the injury occurred some three or four weeks prior to the accident.

The machine is made up of two metal cylinders eight or nine inches in diameter, which are connected at the right end of the machine with a shafting upon which are a fixed and a loose pulley, the power being furnished by a belt from the shafting to the fixed pulley. At the right end is a shipper, which is used to ship the belt from the fixed pulley to the loose pulley when the machine is not in operation. The tops of the cylinders are in plain sight. The dough to be made into crackers is placed in that part of the machine called the hopper, situated above the cylinders with an incline towards the cylinders, so that the dough of its own weight will fall against the cylinders, and the cylinders, which revolve 140 times a minute, draw the dough through and deposit it upon a table in a thin, flat sheet, from which it is taken and run through another machine and finished for baking.

It was the duty of the plaintiff to place the dough in the hopper, and keep it adjusted so that it would pass through the cylinders in proper shape and come out nearly square. On the day of the accident he placed a sheet of dough in the hopper in order that it might be run through the cylinders. On one end of the sheet of dough was a piece of scrap dough, and while placing that scrap of dough under the sheet so that it would not show on top, his hand came in contact with the cylinders and was drawn through them with the dough, and he sustained the injury complained of.

When the plaintiff's hand began to be drawn between the cylinders, he placed his knee against the table and his left hand upon the top of the hopper, bracing himself in the effort to prevent his hand from being drawn further into the cylinders and made an outcry that attracted the attention of the other workmen, one of whom ran to the shipper at the right of the machine and shipped the belt from the driving pulley on to the loose pulley to stop the machine. The shipper was fastened to the machine by a piece of small wire to prevent it from working off to the loose pulley while the machine was in operation. The first attempt to pull the belt on to the loose pulley failed; at the next attempt the belt was pulled on to the loose pulley, and the workman ran to the other end of the machine, where there was a heavy fly-wheel attached to one of the cylinders, and placing his hands upon this wheel stopped the machine as quickly as possible and then, reversing the cylinders and turning them in the opposite direction, rolled the plaintiff's hand from the machine.

At the close of the plaintiff's testimony the presiding Justice ordered a nonsuit, and the plaintiff brings the case forward upon exceptions to that ruling.

The plaintiff claims that the defendants are liable for the injuries received:

First: Because the plaintiff did not assume the risk of the employment, as he did not fully appreciate the risk of operating the machine.

Second: Because the cylinders or rolls were unguarded.

Third: Because the shipper was fastened to the machine by a wire, and when the plaintiff's fellow-servant attempted to shut off the power it failed to work at the first effort, and the plaintiff's hand was between the cylinders two or three seconds longer than it would have been if the shipper had not been fastened.

It appears from the testimony of the plaintiff, as well as from the testimony of all the other witnesses, that the cylinders revolved in plain sight of the operator of the machine, that they drew the dough through the machine, and that anything that came against them would be drawn through them the same as the dough. It was an obvious danger, in plain view of the plaintiff whenever he was operating the machine, and he knew of the danger. He testified: "Q. Well, didn't you know, if you had stopped to think, that if you got your hand in between the rolls that day you would get it pinched? A. I knew if I got them between the rolls I would get them pinched. Q. You knew that perfectly well, didn't you? A. Yes, sir. Q. And you had knowledge enough of that machine to know that that would be the inevitable result if you got your fingers in there, didn't you? A. Yes, I would get them pinched."

No instructions by the master of the danger of having his hand come in contact with the cylinders would have informed the plaintiff of anything that he did not see and did not know, and it was no part of the duty of the master to inform the plaintiff of the dangers that were known to the plaintiff, and which the plaintiff himself testified he knew. It was not a concealed or unknown danger, but one known and seen by the plaintiff, and he must be presumed to have assumed the risk of the employment, unless his age or inexperience prevented him from fully understanding and appreciating the danger of his hand coming in contact with the revolving cylinders. *Wyman* v. *Berry*, 106 Maine, 43; *Wiley* v. *Batchelder*, 105 Maine, 536; *Dempsey* v. *Sawyer*, 95 Maine, 295; *Bryant* v. *Paper Co.*, 100 Maine, 171.

It is urged that by reason of the immature age of the plaintiff he did not appreciate and understand the danger of his hand coming in contact with the rollers. There is nothing in the case that shows

that he did not have the ordinary intelligence and understanding of boys of his age, and in the absence of evidence of that nature, he must be presumed to possess such intelligence and understanding. If he had ordinary intelligence and understanding, he could not fail to know that if he put his hand against machinery revolving with the rapidity that these cylinders were revolving he would be injured.

There are many cases holding that boys of the age of this plaintiff, and even younger, must be presumed to know the danger of getting in contact with moving machinery. In *Rock* v. *Indian Orchard Mills*, 142 Mass. 522, a boy thirteen years of age was injured by getting his hand into unguarded and rapidly revolving cylinders, and he was presumed to know the danger, and the defendant was held not liable. And in *Ciriack* v. *Merchants' Woolen Co.*, 146 Mass. 182, a boy of twelve years was injured by coming in contact with the gearing of cog wheels, and in that case the court said: "In the absence of anything to show the contrary, the plaintiff must be assumed to have the intelligence and understanding which were usual with boys of that age. . . . . There is no reason to suppose that explicit instructions, if given to him at the beginning of his employment with reference to the danger of touching those wheels when in motion, would have added anything to what he himself must fairly be presumed to have known at the time of the accident."

The plaintiff being of ordinary intelligence and understanding, and the dangers of operating the machine being obvious and apparent, he is presumed to have assumed the risk of operating the machine as it was, without any guard to protect his hands from being drawn between the cylinders.

It is further urged that the defendants were negligent in not providing a suitable machine for the plaintiff to operate, because the shipper that shipped the belt from the fixed pulley which drove the cylinders to the loose pulley, was fastened to the machine by a wire, which was done for the purpose of preventing the belt from slipping from the fixed pulley to the loose pulley, and that when the fellow-servant of the plaintiff discovered that the plaintiff's hand was between the cylinders he was prevented, for the space of one or

two seconds, from shipping the belt to the loose pulley by reason of the shipper being thus fastened to the machine. The plaintiff was bound to exercise due care in operating the machine. He was presumed to know and, from his testimony, it appears that he did know, that if his hand came in contact with the cylinders, it would be drawn into them. Due care upon his part required him to keep his hand at a safe distance from the cylinders. He failed to do so. This was negligence on his part, and by reason of his negligence his hand was drawn between the cylinders. It was no part of the duty of the master, in providing machinery for his employee, to guard against the negligence of the employee. As the accident was caused by the negligence of the plaintiff, he is barred from recovering damages for the injury received, even if it were possible to determine how much of the injury was received during the instant that his fellow-servant was prevented from shipping the belt to the loose pulley. *Nelson* v. *Sanford Mills*, 89 Maine, 219.

Exceptions overruled.

JOHN N. MARTIN *vs.* FREDERICK BRYANT.

Somerset. Opinion June 24, 1911.

Attachment. Nominal Attachment. Service. Non-residents. Jurisdiction. Statutory Construction. U. S. Constitution XIV Amendment, section 1. Statute, 1821, chapter 59. Revised Statutes, 1840, chapter 114, section 27; 1857, chapter 81, sections 17, 18; 1871, chapter 81, section 19; 1903, chapter 83, section 21.

The return of an "attachment of a chip" is a legal fiction; it represents a nominal and not an actual attachment of property.

Jurisdiction is acquired over a non-resident defendant's property only when it is both found in the State and attached.

Jurisdiction of the person of a non-resident is acquired only by service of process upon him within the jurisdiction of the court, or by his submission to its jurisdiction.

Revised Statutes, chapter 83, section 21, authorizing attachment against a non-resident defendant by service on his tenant, agent, or attorney, does not authorize such service unless property is attached.

Where the service of a writ of attachment against a non-resident defendant was made upon his attorney in the State and no property of the defendant within the State was attached and no personal service of the writ was made upon the defendant, *held* that the action must be dismissed for want of jurisdiction.

A change in phraseology in the re-enactment of a statute in a general revision does not change its effect unless there is an evident legislative intention to work such change.

On exceptions by defendant. Sustained.

Assumpsit on account annexed to recover from the defendant, a non-resident, the sum of $117.00 for a casket, oak box, embalming, etc., and interest on the same. The defendant appeared specially and filed the following motion: "And now the said Frederick Bryant, party defendant in the above entitled cause, appearing specially and solely for the purpose of objecting to the jurisdiction of this court, moves the court to dismiss the above entitled action for want of jurisdiction over the defendant's person, because he says it appears by the plaintiff's writ and officer's return thereon that the

said Frederick Bryant is the sole defendant in said action and that he is not a citizen of the State of Maine, but is a non-resident, to wit, a resident of Worcester in the county of Worcester and State of Massachusetts, and it does not appear by the said writ and officer's return or record of said cause that the said defendant has ever been found and served with process within the limits of the State of Maine, or that any property belonging to the said defendant has been found or attached within said limits of the State of Maine." The motion was overruled and the defendant excepted.

The case is stated in the opinion.

H. H. Thurlow, for plaintiff.

Manson & Coolidge, for defendant.

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

KING, J. On the second day of the return term of this action the defendant appeared specially and filed a motion to dismiss for want of jurisdiction. The case comes up on exceptions to the overruling of that motion. It is an action of assumpsit on an account annexed against a non-resident, and the officer's return is that he "attached a chip as the property of the within named defendant and summoned him to appear as within commanded by leaving a summons with Manson & Coolidge, Attorneys for the within named defendant."

The return of an attachment of a chip is a legal fiction; it represents a nominal and not an actual attachment of property. *Swift* v. *Hawkens*, 103 Maine, 371, 374; *Middlesex Bank* v. *Butman*, 29 Maine, 19; *Carleton* v. *Ins. Co.*, 35 N. H. 162.

The court acquires jurisdiction over the property of a non-resident when it is found within the State and attached. Both must concur. The jurisdiction over property is acquired by the attachment of the property, and only to the extent of the attachment. *Eastman* v. *Wadleigh*, 65 Maine, page 254. In this case the court had no jurisdiction over property of the defendant, for none was attached.

Jurisdiction of the person of a non-resident is acquired only by service of process upon him within the jurisdiction of the court, or

by his submission to its jurisdiction. But this defendant was not personally served with process, neither has he submitted to the jurisdiction of the court.

The plaintiff however contends that the court has jurisdiction over the person of the defendant by virtue of the service of the writ upon his attorneys in this State. He relies upon the provisions of sec. 21, c. 83, R. S., which reads: "If any defendant is not an inhabitant of the State, the writ may be served on him by leaving a summons or copy, as the case may be, with his tenant, agent or attorney in the State, fourteen days before the sitting of the court; and if his goods or estate are attached, and he has no such tenant, agent or attorney, after entry, the court in the county where the process is returnable, or before entry, the court in any county, may order notice to the defendant, or a justice thereof in vacation may make such order signed by him on the back of the process; and if it is complied with and proved, he shall answer to the suit." The plaintiff contends that the first clause of the statute quoted authorizes the service of any writ against a non-resident to be made upon his tenant, agent or attorney in the State, whether property is attached thereon or not, and when so made the court acquires jurisdiction over the person of the defendant. This contention we think is not maintainable.

The statutory provisions for service of a writ against a non-resident upon his tenant, agent or attorney were first enacted in this State in 1821 (chap. 59). It was there provided for such service in two cases, (1) writs of attachments on which property had been attached, and (2) where the process was by original summons. It was also there provided that where an attachment had been made and the non-resident defendant had no tenant, agent or attorney in the State, the court could order notice to be given to him. In the revision of 1840 it was provided (chap. 114, sec. 27): "If the defendant was never an inhabitant of the State, or has removed therefrom, then the summons, *where goods and estate are attached*, or a copy of the original summons, as the case may require, shall be left with his tenant, agent or attorney, fourteen days before the sitting of the court as aforesaid." This was a condensation of the provisions of

the statute of 1821, and expressly provided that writs of attachment, at least, against a non-resident, could be served on his tenant, agent or attorney only "where goods and estate are attached." In R. S., 1857, the same provisions are embraced in secs. 17 and 18, c. 81. In the revision of 1871 all the former provisions, including those for notice under order of court, were condensed into one section (sec. 19, c. 81), and the language there used is the same as now used in R. S., sec. 21, c. 83, above quoted.

It is thus noted that in the original statute of 1821, and in all the revisions prior to that of 1871, the provision that the separate summons in a writ of attachment could be served on a non-resident's tenant, agent or attorney, was coupled with the express condition that his goods or estate had been attached. In the revisions of 1840 and 1857 the language is "the summons, where goods and estate are attached, or a copy of the original summons, as the case may require, shall be left," etc. In the revision of 1871 the words "where goods and estate are attached" do not appear, and the phraseology then and since used is, "by leaving a summons, or copy, as the case may be" etc. There has been no specific legislation authorizing the changing of the phraseology of the statute by striking out the words omitted. A change in phraseology in the re-enactment of a statute in a general revision does not change its effect unless there is an evident legislative intention to work such change. *Taylor* v. *Caribou*, 102 Maine, 401, 406; *Hughes* v. *Farrar*, 45 Maine, 72; *Cummings* v. *Everett*, 82 Maine, 260.

Is the change in the phraseology made in the re-enactment of the statute in the general revision of 1871, and followed in subsequent revisions, to be regarded as an expression of an evident legislative intent to change so radically the meaning and effect of these statutory provisions for the service of writs against non-resident defendants? We think not. In deciding this question the statute as it now reads is not to be interpreted solely by its own words. It has become a part of, and is to be read in connection with, the whole body of the law, and in its enactment the legislature is presumed to have acted within constitutional limitations and to have been guided by those principles of right and justice which have been long and

firmly established. This court early, in *Bank* v. *Butman*, supra, page 24, adopted the following language: "There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute. One of them is, that jurisdiction cannot be justly exercised over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits."

To give the statute the construction which the plaintiff contends for would be to find that the legislature by the revision of 1871 intended to provide that this principle of justice, so long and firmly established, should be dispensed with, and that our courts should have jurisdiction over the person of a non-resident, wherever he might be, provided only that he had a tenant, agent or attorney in this State upon whom the writ had been served. Such an enactment would have been in violation of a long established principle of right and justice, would have been discordant with other kindred statutory provisions, and would have resulted in manifest and monstrous injustice. We do not think that such was the evident intent of the legislature.

Moreover, a statute providing that a non-resident personal defendant should become personally subject to the jurisdiction of the courts of this State in an action of assumpsit, where the only service of the writ is by leaving the summons with his tenant, agent or attorney in the State, would seem to be unconstitutional, not being "due process of law." Sec. 1, 14th amendment U. S. Const. *Pennoyer* v. *Neff*, 95 U. S. 714.

In the case at bar the process was a writ of attachment, and not an original summons. No property of the non-resident defendant within the State was attached, and no personal service was made upon him. It is therefore the opinion of the court that the motion to dismiss for want of jurisdiction should have been granted.

Exceptions sustained.

FRED A. GILBERT, Appellant,

vs.

JAMES F. GERRITY.

Penobscot. Opinion June 27, 1911.

Forcible Entry and Detainer. Pleading. Declaration. Landlord and Tenant. Tenancy at Will. Termination. Notice. Revised Statutes, chapter 96, sections 1, 2.

1. The action of forcible entry and detainer is purely a statutory action and can be sustained only upon a statement and corresponding proof of one of the cases in which it is authorized by the statute.
2. In actions of forcible entry and detainer, as in other actions, the proof must be of the particular case set out in the declaration. Proof of some other statutory case, not so set out, will not sustain the action.
3. To determine a tenancy at will by a notice in writing, the notice must be "given the other party." A written notice left at the residence of the other party not on the demised premises and so left in his absence without explanation of its contents and purpose made to some adult member of his family and not seasonably coming to his own knowledge or that of his business agent, is not the notice required by the statute.
4. The day of the termination of a tenancy at will by notice must be stated in the written notice, and if the notice be not given to the other party thirty days prior to that day, it will not terminate the tenancy on that or any subsequent day.
5. If the defendant be in possession under a written lease and the plaintiff desires to remove him by the process of forcible entry and detainer because of expiration or forfeiture of the lease, such case must be stated in the declaration. Proof only of such a case will not support a declaration in which is stated only a case of a tenancy at will terminated by written notice.

On report. Judgment for defendant.

Action of forcible entry and detainer brought in the Bangor Municipal Court and by appeal transferred to the Supreme Judicial Court.

The declaration in the plaintiff's writ is as follows: "In a plea of Forcible Entry and Detainer, for that the said defendant, at Bangor on the first day of August, A. D. 1910, having before that time had lawful and peaceable entry into the lands and tenements of the plaintiff, situated in the City of Bangor, being numbered one hundred twelve (112) and one hundred fourteen (114) Exchange Street, and whose estate in the premises was determined on first day of August, A. D. 1910, then did and still does forcibly and unlawfully refuse to quit the same; although the plaintiff avers, that he gave notice in writing to said James F. Gerrity thirty days before the first day of August aforesaid, to terminate his estate in the premises." Plea, the general issue with brief statement as follows: "And by way of brief statement, defendant further says: That at the time of the alleged service of the notice to quit, and also at the time of the bringing of this action, he and those who lawfully claim under him, the said defendant, were lawfully and peaceably in possession of the lands and tenements described in the plaintiff's writ and declaration by virtue of a written lease or indenture under seal from Charlotte W. Thatcher et als. to said defendant, James F. Gerrity, dated January 1, 1908, and recorded in Penobscot Registry of Deeds, Book 774, page 272, said Charlotte W. Thatcher et als. being the predecessors in title of said plaintiff, Fred A. Gilbert, he, said Gilbert, having acquired title to the real estate in question subject to said lease or indenture. And defendant further says that any occupancy of the whole or any part of said premises by any party or parties claiming in any manner under said defendant was with the full knowledge and consent of said Gilbert and those under whom he claims; and defendant further says that neither his estate or tenancy in the premises by virtue of said lease or indenture, or otherwise, nor the estate or tenancy in the premises of those claiming under him, was lawfully terminated either at the time alleged in said writ and declaration, or at the time of the bringing of said action, or at any time previous thereto."

At the conclusion of the evidence in the Supreme Judicial Court, the case was reported to the Law Court for determination.

The case is stated in the opinion.

George E. Thompson, for plaintiff.
Matthew Laughlin and E. M. Simpson, for defendant.

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

EMERY, C. J. The plaintiff, the owner of certain business premises on Exchange Street, Bangor, leased to the defendant, seeks to recover possession by the statutory process of forcible entry and detainer. The process is summary, and to sustain it a plaintiff must bring himself completely within the terms and conditions of the statute authorizing it. *B. M. R. R. Co.* v. *Durgin*, 67 Maine, 266. The process is authorized in but four cases, viz: against a disseizor who has not acquired any claim by possession and improvement; against a tenant occupying under a written lease which has terminated; against such tenant when the lease is forfeited; against a tenant at will whose tenancy has been terminated by a prescribed statutory notice in writing. In the second and third cases, the process must be commenced within seven days from the expiration or forfeiture of the term. In the fourth case, the tenancy at will must have been "determined by thirty days notice in writing for that purpose given to the other party," or by mutual consent or by operation of law. R. S., ch. 96, secs. 1 and 2. (There are some exceptions in sec. 2 which however do not affect this case.)

The declaration in this action states a case within the fourth class only. No disseizin, no expiration nor forfeiture of a lease is alleged. The allegation is simply that the defendant before Aug. 1, 1910, had lawful and peaceable entry into the premises; that his estate was determined on that day; that he refused to quit although he had been given notice in writing, thirty days before that day, to terminate his estate. The defendant clearly is declared against only as tenant at will whose tenancy was terminated by thirty days notice in writing. Under it, the plaintiff had the burden to show that the tenancy had been thus determined by notice in the manner prescribed by the statute.

The written notice given was as follows:

"Bangor, Maine, July 1, 1910.

James F. Gerrity &c.

You are hereby notified that your tenance on the premises now occupied by you in the City of Bangor, being numbered 112 and 114 Exchange St. in said Bangor will terminate in thirty days from date.

(Signed) FRED A. GILBERT."

The day named in the notice to be the end of the tenancy was July 31, 1910, that being the thirtieth day from the date. Hence for the notice to effect a termination of the tenancy it should have been given to the defendant as early as the day of its date, July 1, 1910. It was left on that day at the residence of the defendant in his absence from the city and did not come to his knowledge till his return the next day, July 2, twenty-nine days only before the day named for the termination of the tenancy. It does not appear that anyone at his residence was informed of the contents or purpose of the notice. The residence was in a different part of the city from the demised premises.

The plaintiff contends that by thus leaving the notice at the defendant's residence, though in his absence from town, it was then "given to the other party" as required by the statute. Whatever might be the effect of giving the notice, the writing, to some agent of the tenant, or leaving it with some one on the demised premises in the absence of the tenant himself, we think it clear that merely leaving the notice at some other place in his absence, and not with any agent nor with any explanation to anyone of its contents or purpose, is not a compliance with the statute even though that other place be his residence. Nothing in the statute indicates that a notice thus left is to be regarded as sufficient. No mode of giving the notice is prescribed, but it is broadly declared that the notice shall be "given to the other party," that is, that the other party shall have notice. Under such a statute, to lay the foundation for such a summary process, we think

something more is required than merely leaving the notice at the tenant's residence at a distance from the demised premises in his absence without more. The notice in this case, therefore, was not effectual to terminate the defendant's tenancy on the day named for its termination, nor was it effectual to terminate the tenancy on any later day. The notice must name the day on which the tenancy is to terminate, and will not operate to terminate it on any other day. For that purpose a new notice must be given. *Currier* v. *Barker*, 2 Gray, 224; *Steward* v. *Harding*, 2 Gray, 335.

But the plaintiff claims he can maintain this process upon another ground. It appears from the evidence that the defendant went into possession under a written lease for a term of years which had not expired. The plaintiff claims, however, that the defendant's rights under the lease had been forfeited because of the use of the premises for purposes prohibited in the lease, and that therefore upon the ground of forfeiture this process is maintainable.

But the plaintiff did not state any such ground in his declaration. He did not allege any written lease nor any relation of landlord and tenant, nor any date of forfeiture, nor any forfeiture at all. He only stated a case of a tenancy at will terminated by a notice in writing. The rule that a plaintiff cannot recover by stating one case and proving another and different case, applies to actions of forcible entry and detainer as well as to other actions. *Small* v. *Clark*, 97 Maine, 304; *Eveleth* v. *Gill*, 97 Maine, 315.

Further, the evidence shows that the plaintiff made no entry for breach of condition, as authorized in the lease, but notified the defendant both orally and in writing that because of the misuse of the premises he should consider him a tenant at will only.

We must hold that in this case the process cannot be sustained upon either ground, that of forfeiture or of terminated tenancy at will. No other ground is relied upon.

Plaintiff nonsuit.

EDWARD H. MARTIN *vs.* CHARLES R. BUSWELL.

Penobscot. Opinion July 3, 1911.

Exemptions. Tools and Implements. Attachment. Common Law Rule. Revised Statutes, chapter 83, section 64, paragraphs 6, 9.

At common law neither tools necessary for a trade or occupation nor farm implements were exempt from attachment.

Statutes have usually been enacted declaring specifically the articles exempted; but this mode is not always practicable on account of the large number of tools and implements that might be necessary to the execution of a particular trade, and it consequently became necessary to specify by groups or classes some of the exemptions of the debtor.

The statute of exemptions has its foundation in the principles of public policy. It aims to place beyond the reach of creditors sufficient of nearly everything to enable the debtor to obtain a livelihood for himself and family; but beyond this the statute did not intend to go.

It is not intended that a debtor shall be protected in carrying on an extensive trade with a large capital in tools, while his creditors may be suffering for the money justly due them.

A potato planter, sprayer, or digger, mounted on wheels and drawn by animals, is not exempt from attachment, under Revised Statutes, chapter 83, section 64, paragraph 6, as a "tool necessary for the debtor's trade or occupation."

A potato planter, sprayer, or digger, mounted on wheels and drawn by animals, is not exempt from attachment, under Revised Statutes, chapter 83, section 64, paragraph 9, exempting one plow, one cart or truck wagon, or one express wagon, one harrow, one yoke with bows, rings and staples, two chains, and one mowing machine.

On report. Plaintiff nonsuit.

Action of trespass against the defendant, an officer, for attaching and carrying away as the property of the plaintiff on a writ, one Aspinwall potato planter, one Standard or Rotary potato sprayer and one Hoover potato digger, each of said articles being mounted on wheels and operated by means of horses, mules, oxen or other beasts

of burden. An agreed statement of facts was filed and the case reported to the Law Court for determination with the stipulation as stated in the opinion.

The opinion states the case.

L. B. Waldron, for plaintiff.

W. S. Brown, and P. A. Hasty, for defendant.

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

SPEAR, J. This is an action of trespass against an officer for attaching three articles of farming husbandry, to wit: One potato planter, one potato sprayer and one potato digger. It is agreed that the plaintiff is a farmer and at the time of the taking of the above articles of property was and had been for many years engaged in farming as his sole business and occupation and that his principal farm crop is that of potatoes; that he plants and harvests each year about twenty-five acres of potatoes; that the articles attached were purchased and used for the purpose of farming husbandry and that they are necessary articles of farm husbandry for the raising of large quantities of potatoes.

"It is agreed that if in the opinion of the court said articles so attached are legally attachable for debt, that the plaintiff is to become nonsuit, but if non-attachable, or exempt property, then defendant is to be defaulted and damages should be assessed at nisi prius."

From the above statement it is obvious that the only question involved is whether the articles in controversy are exempt from attachment.

By the common law neither the tools necessary for a trade or occupation nor the implements employed in farming were exempt from attachment. At a very early day, however, it became clearly evident to law makers and law givers that it was against sound public policy to take from the artisan or the husbandman by attachment the tools or implements by the use of which alone he could perform the services that would enable him to pay his debt or contribute to the support of his family. We therefore find the common

law qualified by statute until at the present time the modification is operative in nearly every common law jurisdiction, exempting from attachment the tools and implements of the artisan or the farmer, necessary for the support of himself and family.

Statutes have usually been enacted declaring specifically the articles exempt but this mode is not always practicable on account of the large number of tools and implements that might be necessary to the execution of a particular trade, and it consequently became necessary to specify by groups or classes some of the exemptions of the debtor. The plaintiff claims statutory exemption.

It is therefore evident that his contention must stand or fall upon the construction of paragraphs 6 and 9 of section 64, chap. 83, R. S., the statutes pertinent to the questions at issue. Paragraph 6, so far as applicable to the case at bar exempts to the debtor, in a group or class, "the tools necessary for his trade or occupation." It cannot be successfully contended that so ponderous and complicated a device as a potato planter, sprayer or digger, is embraced within the phrase "tools necessary for his trade or occupation." While this statute might cover a hoe, a rake, a scythe and other articles of husbandry, essential to the operation of the farm, to the extent of enabling the husbandman to procure a living for himself and family, it was never intended that its meaning should be so expanded as to include the implements or machinery, by means of which the farmer might be able to cultivate the soil beyond the necessities of himself and family, to the extent of a profit it may be of thousands of dollars annually. As bearing upon this conclusion see *Daily* v. *May*, 5 Mass. 313; *Knox* v. *Chadbourne*, 28 Maine, 160.

But in the agreed statement it is said that the articles attached by the defendant "are necessary articles of husbandry for the raising of large quantities of potatoes." The expression "large quantities," being a relative term, might be very indefinite were it not elsewhere specified that the plaintiff harvests about 25 acres of potatoes each year. As before observed the statute of exemptions has its foundation in the principles of public policy. It aims to place beyond the reach of creditors sufficient of nearly everything to enable the debtor

to obtain a livelihood for himself and family, but beyond this the statute did not intend to go. It did not contemplate as "necessary articles" those which enable the cultivation of 25 acres of one crop. We think the true interpretation of the statute of exemptions is to be found in *Buckingham* v. *Billings*, 13 Mass. 85, in which the court say: "It is not intended that he shall be protected in carrying on an extensive trade, with a large capital in tools; while his creditors may be suffering for the money justly due them."

It is evident that the plaintiff cannot recover under a proper interpretation of paragraph 6. The only other statute to which he can advert is paragraph 9. But this paragraph expressly enumerates what articles shall be exempt thereby excluding all others. This enumeration is as follows: "One plow, one cart or truck wagon, or one express wagon, one harrow, one yoke with bows, ring and staples, two chains and one mowing machine." As bearing upon the intention of the legislature it is proper to note that a mowing machine was not considered exempt under either paragraphs 6 or 9, prior to 1867 when it was made exempt by positive statute.

But the mowing machine bears the same relation to the hand scythe that the potato digger does to the hoe. The hand scythe was undoubtedly exempt under paragraph 6 but the mowing machine not. The hoe is also undoubtedly exempt under the same paragraph but the potato digger, planter and sprayer, not. If it is desirable to extend the exemption of the statute to these last named devices, it is our opinion that it should be done by the legislature, not by the court.

In accordance with the above stipulation, the entry must be,

Plaintiff nonsuit.

ORA G. STROUT *vs.* HORACE D. JOY.

Hancock. Opinion July 3, 1911.

Payment. Medium. Option. Damages. Contracts.

Where the plaintiff agreed to build a road for the defendant "for the sum of $200 to be paid for in loam" at 25 cents per cubic yard, *held* that the defendant was entitled to exercise the option of paying the $200 in money or letting the plaintiff remove the loam as an equivalent of money and apply it in payment of the $200 at 25 cents per cubic yard.

Where the plaintiff agreed to build a road for the defendant for $200 to be paid for in loam at 25 cents per cubic yard, and the plaintiff took some of the loam but not enough to pay the whole sum of $200, *held*, that while the measure of damages should have been $200 less the value of the loam the plaintiff might have taken under his contract, yet inasmuch as the evidence was too vague to warrant more than a speculative estimate of loam that might have been taken that the plaintiff was entitled to recover $200 less $6.75 the value of 27 cubic yards of loam admitted to have been taken by the plaintiff.

On motion by defendant. Sustained unless remittitur be made.

Action on a written contract. Writ contained three counts, one for breach of contract, one upon an alleged promise to sell certain loam to the plaintiff, and one on an account annexed. Plea, the general issue. Verdict for plaintiff for $350.50. Defendant filed a general motion for a new trial.

The case is stated in the opinion.

Deasy & Lynam, for plaintiff.

Charles H. Wood, and George E. Googins, for defendant.

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

SPEAR, J. The declaration in this case contains three counts, one for a breach of contract, one upon an alleged promise of the defendant "to sell to the plaintiff 800 cubic yards of loam to be taken from the defendant's land" at 25 cents per cubic yard and one in assumpsit, as will more fully appear from the following extracts upon which the counts are based, to wit:

The essence of the contract was an agreement on the part of the plaintiff to build a road for the defendant in a specified manner. This the jury found was done in accordance with the contract and the plaintiff must therefore be regarded as having executed his contract and to have become entitled to the compensation agreed upon for so doing. The amount to which the plaintiff was entitled for the performance of his contract depended upon the medium in which he was to be paid, and is the issue upon which the present contention has been raised. Article 3 of the contract reads: "Said Strout agrees to complete all of the above specified work for the sum of $200, to be paid for in loam as hereinafter set forth." So much of Article 4 as is pertinent to the present inquiry, reads, "Said Joy agrees to pay said Strout for building said road and bridge as aforesaid, the sum of $200, the same to be paid for in loam from said road at 25 cents per cubic yard and as said loam is removed by said Strout. . . . Said Strout agrees to remove said loam as rapidly as possible and will have it all off not later than June 15, 1909."

Under this agreement the plaintiff contended that he was entitled upon the completion of his contract to 800 yards of loam, or the value thereof, regardless of the two hundred dollar limit as the value of the work. Upon this theory at the trial he asserted that the loam in which he was to be paid was worth fifty cents per yard and recovered a verdict of $350.50, $150.50 in excess of the consideration named in the contract as the amount in dollars and cents for which he was to do the work. The defendant contended that under the contract he was entitled to exercise the option of paying $200 in money or letting the plaintiff remove the loam as an equivalent of money and apply it to the payment of $200 at 25 cents per cubic yard.

In view of the purpose, subject matter and language of the contract, we think the defendant's contention must prevail. The count, upon which the plaintiff claims, alleges a promise on the part of the defendant "to sell to the plaintiff 800 cubic yards of loam," etc. We do not think the contract shows such a sale. The object and purpose of the contract were not to effect a sale of loam

but the construction of a road. The thing to be done was the building of a road. The amount to be paid for doing it was $200. Incident to the payment of the $200 the defendant agreed to let the plaintiff have loam at 25 cents per yard in payment in full, or pro tanto if not enough loam, and the plaintiff agreed to take it and remove it. As money is a standard of value and dirt is not, the loam must be regarded as an equivalent of money at 25 cents per cubic yard in its application to the payment of the $200.

Now it is apparent that either the plaintiff or defendant had the option as to how this $200 should be paid. If the plaintiff had the option then his verdict should stand. If the defendant had the option then the plaintiff's verdict should be reduced to comply with the terms of the contract.

The question here involved seems to have been fully considered and settled in favor of the defendant in *Heywood* v. *Heywood*, 42 Maine, 229, and many cases cited. The court say: "According to written authorities cited, the contract to pay a certain sum in specific articles at an agreed price, being for the benefit of the debtor, he has the election to pay in that manner, or in cash, at the time agreed upon, "and a tender if made at the exact time of payment, in lawful money, would bar an action on the contract."

Upon this view of the law governing the contract the further question arises as to the amount to which the plaintiff was entitled. The measure of damages should have been $200 less the value of the loam the plaintiff might have taken under his contract. It is very evident that he might have taken more loam from the north side of the brook, but, inasmuch as the evidence is too vague to warrant more than a speculative estimate, it is the opinion of the court that the plaintiff, upon the evidence, should recover $200, less $6.75, the value of 27 yards of loam admitted to have been taken, or $193.25, and interest from the date of the writ.

Motion sustained.

New trial granted unless the plaintiff, within 30 days from the certification of this decision files a remittitur of all of his verdict above $193.25, and interest to be added to this amount from the date of the writ.

FRED E. MILES *vs.* UNITED BOX BOARD CO.

Penobscot. Opinion July 6, 1911.

Waters and Watercourses. Flowage. Pleading. Presumptions.

Whether a complaint for flowage shows a prescriptive right in defendant to maintain the height of water occasioning the damage sought to be recovered, so as to be demurrable, is to be determined by the rules of pleading in equity.

A grant of a flowage right is presumed after twenty consecutive years of flowage, with appreciable damage in each year, without damages paid to or claimed by the party aggrieved; but when no damages have followed the flowing grant as presumed only when the flowing has been adverse.

On exceptions by plaintiff. Overruled.

Complaint for flowage, to which a general demurrer was filed and joined. The presiding Justice pro forma sustained the demurrer, and the plaintiff excepted.

The case is stated in the opinion.

W. H. Mitchell, for plaintiff.

Norman L. Bassett, for defendant.

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

BIRD, J. This complaint for flowage comes before this Court upon exceptions to the pro forma ruling of the presiding Justice sustaining defendant's demurrer to the complaint. The ground of demurrer relied upon is that the allegations of the complaint show a prescriptive right in defendant to maintain the height of water occasioning the damages sought to be recovered. The question is to be determined by the rules of pleading in Equity: *Moor* v. *Shaw*, 47 Maine, 88, 90.

We think the complaint does set out maintenance of the dam with flowage in each of twenty-one consecutive years with appreciable damage to complainant.

The objection of complainant that such flowing is not alleged to be adverse is not tenable. A grant is presumed after twenty consecutive years of flowage with appreciable damage in each year without damages paid or claimed by the party aggrieved. But when no damages have followed the flowing, a grant is presumed only when the flowing has been adverse. *Prescott* v. *Curtis*, 42 Maine, 64, 71; *Augusta* v. *Moulton*, 75 Maine, 284, 286; *Foster* v. *Improvement Co.*, 100 Maine, 196, 199, 201.

Matter in bar can be taken advantage of by demurrer when it is stated without sufficient avoidance in the bill itself. *Tappan* v. *Evans*, 11 N. H. 311; *Post* v. *Beacon Vacuum, etc., Co.*, 89 Fed. 1. See also *Mooers* v. *K. & P. R. R. Co.*, 58 Maine, 279, 280-1; *Baker* v. *Atkins*, 62 Maine, 205, 209.

The entry must therefore be,

Exceptions overruled.
Demurrer sustained.

In Equity.

GEORGE W. JOHNSON *vs.* JOHNSON BROTHERS.

Sagadahoc. Opinion July 14, 1911.

Corporations. Franchise Tax. Treasurer. Findings. Accommodation. Indorsement. Consideration. Accommodation Paper. Ultra Vires. Bills and Notes. Innocent Holders. Evidence. Revised Statutes, chapter 8, sections 18-22; chapter 47, section 26.

Assessment of a franchise tax against a corporation under Revised Statutes, chapter 8, sections 18-22, after appointment of receivers in proceedings to dissolve the corporation and while such proceedings are pending, does not create a debt provable against the corporation.

The treasurer of a corporation is presumed to have had authority to use the corporate name on notes for the benefit of another corporation or himself, where the other directors who constituted the remaining stockholders, knew that he had followed such practice for several years and did not object.

The finding of receivers acting as masters under order of court is entitled to the weight of a verdict, and is not to be set aside or reversed unless the evidence reported shows the finding to be clearly wrong.

That a defendant corporation was a large creditor of another company does not show such interest as to constitute a valid consideration for defendant's indorsement of the company's paper.

Where a corporation, having taken over the assets and assumed the liabilities of a partnership, substitutes its name for that of the partnership in the renewal of a note on which the partnership was liable as an accommodation party, its act in so doing is not without consideration.

Unless a corporation be specially authorized to do so, the execution or indorsement of accommodation paper merely for the benefit of third persons is an act beyond the scope of its corporate authority.

A private corporation organized for pecuniary profit may borrow money when necessary and issue customary evidences of debt therefor, unless prohibited by its charter.

The title of the holder before maturity of accommodation paper used by a corporation can be defeated only by proof that he took it knowing that it was accommodation paper, or under such facts and circumstances that he is chargeable with notice of that fact.

Evidence *held* to show that notes were indorsed on the part of a corporation for the benefit of another.

Evidence *held* to show that the payees of notes took them with knowledge that they were indorsed by a corporation for accommodation.

In equity. On report. Decree according to opinion.

Bill in equity against the defendant, an insolvent corporation, to wind up its affairs and distribute its assets among its creditors. Reported to the Law Court for determination.

The case is stated in the opinion.

NOTE. See *Johnson* v. *Monson Consolidated Slate Co.*, post.

Frank L. Staples, for Receivers.

Arthur J. Dunton, for First, Marine and Lincoln National Banks.

Stearns & Stearns, for Bacon-Robinson Co.

Charles P. Barnes, Assistant Attorney General, for the State.

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

KING, J. This is a proceeding in equity against the defendant, an insolvent corporation, to wind up its affairs and distribute its assets amongst its creditors. Receivers of the corporation were appointed, who, acting by order of the court to take proof of claims against the corporation, made report of their doings in which they specified all claims presented, showing a total indebtedness claimed of $94,111.89, of which they recommended that the following should be disallowed:

State of Maine	$ 10.00
Marine National Bank (one half)	850.00
do	1500.00
do	10000.00
Lincoln National Bank	1200.00
do	1750.00
do	700.00
do	850.00
do	900.00
First National Bank	450.00
do	2800.00
do	850.00
do	800.00
do	450.00
Bacon & Robinson Co.	300.00
do	400.00
Mrs. Henry C. Tarbox	2950.00
Edward W. Hyde total	9451.57

The report of the receivers as to all claims presented (except those recommended by them to be disallowed as above) has been accepted, and Mrs. Henry C. Tarbox and Edward W. Hyde do not now contest the disallowance of their claims. As to all the other claims above enumerated the case is reported to this court upon statements of facts agreed to by the receivers and the various creditors presenting said claims, the Law Court to render such decision respecting each claim as the law and the evidence require. The report of the receivers (acting as masters under direction of the court) is made a part of the case.

In determining whether or not the claims here involved should be disallowed, it is to be borne in mind at the outset, that the affairs of the corporation are now in the hands of the receivers as officers of the court, and that the controversy is not one between the corporation and these claimants, but one between them and the other creditors of the corporation.

CLAIM OF THE STATE OF MAINE.

This claim is for a franchise tax of $10 assessed against the corporation under the provisions of chapter 8, R. S., secs. 18-22. Section 19 provides, that the State Assessors shall, on or before the first day of July, annually, assess a franchise tax upon the authorized capital stock of the corporation, and the tax shall become due and payable on the first day of September thereafter. Every corporation subject to a franchise tax is required to make a return to the Secretary of State, on or before the first day of June, annually, of the amount of its authorized capital stock, as the basis of the assessment of the franchise tax. Chap. 47, R. S., sec. 26. Such tax "shall be a debt due from such corporation to the State," which shall also be "a preferred debt in case of insolvency under the laws of this State, or in any process of liquidation in its courts." Sec. 20, c. 8, supra.

This so called tax is not levied on property, but is imposed on the corporation in the nature of an annual license fee for the right to continue to exercise the privileges conferred upon it by the State. It is plain that under the provisions of our statute a franchise tax is assessable against a corporation only as of the first day of July annually, and covers the period of the succeeding year. And the franchise tax in question was assessed against the defendant corporation as of July 1st, 1910, and for the year beginning on that date. But the defendant corporation had passed into the hands of receivers by order of court made in April, 1910, under proceedings for its dissolution. The defendant thereafter had no right to exercise for itself any of the privileges conferred upon it by the State. Its franchise—its right to do business for itself—had ceased, and the State had taken possession of its assets for distribution among its then existing creditors. No claim can share in those assets unless it was an outstanding debt against the corporation at the date of the decree of sequestration. The tax in question was not such a debt. It did not exist at that time, and under the statute which authorized it, could not have existed prior to July 1, 1910. Moreover, at the time this tax was assessed there was no

basis for its assessment, because the corporation then had no franchise or privilege to do business, without which, manifestly, no franchise tax could be imposed. *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242. Our conclusion, therefore, is that the State has no valid claim against the defendant corporation for this tax.

The several claims herein above specified as presented by the three banks arise upon negotiable promissory notes, and it is contended in support of the recommendation that they be disallowed, (1) that the name of the defendant corporation was put upon the notes without authority of the corporation, (2) that it was done for the accommodation of another corporation or person, an act entirely outside of the scope of the powers conferred upon the corporation, and therefore, ultra vires and void, and (3) that the banks took the notes, either having actual knowledge that the defendant was an accommodation party thereto, or charged with notice of that fact. Each of these contentions is sharply controverted.

In deciding the questions thus presented in respect to these notes, it becomes necessary to consider the business relations of the parties thereto, and the manner and circumstances in which the notes were issued.

The notes in question are made payable to the respective banks. The name of Johnson Brothers appears on the back of all but two, and another name, in most instances that of the Monson Consolidated Slate Company appearing on the face of the notes as maker. Johnson Brothers was originally a partnership consisting of three members, George W. Johnson, Edward F. Johnson, and Ernest A. Johnson. This firm carried on a hardware and ship chandlery business in Bath. January 12, 1895, George W. Johnson became treasurer of the Monson Consolidated Slate Company, a Maine corporation operating a slate quarry at Monson, Maine. Subsequently Ernest A. Johnson also became a stockholder in the Monson Company, but Edward F. Johnson, the other partner, was never a stockholder therein. The partnership name was signed by George W. Johnson, who was the financial manager of the firm, with the tacit consent of all the members, "on his personal notes and notes

in connection with the business of Johnson Brothers and the Monson Company." Some of the notes in question, as will be hereafter noted, are renewals, or include renewals, in whole or in part, of notes to which the name of Johnson Brothers was signed while the partnership continued. After this practice of signing notes in the partnership name for the Monson Company and for George W. Johnson had continued for a time the three partners, on May 22, 1896, formed a corporation under the general law of Maine to take over and carry on the partnership business, keeping the same name, and they have been its only stockholders and officers since its incorporation. The purposes of the corporation, as expressed in its Articles of Association, were the "carrying on the business of ship chandlery, hardware including anchors, chains and all outfittings of vessels, painters' supplies and farming utensils, the acquiring owning and managing ship property, and the purchasing, owning and selling real estate." The corporation took over the assets and assumed the liabilities of the partnership. After the incorporation of Johnson Brothers the same practice of signing notes for the Monson Company and for George W. Johnson was continued, the corporation taking the place of the partnership on renewals of notes previously discounted at the banks, and various additional notes, made in the same manner, were discounted at the banks. The corporate name of Johnson Brothers was put upon the notes, before they were negotiated, by George W. Johnson its treasurer, but there is no evidence by any formal vote of the directors or stockholders authorizing or ratifying it. It is agreed, however, that Edward F. and Ernest A. Johnson, the other directors and stockholders, had general knowledge that the treasurer, to whom the financial management of the corporation was wholly left, had been signing notes in the corporate name "for the benefit of the Monson Co. with greater or less frequency since August 13, 1895." It is also agreed that, "since its incorporation Johnson Brothers had, at times, paid with its checks various bills of the Monson Company for supplies and merchandise sold direct to that company; had occasionally bought large orders of merchandise for it; had sold to it in the regular course of business

frequent bills of goods; had occasionally paid interest on that company's notes at the various banks, and had transferred from its own account at the different banks from time to time various sums of money, as loans, to the Monson Company, charging all these items up against that company.

It had also occasionally, and as late as April 4, 1910, deposited to its own account checks drawn to the order of the Monson Company, giving that company credit for the same on its (Johnson Brothers) books. At the time of the appointment of the receivers there was due Johnson Brothers on this account, including interest, $84,239.79, in addition to which notes had been given by the Monson Company to Johnson Brothers to the amount of $5,850, which still remain unpaid." George W. Johnson and Ernest A. Johnson, individually, acquired a controlling interest in the capital stock of the Monson Company, and the corporation of Johnson Brothers owned bonds of the Monson Company to the amount of $10,000. Neither of the banks made any inquiry as to whether by its charter, by-laws, or votes of the stockholders or directors, Johnson Brothers had authority to sign notes for the Monson Company; but all were informed that Johnson Brothers was incorporated to take over and carry on in corporate form the business of the partnership, and that the individual brothers who composed the partnership were the only stockholders and officers of the corporation of Johnson Brothers.

The foregoing states substantially all the facts and circumstances, as disclosed in the general agreed statement, applicable to each and all the notes as a class, but the parties have also made special agreed statements as to the history of each note, which will be hereinafter referred to in considering each note separately.

1. Was the treasurer authorized by the board of directors to use the corporate name upon the notes in question?

The corporation of Johnson Brothers consisted of three brothers. It was organized to take over and carry on their partnership business. They were its only stockholders and directors. It is agreed that the other two directors had left the financial management of the corporation "wholly with the Treasurer, George W. Johnson."

The by-laws provided that the Treasurer "shall sign all checks, notes, and negotiable papers in the name of the Company and as Treasurer thereof." And it is further agreed that the other two directors had general knowledge that the treasurer had been signing the corporate name to "notes for the benefit of the Monson Co. with greater or less frequency since August 13, 1895," a period of about fifteen years.

In the recent case of *York* v. *Mathis*, 103 Maine, 67, 69, this court said that "it is entirely competent for a board of directors to establish a mutual understanding that one of their number shall be the active agent of the board in the management of the property and the conduct of the business affairs of the corporation. It is not necessary that such an understanding should be created by a formal vote passed at a formal meeting or proved by a formal record. It may be inferred from the situation and conduct of the parties. A director may acquire the power to bind the corporation by the habit of acting with the assent and acquiescence of the board, and so his unauthorized acts may be confirmed by the approbation and acquiescence of the board. It is true that in either case it is the board that acts or acquiesces, and not the directors as individuals, but subsequent ratification as well as previous authority or acquiescence may be shown by circumstances and conduct." See also *Blake* v. *Domestic Manufacturing Co.*, 64 N. J. Eq. 480, 38 Atl. 241, a case of marked similarity to the one at bar with respect to the questions involved, and in which this precise point is exhaustively considered.

It appears that prior to the incorporation of Johnson Brothers, George W. Johnson used the partnership name, with the assent of his co-partners, on notes for the benefit of the Monson Co. and himself. As treasurer of the corporation of Johnson Brothers he continued to do the same for many years. The other two directors had knowledge that he was so using the corporate name and made no objection. From these facts and circumstances, considered in the light of the familiar principles of law above stated, we think it is to be inferred that the board of directors had authorized the treasurer to

so act, for the officers of a corporation in the conduct of its affairs are presumed to be governed by an observance of the recognized principles of common honesty and good faith.

2. Are the notes to be regarded as accommodation paper on the part of Johnson Brothers?

It has been noted that all the notes, excepting two (one for $1700; presented by the Marine Bank, $850 of which is in question, and a note for $1500 presented by the same bank) were indorsed on the back in the name of Johnson Brothers. All the notes so indorsed were signed by the Monson Company as maker, except the note for $900 presented by the Lincoln National Bank, and that was signed by George W. Johnson as maker. We refer to this particular note below. With respect to all of the notes so indorsed the receivers, acting as masters under order of court, have reported that "we find that Johnson Brothers is an accommodation indorser, ... that such indorsements were not made in the regular course of business of said Johnson Brothers; and that such indorsements were without benefit to said Johnson Brothers, and were made without consideration."

This finding of the receivers as masters, being made a part of the case, is entitled to the weight of a jury verdict. In *Shoe Co.* v. *Shoe Co.*, 103 Maine, 337, this court said: "Upon all questions of fact the finding of the master has all the weight of a jury verdict, not to be set aside or reversed unless the evidence reported shows the finding to be clearly wrong." No evidence has been reported in this case. The report, however, does contain what has been called a general agreed statement of facts, and special agreed statements relating to the origin and history of each note in question. Unless, then, there is evidence in the agreed statements of facts showing the finding of the masters to be clearly wrong, that finding controls. We have already referred to substantially all the facts as disclosed in the general agreed statement, and we think it a fair conclusion that there are no facts therein recited which specifically disprove or contradict the receivers' finding that the indorsement of these notes by Johnson Brothers was for the accommodation of the Monson Company. It is suggested, however, that the business

relations of the two corporations, and especially the fact that the Monson Company was largely indebted to Johnson Brothers on open account and notes, and that the latter held $10,000 of the bonds of the former, show that Johnson Brothers had an interest in the business welfare and financial condition of the Monson Company that was sufficient to constitute a valid consideration for its indorsements of that company's paper. Our attention has been called to *Blake* v. *Domestic Manuf'g Co.*, supra, as a case in support of the principle involved in the suggestion. The questions presented in that case, as in this, arose out of the failure of two corporations, the Domestic Sewing Machine Company and the Domestic Manufacturing Company, and it was there contended that certain notes held by banks should not be allowed against the Manufacturing Company because indorsed by it for the accommodation of the Sewing Machine Company. It there appeared that each company was incorporated for both the manufacture and sale of sewing machines, but the business was divided between the companies so that the manufacturing company made the machines and the other company sold them. The notes there in question were given by selling agents and customers to the Sewing Machine Company and then indorsed by the Manufacturing Company, and the proceeds thereof credited to it in the first instance. The court there found that the business of manufacture and sale of sewing machines was, in point of fact, carried on by the two companies as one entire business, in which both companies were dependent for their continuance upon the realization of the proceeds of sale of the finished product represented by the notes of customers and agents, which were required to be discounted in order that the funds necessary for the continued manufacture as well as sale might be provided. The court, after an exhaustive analysis of the facts and circumstances, reached the conclusion that in view of the manner in which the business of the two companies had been conducted, their intimate and complicated relations, their joint interest in the ultimate payment of the notes, and on the whole circumstances of the case, the notes were not accommodation paper on the part of the Manufacturing Company. It is thus seen that the intimate business relations which existed

between the two corporations in that case differ widely from what appears in the case at bar to have been the business relations between Johnson Brothers and the Monson Company. In that case the two corporations were engaged in one entire business, each, however, carrying on a separate but dependent part; in this case each corporation was carrying on a separate business, not necessarily connected with that of the other. There the notes were indorsed by the Manufacturing Company so that the proceeds could be made available for the continuance of the entire business, and the proceeds were all placed to the credit of the indorser; here Johnson Brothers indorsed the notes to enable the Monson Company to receive the proceeds to use in its business in which, at the most, the indorser had no other interest than that of a voluntary creditor. The suggestion is made in some cases that a corporation may be impliedly authorized to loan its credit to its debtor if by so doing it could make available a debt due it, arising out of a reasonable exercise of its corporate powers, and which otherwise would be lost. It is not necessary, however, here to consider if that suggestion has merit, for it seems clear to us that the facts and circumstances of this case do not bring it within the reach of an application of such a doctrine. The inference seems justifiable that the practice of using the corporate name of Johnson Brothers for the benefit of the Monson Company had its inception and was continued not because it seemed imperatively necessary so to do in order to protect and secure the then existing indebtedness from that company to it, and save its own assets, but chiefly, if not solely, to advance and promote the affairs of the Monson Company, in which George W. and Ernest A. Johnson were so deeply interested. To hold that a trading corporation, having so improvidently conducted its affairs as to permit another corporation to become its debtor on open account and notes for more than ninety thousand dollars, for goods sold, money paid, advanced and loaned, during a period of nearly fifteen years, was also justified, because of that condition, in issuing accommodation paper for the benefit of such corporation, during the same period, would be, in the language of the late Judge Walton, "a doctrine as startling as it would be unprecedented."

And we do not think the business relations existing between Johnson Brothers and the Monson Company, as disclosed in this case, should be held to be a consideration for the indorsement of the paper in question.

In the general agreed statement it is recited that "Except as set forth in the agreed statement of facts relating to particular claims, or as shown by the facts as herein stated, it is agreed that there is no other or further consideration for the execution of negotiable paper for the Monson Company by Johnson Brothers, whether the latter corporation be considered a co-promisor, indorser or guarantor."

From an examination of the special agreed statements of fact giving the history of each note we find no evidence which would authorize a reversal of the finding of the receivers that the notes were indorsed by Johnson Brothers for accommodation and without consideration, except in respect to the following notes.

The history of the $10,000 note presented by the Marine National Bank is, that this note is a consolidation of several notes given by the Monson Company with Johnson Brothers, originally issued as follows: Aug. 15, 1895, $500; Nov. 5, $2000; Dec. 12, $1000; Jan. 11, 1896, $500; Mch. 18, 1897, $1500; July 21, $700; Dec. 29, $700; April 28, 1899, $800; aggregating $7700. Some of the notes were also indorsed by other parties. It is further agreed that, "On June 27, 1899 a note of $8,000.00 signed by Monson Co., with Johnson Bros. and G. W. Johnson as co-makers and $10,000 bonds of the Monson Co. as security, was taken by the Bank, and the net proceeds, $7,838.40, were credited to Monson Co. and Monson notes as follows paid: disc. 7-19, 2000; 8-29, 700; 8-28, 1500; 7-15, 1500; (being a consolidation of the $1000 note and second $500 note above mentioned); 5-28, 800; to amount of $6,469.56 charged up. (Int. on notes not matured, $30.44, having been allowed.) This $8000.00 was renewed from time to time. On Feb. 6, 1901 a loan was made to the Monson Co., that company signing on the face and Johnson Bros. on the back, for $1200, 15 days; and Aug. 21, '01 another similar loan for $800.00, 12 days. These loans were merged into

a $10,000.00 note signed as above by Monson Con. Slate Co. and Johnson Bros., with $10,000 Monson bonds as collateral, which from time to time has been extended and through its renewals is the note in controversy. It is agreed that the proceeds of all the foregoing notes went to the Monson Co."

It thus appears that the first four original notes amounting to $4000, included in the foregoing statement, were issued prior to the incorporation of Johnson Brothers, and they were signed by the partnership. This was a liability of the partnership which the corporation assumed. When the corporation signed renewals of those notes in place of the partnership name its act in so doing was not we think entirely without consideration. Its assumption of the partnership liability on the original notes was a consideration for its undertaking in becoming a party to their renewals. When the $8000 note was given on June 27, 1899, it was not in effect such a payment of the notes previously given, including the $4000, as would change the real status of the corporation in respect to that $4000. It was in reality a renewal of the several notes consolidated into one. The substance and purpose of the transaction and not the way in which it was done should control. Accordingly we reach the conclusion that the $10,000 note in question includes $4000 which has been a legal, if only a contingent, liability of Johnson Brothers since its incorporation.

The history of the note for $900 presented by the Lincoln National Bank shows that an original note for $3300, of which this is a balance, was issued prior to the incorporation of Johnson Brothers, on which the partnership was liable. For reasons similar to those given above in respect to the $10,000 note we conclude that Johnson Brothers has had a certain legal liability for the amount of this $900 since its incorporation, and that it cannot be properly held that its act in indorsing this note was entirely without consideration.

There is one other note, that for $1200 presented by the Lincoln National Bank, which appears to have had its inception in a note of $750 which Johnson Brothers while a partnership had indorsed. It appears that this note was reduced to $400 and that balance was

paid from the proceeds of a $1500 note on which the corporation of Johnson Brothers was a party. The $1500 note was consolidated with another later, making a $2500 note, and this was reduced to the $1200 note in question. Because of the reduction of the original $750 note to $400 at least, and the further reduction of the consolidated note of which this balance may have been a part, we are unable to determine that the $1200 note now in question includes any part of the original note of $750 on which the partnership was liable, and, therefore, we think this note for $1200 must be regarded as accommodation paper on the part of the Johnson Brothers corporation.

Except as above stated with reference to the $10,000 note and the $900 note, we find, in accordance with the report of the masters, that all the notes in question which were indorsed by Johnson Brothers (and they include all the notes except the first two presented in favor of the Marine National Bank) are to be regarded as accommodation paper by Johnson Brothers to the Monson Co.

The other two notes were signed by the defendant corporation as maker and were payable to the bank. The $1500 note was originally given May 24, 1905. At that time the Monson Co. owed the bank for overdue interest and an overdraft. The cashier insisted on payment. The Monson Company then had no means with which to pay and could not legally borrow more of the bank. Thereupon George W. Johnson, treasurer of both corporations, said "he would put in a note of Johnson Brothers endorsed by himself for discount." This was done and the proceeds were carried to the Monson Company's account and used to pay the indebtedness. There can be no doubt that as between the two corporations this note was given by Johnson Brothers for the accommodation of the Monson Company.

The remaining note presented by the Marine National Bank, of which $850 is in question, is for $1700, and was issued March 2, 1910, under these circumstances. At an interview between George W. Johnson and representatives of the three banks he asked for a loan of $3000 to tide both corporations over then existing financial difficulties. In behalf of the Marine Bank it was claimed at that interview that its portion of the loan must be made to Johnson

Brothers because the Monson Company then had its full limit of credit at that bank. Instead of $3000 the banks agreed to make a loan of $5100, or $1700 for each bank. The Marine Bank made its part of the loan on the $1700 note in question, signed by Johnson Brothers as maker and secured by $2000 of the bonds of the Monson Company. The proceeds of the loan was placed to its credit in that bank, but on the same day one-half thereof was by check of Johnson Brothers transferred to the account of the Monson Company in the same bank. Each of the other banks made its part of the loan on two notes for $850 each, one signed by the Monson Company and indorsed by Johnson Brothers, and the other signed by Johnson Brothers only. Under the circumstances stated we think this $1700 note must be regarded as accommodation paper by Johnson Brothers to the Monson Company to the extent of one-half of it, or $850. The facts and circumstances under which these notes last mentioned were issued have an important bearing upon the question hereinafter considered, whether the banks had knowledge, or are chargeable with notice, of the accommodation character of the notes, and we have thus fully stated those facts and circumstances in this connection to avoid unnecessary repetition as far as possible.

3. We come now to the question whether this accommodation paper in the hands of the banks is valid against the defendant corporation in this proceeding.

The general rule is that it is ultra vires of a corporation to make accommodation paper.

"Unless the corporation be specially authorized to do so, the execution or indorsement of accommodation paper for the benefit of third persons is an act beyond the scope of its corporate authority." Daniel on Neg. Ins. (4th Ed.) sec. 386.

"Judicial authority is nearly unanimous to the effect that a corporation has no power to make or indorse commercial paper for the mere accommodation of another person or corporation." 4 Thom. Corp. sec. 5739.

"A corporation, as has been seen, may issue and indorse negotiable bills and notes whenever it is necessary or usual in the course

of its authorized business; but by the overwhelming weight of authority, a corporation has no power to issue or indorse, for the accommodation of others, bills or notes in which it has no interest, unless, as is seldom if ever the case, such power is expressly conferred." 7 Eng. & Am. Ency. Law, (2d Ed.) 793.

"The proposition is well supported by authority that it is ultra vires of a corporation to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so." Mr. Freeman in note to In re Assignment Mutual, etc., Ins. Co., 70 Am. St. R. page 164.

The following are some of the many cases in which this doctrine is affirmed: *Bank* v. *Remsen*, 43 Fed. 226; *Bank* v. *Atkinson*, 55 Fed. 465; *Tod* v. *Land Co.*, 57 Fed. 47; *Sav. Bank* v. *Shawnee Bank*, 95 U. S. 557; *Blake* v. *Mfg. Co.*, 64 N. J. Eq. 480, (1897) 38 Atl. 241 (supra); *Culver* v. *R. E. Co.*, 91 Pa. St. 367; *Bank* v. *German, etc., Co.*, 116 N. Y. 281; *Cook* v. *Am. Tubing & Webbing Co.*, 28 R. I. 41, 65 Atl. 641; *Bank* v. *Snyder Mfg. Co.*, 102 N. Y. S. 478; *Owen & Co.* v. *Storms & Co.*, 78 N. J. L. 154, 72 Atl. 441. See also *Davis* v. *Old Colony Railroad*, 131 Mass. 258. The same principle was approved and applied in *Franklin Co.* v. *Sav. Bank*, 68 Maine, 43, although the act there held to be ultra vires was not the execution of accommodation paper.

But is it contended by the several banks that if the notes in question are to be regarded as accommodation paper, and for that reason ultra vires of the defendant corporation, nevertheless, they are valid in the hands of the banks as bona fide holders of them for value.

We might otherwise perhaps have proceeded at once to consider if it appears in this case that the banks are innocent holders of the notes in question, but the learned counsel for the receivers urges that this court should accept the doctrine, and apply it in this case, that all contracts ultra vires are not merely voidable but absolutely void.

There is a class of authorities in which that doctrine is maintained. It is the rule announced in the federal cases, of which the following may be considered leading ones. *Pittsburg, etc.*, v. *Keokuk, etc., Co.*, 131 U. S. 371; *Central Transp. Co.* v. *Pullman*

Car Co., 139 U. S. 24; *Union Pac. Railway* v. *Chicago, etc., Railway*, 163 U. S. 564; and *California Bank* v. *Kennedy*, 167 U. S. 362. The fundamental reason for this doctrine is stated to be that because the corporation had no power to make the contract, nothing that is done under the contract by any party can infuse any vitality into it. And in the Union Pacific case, supra, Mr. Chief Justice Fuller said: "A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

There is, however, another class of authorities maintaining that this doctrine, (that every contract and undertaking of a corporation made beyond the scope of its corporate authority is null and void under all circumstances), is too rigid. In the very recent case of *Oakland Electric Co.* v. *Union Gas & Electric Co.*, 107 Maine, 279, 72 Atl. 282, this court said: "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." And the court there pointed out that "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." Such distinction is essentially important to be regarded in the determination of the question whether accommodation paper of a corporation should be held good in the hands of an innocent holder for value. It is too well settled to be now questioned that a private corporation organized for pecuniary profit, unless forbidden in its charter, may borrow money whenever the necessity of its business requires, and issue customary evidences of debt therefor. Such power is incidental to that expressed in its charter, because necessary in carrying out the purposes of its incorporation. 4 Thom. Corp. sec. 5697. Such corporation, thus having the power to issue notes, merely exceeds the limit of its right to exercise the power when it issues notes for accommodation.

But the reason given in the cases, holding to the rigid application of the defense of ultra vires, as a justification for the hardship resulting to innocent parties, is, that every person dealing with a corporation may know, and is bound to take notice of, the legal limits of its powers. But, whether a note was issued by a private corporation for its own debt, or for the accommodation of another party, depends upon the intent and purpose of its issue, and not necessarily upon any difference in the act of its issue. How, then, may a person taking such note determine if it be or not accommodation paper? Certainly not from an examination of the charter of the corporation, for that would not disclose the fact. Must the party taking such note ascertain in some way, at his peril, the intent and purpose of the corporation in its issue? We think not, but on the other hand are of opinion that the more reasonable doctrine, with reference to the liability of private corporations on accommodation paper, is, that the title of the holder of such paper before maturity can only be defeated by proof that he took it with knowledge that it was accommodation paper, or under such facts and circumstance that he is chargeable with notice of that fact. The following are a few of the authorities which sustains this doctrine. *Bird* v. *Daggett*, 97 Mass. 494; *Monument National Bank* v. *Globe Works*, 101 Mass. 57; 4 Thom. Corp. secs. 5738 & 5740; *Webster* v. *Howe Machine Co.*, 54 Conn. 394; *Republic Natl. Bank* v. *Young*, 41 N. J. Eq. 531; *Blake* v. *Domestic Mfg. Co.*, 64 N. J. Eq. 480, 38 Atl. page 259; *Jacobs Pharmacy Co.* v. *Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *Bank* v. *Gas Light Co.*, 72 Conn. 582, 45 Atl. 361; 1 Am. & Eng. Enc. Law (2d Ed.) pages 348, 349, cases cited. Morawetz on Corp., sec. 65, and cases cited. 10 Cyc. page 1115 (C,) and cases there cited.

Were the banks bona fide holders of the notes in question?

In respect to the $1700 note ($850 of which is in question) and the $1500 note, both presented by the Marine National Bank, the defendant corporation was the maker, and the bank the payee, of each note. We have already stated with some detail the facts and circumstances, of which the bank had full knowledge, under which

each of these notes was given. Briefly stated those facts and circumstances show, that the $1700 note represented a loan by the bank for the benefit of both the defendant corporation and the Monson Company, but the note was taken from the defendant company alone to avoid what would otherwise be an excess loan to the Monson Company; and that the $1500 note was given to the bank by Johnson Brothers for funds to pay, and they were used to pay, an indebtedness of the Monson Company to that bank. But it is contended in behalf of the bank that its knowledge of those facts and circumstances is not enough to defeat its title to the notes, and in support of the contention it maintains, that knowledge on the part of a bank that a corporation intends to use the money obtained from the bank on its note for a purpose ultra vires of the corporation will not alone invalidate the note in the hands of the bank. But we think the facts in this case do not limit the bank's connection with these notes merely to information that Johnson Brothers was intending to loan the proceeds to, or apply them for the benefit of, the Monson Company ultra vires. It knew that the specific transactions were to be carried out, and it may fairly be regarded we think as assisting in furthering the consummation of them. As to the $1700 note the bank was a party to the conference at which the three banks agreed to loan for the benefit of both corporations $5100, divided equally between the banks. It was then informed of the financial condition and needs of the two corporations, and that if one of them failed both would. It knew that Johnson Brothers was to use its name for the accommodation of the Monson Company in getting this loan, and it was implicated in, and aided in, the consummation of the specific transaction—the giving by Johnson Brothers of the note of $1700, one-half of which was for the benefit of, and was placed to the credit of, the Monson Company. And as to the $1500 note, we think the bank's connection with that can not be limited to the mere making of a loan to Johnson Brothers with knowledge, however, that Johnson Brothers intended to use the proceeds to pay a debt of the Monson Company. The bank had a closer connection than that in the specific transaction. The debt to be paid was due the

bank. It knew the Monson Company could not pay it, or raise money to pay it, and under these circumstances it took Johnson Brothers note, knowing that it was given to pay the other corporation's debt to the bank.

For these reasons, and under all the facts and circumstances of the case, it is the opinion of the court that the Marine National Bank cannot be regarded as a bona fide holder of these two notes—the $1700 note to the extent of $850 thereof, and the $1500 note—and without notice that they were given by Johnson Brothers for the accommodation of the Monson Company.

As to all the other notes the receivers as masters have reported, that, "We find that Johnson Brothers is an accommodation indorser; that in all these cases the payee took the notes of the Monson Consolidated Slate Company, either having actual knowledge, or charged with notice of that fact." Here is a clear, definite specific finding of fact by the masters. We have no record of the evidence on which they based that finding. Except as hereinbefore noted respecting the $10,000 note, and the $900 note, there is no evidence before us to justify a reversal of that finding. The learned counsel for the banks has argued several propositions in support of the claim that the banks should be regarded as bona fide holders of the notes indorsed by Johnson Brothers; for example, that the legal presumptions are in the banks' favor that such instruments are presumed to have been executed in the regular course of business and to be legal, and that the position of the names upon the notes is not notice of any accommodation character of the paper, especially under the rule adopted in this State, that one not appearing to be a party either as payee or indorsee of a note payable to a payee therein named or his order, who puts his name on the back of it in blank at its inception and before negotiated, is an original promissor. Those are pertinent considerations bearing upon the question whether the banks were in fact bona fide holders. But the finding of the masters upon that question must control in the absence of evidence that will justify its reversal, and as before stated, no such evidence is before us.

On the other hand as tending to show, at least, an opportunity for two of the banks to acquire notice of the accommodation character of the notes, it appears in the agreed statement that one Randall D. Bibber of Bath was an incorporator and director of the Slate Company from its incorporation to the date of his death in 1910; that he was its President for more than eight years; and that during all that time he was a director, and for the most of the time Vice President, of the Marine National Bank. Horatio A. Duncan was a director of the Slate Company from Aug. 3, 1897, to date, during all of which time he was a director and also Cashier or President of the Marine National Bank. Edward W. Hyde has been a director and President of the Slate Company since January 6, 1903, and during the same time he has been a director and Vice President of the Marine National Bank, and also a director and President of the First National Bank during practically all of that period. Silas H. Duncan was a director of the Slate Company for about four years, and during the same period Cashier of the Marine National Bank.

We have above expressed the opinion that $4000 of the $10,000 note presented by the Marine National Bank, and the $900 note presented by the Lincoln National Bank, are not to be regarded strictly as accommodation paper on the part of the defendant, and accordingly the conclusion follows that those amounts should be allowed.

With respect to the $10,000 note it is urged that inasmuch as a part of the amount of the note is allowable the whole must be. We think not. This is not an action at law, but a proceeding in equity in which the court has power to allow so much of the amount of a note as appears to be a valid claim against the defendant, and disallow the rest.

It is therefore the opinion of the court that all the claims, specified in the report of this case, as presented in behalf of the respective banks, are to be disallowed, except $4000 of the $10,000 note presented by the Marine National Bank, and the $900 not presented by the Lincoln National Bank, which are to be allowed.

CLAIM OF BACON & ROBINSON COMPANY

The agreed statement of facts relating to this claim is as follows:

"For the purpose of this trial and for no other purpose it is agreed that sometime prior to July 1st, 1905, Alfred J. Robinson, Treasurer of Bacon & Robinson Co. met G. W. Johnson, Treasurer of Johnson Bros. and also Treasurer of Monson Consolidated Slate Company in Bath. At that time the subject of supplying the Monson Company with coal was considered and Mr. Robinson told Mr. Johnson that they would refuse to supply the Monson Company with coal on its credit. Mr. Robinson on behalf of the Coal Company, however, offered to furnish the Slate Company with coal in such quantities as might be ordered, on the express condition that each and every shipment should be paid for on its receipt by the Slate Company with a promissory note signed by the Slate Company and endorsed by Johnson Bros. Mr. Johnson told Mr. Robinson that Johnson Bros. would endorse the notes for the Slate Company. Up to that time the Coal Company had not furnished the Slate Company with any fuel.

In pursuance of this arrangement from time to time for the next five years coal was shipped to the Slate Company by the Coal Company on the former's orders. From time to time viz: on receipt of each shipment, joint and several notes of the Slate Company, signed on the back thereof by Johnson Bros. were returned to the Coal Company. The notes were practically always signed by Monson Consolidated Slate Co., G. W. Johnson, Treasurer, and on the back by Johnson Bros., G. W. Johnson, Treasurer.

It is admitted that E. A. Johnson and E. F. Johnson stockholders and directors of Johnson Bros. knew in a general way that such notes were being given to Bacon & Robinson Company from time to time on account of fuel furnished the Slate Company.

A joint and several note dated March 1, 1910, for $300.00 of the Monson Consolidated Slate Co. and Johnson Bros., the name of the first corporation appearing on the face of the note, and of the latter on the back thereof, each being affixed by its Treasurer, G.

W. Johnson, payable in two months, given for coal shipped the Slate Company, has not been paid. Likewise another joint and several note, bearing the same date, for $400.00, executed and signed by the Slate Company and Johnson Bros., in the same way, remains unpaid. These two notes are the basis of the claim involved in this controversy."

The principles we have discussed and applied with respect to the notes presented by the banks are applicable to the notes which are the basis of this claim.

The indorsement of Johnson Brothers on these notes was for the accommodation of the Monson Company, and the claimant had knowledge of that fact—indeed the claimant suggested the indorsement, without which it would not give credit to the Monson Company.

But the learned counsel for the claimant urges, as was done in behalf of the notes presented by the banks, that the business relations existing between Johnson Brothers and the Monson Company was a sufficient consideration for the former to make the agreement with the claimant under which these indorsements were made. We have hereinabove considered this precise question at some length, and expressed the conclusion that the business relations existing between these two corporations, as disclosed, should not be held a sufficient consideration for Johnson Brothers to make accommodation indorsements for the Monson Company. We need not here restate the reasons for that conclusion. We have examined the cases cited in behalf of this claimant on this point, some of which are in addition to the cases cited by the counsel for the banks, and we find that in all of them the business relations existing between the alleged accommodation indorser, surety or guarantor and the other party to the paper or contract, were of an entirely different character from the business relations existing between Johnson Brothers and the Monson Company. For example, in *Whitehead* v. *American Lamp & Brass Co.*, 70 N. J. Eq. 581, 62 Atl. 554, the court said: "The defendant company was engaged in a manufacturing business, to carry on which certain articles were being manufactured for its account by the Clark Bros. Glass Company, to

produce which the materials furnished by the claimant were essential. They could not be had from the claimant without the guaranty of the defendant company, which was given for the purpose of continuing its own business, and resulted in a direct benefit to it in the prosecution of the business it was chartered to carry on." And in the case of *Hess* v. *W. & J. Sloane*, 73 N. Y. Sup. 315, cited by the claimant, it appears that the alleged accommodation indorser actually received the proceeds of the note. If Johnson Brothers had received the coal for which the note was given, a much different question would have been presented. But there is no evidence in this case that the furnishing of coal by the claimant to the Monson Company was of any direct benefit to Johnson Brothers, or in fact of any indirect benefit to it, except so far as such an indirect benefit may arise from the fact that Johnson Brothers had become a voluntary creditor of the Monson Company. It does not appear that Johnson Brothers, in carrying on its corporate business, was dependent upon a continuance of the business the Monson Company was engaged in — otherwise than that the latter company was indebted to it. Johnson Brothers was not incorporated to sell or deal in the products of the Slate Company, and it is not shown that in did so.

The court is constrained to the opinion that the indorsement by Johnson Brothers of these notes was for the accommodation of the Monson Company, and without consideration, and that the claimant received the notes with knowledge of that fact. The conclusion therefore necessarily follows that this claim is not provable against Johnson Brothers in this proceeding.

It is therefore the opinion of the court that all the claims presented against Johnson Brothers as specified and enumerated in the report of this case are to be disallowed, except $4000 of the $10,000 note presented by the Marine National Bank, and the $900 note presented by the Lincoln National Bank. Decree to be made accordingly.

So ordered.

In Equity.

GEORGE W. JOHNSON *vs.* MONSON CONSOLIDATED SLATE CO.

Sagadahoc. Opinion July 14, 1911.

Corporations. Franchise Tax. Claims Provable. Taxation. Real Estate. Revised Statutes, chapter 8, sections 18-22.

Assessment of a franchise tax against a corporation under Revised Statutes, chapter 8, sections 18-22, after appointment of receivers by the court in proceedings to dissolve the corporation, and while such proceedings are pending, does not create a debt provable against the corporation.

Real estate sold for taxes is properly assessed to the owner, while he remains in possession with the right to redeem.

On bill to dissolve a corporation, taxes legally assessed and claimed by a town should be allowed against the assets, but as a non-preferred claim, though the property had been sold by the collector in an effort to collect the taxes.

In equity. On report. Decree according to opinion.

Bill in equity against the defendant, an insolvent corporation, to wind up its affairs and distribute its assets among its creditors. Reported to the Law Court, in connection with *Johnson* v. *Johnson Brothers*, ante, for determination.

The case is stated in the opinion.

Frank L. Staples, for Receivers.

John F. Sprague, for Town of Monson.

Charles P. Barnes, Assistant Attorney General, for the State.

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

KING, J. This is a proceeding in equity against the defendant, an insolvent corporation, to wind up its affairs and distribute its assets among its creditors. The cause is reported to this court, in connection with that of *George W. Johnson* v. *Johnson Brothers*,

(infra), and the questions to be decided are whether the following claims, presented against the defendant as preferred, should be allowed as such.

Claim favor State of Maine for franchise tax	$10.00
Claim favor Town of Monson for taxes	$992.53

CLAIM OF THE STATE

This franchise tax was assessed against the corporation July 1, 1910, under the provisions of chapter 8, R. S., secs. 18-22. But the defendant corporation had passed into the hands of receivers, by order of court made in April, 1910, under proceedings for its dissolution. This court has decided in the case, *Johnson* v. *Johnson Brothers*, infra, that the assessment of a franchise tax against a corporation subsequent to the appointment of receivers by the court in proceedings for the dissolution of the corporation, and while such proceedings are pending, did not create a debt provable against such corporation. And for the reasons there stated it is the opinion of the court that the State has no valid claim against the defendant corporation for this franchise tax.

CLAIM OF THE TOWN OF MONSON.

This claim is for the amount of taxes assessed against the defendant corporation as a non-resident on real and personal property for the years 1902, 3, and 4, less some subsequent payments. On the first Monday of December, 1903, the real estate taxed to the defendant in the assessment of 1902 was sold and purchased for the town by one of the selectmen, authorized by the other selectmen to do so. In pursuance of that sale a deed of the real estate was made by the collector to the town and deposited with the town treasurer as provided by statute. In 1903 the same real estate was assessed to the defendant, and on the first Monday of December, 1904, the same real estate was again sold by the collector, bid in for the town, and a collector's deed thereof made to the town. Again for the year 1904 the real estate was assessed to the defendant, and subsequently similar proceedings were had in making a

sale of it to the town. All subsequent taxes against the property have been assessed against the defendant and paid in full by it. The defendant was in possession of the real estate during all the time. In the agreed statement upon which this case is reported it is said that the only question presented is "the legality and effect of successive assessments, sales and purchases of the property taxed, by the town assessing the same."

The right to redeem the real estate from the first sale, made in December, 1903, continued for a year after the sale, or until December, 1904. Accordingly the real estate was properly assessable to the defendant for the years 1902-3 and 4, for at the time of those assessments the defendant was in possession, and the owner, having the right to redeem it from the first sale until December, 1904. It is agreed that the assessors were duly elected and qualified, that the assessments in question were legally committed to a duly elected and qualified collector, who gave all notices and filed all certificates required by law.

When a tax has been assessed so as to create a lien upon the property assessed for its payment, or make it the duty of the party assessed to pay the tax, even if the lien has become lost, and even if such party is not compellable by law to pay, it is nevertheless equitable that he should pay it. The taxes in question were legally assessed upon the property of the defendant corporation. Notwithstanding that the collector sold the property assessed in an effort to secure the tax, it was still the duty of the defendant to pay the taxes. And it is the opinion of the court that in this proceeding in equity to wind up the affairs of the defendant corporation, the amount of these taxes should be allowed as a non-preferred claim against the assets in the hands of the receivers. *Bisbee* v. *Mt. Battie Mfg. Co.*, 107 Maine, 185, 77 Atl. 778. Decree to be made in accordance with this opinion.

So ordered.

HERVEY H. PATTEN *vs.* WILLIAM N. FIELD.

Penobscot. Opinion July 15, 1911.

Trial. Directing Verdict. Fraud. Deceit.

If the evidence would warrant a jury in returning a verdict for defendant it is error to direct a verdict for plaintiff.

In an action for deceit, it must be shown that the defendant made a false representation as to a material fact, that he knew it was false, or made it as a statement of fact of his own knowledge not knowing whether it was true or false, with the intent that the plaintiff should rely on it, and further that the plaintiff was ignorant of its falsity and acted upon it to his damage.

Whether the elements of actionable deceit exist in an action therefor, are questions of fact to be determined from the evidence and the inferences to be drawn from the facts established.

Where there were facts and circumstances in an action for deceit from which the jury might have reached the conclusion that the plaintiff did not believe and rely upon the alleged misrepresentations, it was error to direct a verdict for the plaintiff.

Where fair-minded and unprejudiced persons might reasonably differ on the conclusions to be drawn from undisputed facts, the question is for the jury.

On exceptions by defendant. Sustained.

Action on the case for deceit. Plea, the general issue with special plea as follows: "And now the said defendant, William N. Field, by his attorney, comes and defends, etc., when etc., and says that the said plaintiff, H. H. Patten, ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defendant, William N. Field, avers that after the making of the said supposed promises and undertakings and the accruing of the said several causes of action in the plaintiff's declaration, if any such were made or accrued, a discharge in bankruptcy was granted to him, the said defendant, by the District Court of the United States for the District of Maine. A certificate of such discharge under seal of the said court granting the same is hereto attached."

At the conclusion of the evidence the presiding Justice ordered a verdict for the plaintiff for $454 and the defendant excepted.

The case is stated in the opinion.

Martin & Cook, for plaintiff.

Fellows & Fellows, for defendant.

SITTING: EMERY, C. J., KING, BIRD, HALEY, JJ.

PER CURIAM. Action on the case for deceit. In addition to the general issue the defendant pleaded his discharge in bankruptcy proceedings commenced after the time of the alleged deceit. The case comes up on exceptions to the ruling of the presiding Justice directing a verdict for plaintiff.

It appears that the plaintiff, his partner Mr. Sayles, and the defendant agreed to organize a corporation to purchase a woolen mill property in Uxbridge, Massachusetts. Mr. Sayles was one of the heirs owning the property and was to put in his interest for stock in the corporation. $25,000 was to be paid to the other heirs, $1000 on September 1st, 1909, and the balance on September 15, 1909. The plaintiff and defendant were to organize and finance the corporation and each have a block of the stock equal to that of Sayles. The corporation was organized and the plaintiff paid the expenses thereof. Thereafter the plaintiff and defendant went to New York and made arrangements with certain brokers to undertake the financing of the proposition, to whom it was necessary to pay $54 for advertising. This amount was for defendant to pay, but not having the money he requested plaintiff to pay it for him, saying: "I am all right. . . I have been holding thirty thousand dollars worth of wool about two years and it has taken every dollar I could get to pay the storage on that wool. I didn't want to sell on a sacrifice and I will finance the whole proposition in sixty days." The plaintiff paid the $54 for which defendant gave him his check on a Boston bank. The check was immediately presented but there was no "funds" to pay it, and it has not been paid.

On September 1, 1909, a note of the corporation for $800, on thirty days, was made and signed on the back by the plaintiff,

defendant and Sayles. The proceeds of this note, together with a check for $200 which plaintiff had received from a woman in Maine for the sale of stock, was used to pay the first payment on the property. With respect to the making of this note the plaintiff testified:

"Mr. Field came into the office on the morning of September 1st: 'Now' he says 'We have got to raise that thousand dollars' I says 'Field, can you pay your half?' 'Well' he says, 'There is that two hundred dollar check; we have got to have eight hundred more to go with it.' I says 'I wouldn't want to use this woman's check if this thing isn't going through all right; because I should feel that I ought to pay the woman back if we used the check.' He commenced to talk and wanted to know if I doubted his financial condition. I says 'I don't know, I suppose you are all right.' He says 'I am,' and went on to tell his thirty thousand dollar wool story and about the sheep he owned in his own right,— that he practically owned a thousand sheep. He says, 'I am good for the whole amount.' I says, 'Field, I am willing to stand one-half of this; I will pay four hundred and you pay four hundred and we will turn the check in.' He says 'I can't this morning; if you will sign a note with me,—that is, have the Woolen Company on it and Sayles name we will take care of it,— I will take care of it myself,' he says, 'and then you ain't losing but one-half any way,' and we took and signed the note."

On October 1st, the plaintiff paid the note, and also sent the woman in Maine the $200 she had sent for stock.

The defendant was not present at the trial, and no evidence was presented in his behalf other than his discharge in bankruptcy. The presiding Justice asked plaintiff's attorney how much he claimed and he replied "For the note, four hundred dollars, and the check, fifty four dollars." Thereupon a verdict for $454 was directed for the plaintiff.

If the evidence in the case would have warranted the jury in returning a verdict for the defendant the exceptions must be sustained; otherwise, overruled.

To sustain this action there must be clear and decisive proof of each and all the essential elements of actionable deceit; that the defendant made a representation in regard to a material fact; that the representation was false; that he knew it was false, or made it as a statement of fact of his own knowledge not knowing if it was true or false; that it was made with intent that the plaintiff should rely and act upon it; and that the plaintiff was ignorant of its falsity and reasonably believed it to be true, and relied upon it, and acted upon it to his damage. Whether these elements existed in this case were questions of fact determinable from the evidence, and the inferences to be drawn from facts established by the evidence. Had the case been submitted to the jury they would undoubtedly have been justified in finding for the plaintiff if they accepted his evidence and drew their inferences in his favor. But, on the other hand, would not a verdict of a jury in the defendant's favor be sustainable upon the evidence in this case? It may be conceded that a jury would not have been justified in this case in finding that the defendant did not make a false representation of a material fact, knowing it to be false, and with intent that it should be acted upon by the plaintiff, but can it be held that a jury would not have been justified in finding that the plaintiff did not reasonably believe the alleged representations, and did not reply upon them, and was not induced by them to pay the $54, or sign the note, or both? To make the question before us more concrete, assume that a jury had made a special finding that at the time the plaintiff signed the $800 note he did not believe the defendant's wool and sheep story, and was not induced thereby to sign the note, but signed it because he was personally interested to have the $1000 paid and thereby save the option, and expected the note could be paid from sales of stock, would such finding by a jury be sustainable in this case? We are constrained to the conclusion that it would. Patten did not testify that he believed and relied upon Field's representation about the wool and sheep. Why should he have believed and relied upon this representation on Sept. 1st? It was made to him in New York on Aug. 8, when Field gave him his worthless check, representing it to be good, and Patten had held that dishonored check

for nearly a month as a constant reminder that Field was not only financially worthless, but had boldly falsified about the check. In the absence of any statement by Patten that he did believe and rely upon the wool and sheep story, that essential element of the case can only be found as an inference from Patten's act in signing the note. But we do not think that is the only inference that can be properly drawn therefrom. When fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from undisputed facts, the question is one of fact for the jury.

For the reasons stated it is the opinion of the court that the case should have been submitted to the jury.

Exceptions sustained.

STATE OF MAINE *vs.* EDWARD J. MORIN.

York. Opinion July 18, 1911.

Lord's Day. Sunday. Opening Drug Store. Criminal Law. Revised Statutes, chapter 125, section 25.

Revised Statutes, chapter 125, section 25, making it an offense for any person to keep open his shop, workhouse, warehouse or place of business on the Lord's Day, to wit, Sunday, does not prohibit a druggist from going into his shop or store on that day to prepare or compound a prescription in case of sickness, or from entering for the purpose of doing any act of necessity or charity. The statute means that one shall not keep open his shop, workhouse, warehouse or place of business for the purpose of inviting trade, or inviting people to enter to transact business, or to work therein.

Where the defendant was on trial, under Revised Statutes, chapter 125, section 25, for keeping his drug store open on Sunday, *held* that an instruction that the defendant might enter his store on Sunday to fill a prescription for a medicine which was required for the treatment of disease was not inconsistent with an instruction that he could not keep his store open on Sunday even to sell drugs.

On exceptions by defendant. Overruled.

Complaint and warrant issued by the Sanford Municipal Court against the defendant for an alleged violation of the provisions of Revised Statutes, chapter 125, section 25. The defendant appealed to the Supreme Judicial Court, and on trial in that court was found guilty. The defendant excepted to certain instructions given to the jury by the presiding Justice.

The case is stated in the opinion.

Revised Statutes, chapter 125, sections 25 and 27, read as follows:

"Sec. 25. Whoever, on the Lord's Day, keeps open his shop, workhouse, warehouse or place of business, travels, or does any work, labor or business on that day, except works of necessity or charity; uses any sport, game or recreation; or is present at any dancing, public diversion, show or entertainment, encouraging the same, shall be punished by fine not exceeding ten dollars.

"Sec. 27. The Lord's Day includes the time between twelve o'clock on Saturday night and twelve o'clock on Sunday night."

Frederick A. Hobbs, County Attorney, for the State.

Hiram Willard, for defendant.

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

HALEY, J. This is a complaint and warrant issued by the Sanford municipal court, charging the respondent with the crime of keeping open his store, in Sanford, on Sunday, April 24, 1910, in violation of the statute against keeping open shops, workshops, warehouses, or place of business on the Lord's day. (Sec. 25, chap. 125, R. S. of Maine.)

The case was taken on appeal to the Supreme Judicial Court, and tried to a jury at the May term, 1910; the verdict was guilty, and the respondent brings the case forward upon exceptions to the following instructions of the presiding Justice:

"I have read to you the statute, that no person shall keep open his store, or shop, or warehouse. This is the gravamen of the charge, that they should not be kept open to invite customers in as

on week days, but should be closed. That is apart from the second clause which says he shall not do business except works of necessity or charity. It is immaterial under the first clause what kind of business he intends to do when he gets in there. It is immaterial whether he intends to do the ordinary business exclusively which he does on week days. It is immaterial whether that business includes drugs or not. He is prohibited from keeping open his store in the ordinary course of business as on week days even for the purpose of selling drugs. He might open his store and enter it for the purpose of filling a prescription for a medicine which was required for the treatment of disease, that would be a matter of necessity or charity, but he cannot keep open his store for the purpose of selling drugs including all kinds of merchandise during the day as on week days. That is the thing which is not to be permitted by the statute; it is what is prohibited by the statute, and I cannot ignore it and you violate your oaths if you ignore it.

"Now the state says there can be no reasonable doubt, therefore, that this defendant kept his store open on that day for the purpose of doing business generally, including the sale of drugs, if anybody called for drugs, also including all other kinds of merchandise which are not drugs and which do not involve the doing of any business of necessity or charity, although I tell you distinctly, for the purpose of this trial, that he has not a right to keep open his store in the ordinary course of business even for the purpose of selling drugs although that should be his primary purpose. It is immaterial whether the business be deemed one of necessity or charity; he has no right to keep open his store for that purpose. That is what the law prohibits."

Sec. 25, chap. 125, R. S., makes it an offense for any person to keep open his shop, workhouse, warehouse, or place of business on the Lord's day. The proper construction of the statute does not mean that one is prohibited from going into his shop to prepare or compound a prescription in case of sickness, or from entering for the purpose of doing an act of necessity or charity. One may enter his shop for many purposes and not violate the statute. The entering of the shop would not be keeping open shop within the meaning

of the statute. The statute means that one shall not keep open his shop, workhouse, warehouse, or place of business for the purpose of inviting trade, or inviting people to enter to transact business, or to work therein.

The instruction is complained of because the court stated that the defendant might open his store and enter it for the purpose of filling a prescription for a medicine which was required for the treatment of disease, and it is urged that such instruction is inconsistent with the instruction that he had no right to keep open his shop, even for the purpose of selling drugs: The opening of his store and entering it for the purpose of furnishing a medicine then needed for sickness, would not be keeping open shop within the meaning of the statute; it would not be keeping open shop in a manner to invite trade, or to invite people to enter to transact business, or doing work therein. The opening would only be that the defendant might do an act of necessity or charity— furnish medicine to aid the sick and suffering, not to induce others to enter to trade or transact business. The instructions are inconsistent only when sentences are taken from different parts and compared with each other; taken as a whole they correctly state the law.

The statute of Massachusetts, similar to the statute under discussion, was construed as above in *Commonwealth* v. *Dextra*, 143 Mass. 28, in which case, as in this, the complaint contained the words, "his said labor, business and work not being then and there works of necessity or charity," and the court held that the words might be rejected as surplusage. The same construction was placed upon the statute in *Commonwealth* v. *Osgood*, 144 Mass. 362, and in *Commonwealth* v. *Kirshen*, 194 Mass. 152, the construction complained of was held a proper construction of the statute.

Exceptions overruled.

In Equity.

MATTHEW LAUGHLIN, Trustee,

vs.

ALPHONSO W. PAGE et als.

Penobscot. Opinion July 18, 1911.

Trusts. Statute of Uses. Deeds. Recitals. Beneficiaries. Consideration. Death of Trustee. Estates Tail. Remainder. Reversion. Wills. Costs. Revised Statutes, chapter 79, section 30.

A deed in trust for benefit of the grantor's daughter, vested the legal title in the trustee and an equitable fee simple in the daughter, depriving the grantor and his heirs of all interest in the property and its proceeds.

A deed in trust is not within the statute of uses, where the trustee has discretion to sell and manage the estate and invest the proceeds.

The beneficiaries of a trust, and persons claiming under them, are not bound by a recital in a deed to the trustee of land purchased with proceeds of the trust estate, that they consented to the inclusion of others as beneficiaries.

A trustee diverting property, as by taking a conveyance including other beneficiaries, must show clearly and satisfactorily that all parties consented.

Persons whose names are wrongfully and without consideration inserted in a deed as beneficiaries of a trust take no interest, and the trustee holds the property for the rightful beneficiaries.

A trustee having died without exercising a power to terminate the trust by conveying to the beneficiary, the legal estate descended to the trustee's heirs in trust; his executrix and residuary legatee taking no interest.

Where the holder, under a deed in trust, of an equitable fee simple, consented that an equitable remainder in estate tail effective on her death be conveyed to another, such remainder revested in the consenting beneficiary on predecease of the remainderman without issue, leaving the beneficiary the equitable owner in fee simple.

Title of trustees for an equitable owner in fee simple, under a trust which, by the terms of its creation, terminates at the death of such owner, is extinguished by the owner's death, vitiating subsequent appointment of a trustee.

An equitable owner in fee of trust property is entitled to devise the property free of the trust, which by the terms of its creation ceases at the death of such owner.

Held: That trust property was properly chargeable with the plaintiff's expense, and the costs on a bill in equity brought by him to settle the rights of the parties claiming an interest in the property.

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

Bill in equity brought by the plaintiff, Matthew Laughlin, of Bangor in the county of Penobscot and State of Maine, "Trustee of certain estate conveyed in trust for the alleged benefit of Mary E. Page, Jennie H. Page, Alphonso W. Page, Gertrude Simpson, Maude S. Smith, and Howard W. Simpson, under a deed from Frank W. Eastman to Aaron L. Simpson, dated March 28, 1895, recorded in Penobscot Registry of Deeds, Book 645, page 449, against Alphonso W. Page and Imogene P. Russell, both of said Bangor, and Gertrude Simpson of said Bangor, both individually and in her capacity as executrix of the last will and testament of Aaron L. Simpson, late of said Bangor, deceased testate, and Corelli C. W. Simpson of said Bangor, and Maude S. Smith of Rockland, in the county of Knox, in said State, and Grey Simpson De La Mater of Evanston, in the State of Illinois, the only child and only heir at law of said Howard W. Simpson, said last-named being a minor under the age of twenty-one years, and Frank H. Monks of Boston, in the Commonwealth of Massachusetts, Louisa D. Hempel of Dresden, Germany, George H. Monks of said Boston, and Robert H. Monks of Wellesley, in said Commonwealth of Massachusetts." Answers were filed by the several defendants. At the conclusion of the hearing before the Justice of the first instance, the case was reported to the Law Court "upon bill, answers and admissions," for determination.

The case is stated in the opinion.

Matthew Laughlin, pro se.

Thompson & Blanchard, for Gertrude Simpson, Corelli C. W. Simpson, and Maud S. Smith.

George H. Worster, for Alphonso W. Page.

Edgar M. Simpson, for Imogene P. Russell.

Milton S. Clifford, for Frank H. Monks, Louisa D. Hempel, George H. Monks, and guardian ad litem of Robert H. Monks.

Bingham, Smith & Hall of Boston, associate solicitors.

Wm. P. Thompson, guardian ad litem of Grey Simpson De La Mater.

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

HALEY, J. 1. This is a bill in equity in which the plaintiff asks that he may be authorized and directed to sell and convey, and give sufficient deed or deeds of a certain parcel of real estate, alleged to be held in trust by him, and to safely invest the proceeds thereof or dispose of the same as directed by this court.

2. That this court will determine whether or not said plaintiff, as trustee, shall use the proceeds obtained by him from such sale of said real estate for the support and maintenance of Alphonso W. Page, the widower of Mary E. Page, during his lifetime, before he uses for that purpose any of the property bequeathed by the will of Mary E. Page to the plaintiff, in trust.

3. That the court will determine whether the provisions in the trust deed mentioned in the bill gives to the defendants, Gertrude Simpson, Maud S. Simpson and Howard W. Simpson, any interest in the trust property, and what rights, if any, the defendants in this bill, or their heirs, now have, or shall have, in said trust property at the decease of said Alphonso W. Page.

On March 9, 1874, Nathaniel Hatton conveyed certain real estate in Bangor to Delia S. Monks. The conveyance was absolute on its face, but was admitted by said Monks to be in trust for the benefit of the grantor's only daughter, Mary E. Page. In 1880 the creditors of the grantor brought a bill in equity against said Monks for the purpose of having the conveyance set aside on the ground that it was fraudulent as to creditors. Said Monks made answer to the bill, stating in her said answer that there was no fraud, and that the conveyance was in trust for Mary E. Page. In that action judgment was rendered for the defendant.

July 28, 1881, with the written consent of said Hatton and said Mary E. Page, said Monks quitclaimed all her interest in said real

estate to Aaron L. Simpson, of said Bangor, and his heirs, by deed containing the following clause: "This conveyance is made to said Simpson, in trust, and he and his heirs are to hold the same in trust for the use and benefit of my niece, Mary E. Page of said Bangor, for whose use and benefit said conveyance was made to me, and this conveyance is made to said Simpson at her request, and said Simpson, as such trustee, is hereby fully empowered and authorized at his discretion to sell and convey the premises herein described, in fee, to such person, and for such consideration and on such terms as he may see fit, and invest the proceeds of such sale in such manner and upon such terms as he may deem for the best interest of all concerned. Said trustee is also hereby authorized and empowered at any time he may see fit to convey said property and the proceeds of the same which may be held by him at any time by virtue of this trust, and as such trustee, execute all proper deeds and papers therefor, to the said Mary E. Page upon such terms, and conditions as he may see fit, and deem just and proper.

"If the said Mary E. Page shall die before such conveyance shall be made to her, then said trustee may convey said estate, or the proceeds thereof, in like manner and with like conditions to Jennie H. Page, and the heirs of her body, the said Jennie being the daughter of said Mary E. Page. Upon any such conveyance to said Mary E. Page or to said Jennie H. Page this trust shall cease. No responsibility shall rest upon or attach to said trustee as to the care and management of any of such property, when the same may be occupied by the said Mary E. Page, or the said Jennie H. Page or under either of their control.

"In the event of the death of the said Mary E. Page before a conveyance shall be made to her of the estate or the proceeds thereof, as aforesaid, then in place of conveying to said Jennie as aforesaid the said Simpson may at his discretion hold the said estate or the proceeds thereof in trust for the said Jennie H. Page and the heirs of her body in the same manner and with like conditions as he is hereby directed to hold the same for the said Mary E. Page."

In 1895 said Nathaniel Hatton died intestate, leaving no widow and leaving as his only heir at law said Mary E. Page, his only

child. Said Delia S. Monks is dead, leaving no husband and as her only heirs at law the defendants Frank H. Monks, Louisa D. Hempel, George H. Monks and Robert H. Monks.

Aaron L. Simpson held the property as trustee up to March 28, 1895, when he sold it to Minta F. Brown, under the power of sale granted him in the deed conveying the property to him, and on the same day, with the proceeds of said sale, he bought of Frank W. Eastman other real estate in Bangor, being the premises now in question. The Eastman deed was "in consideration of $2800 paid by Aaron L. Simpson of Bangor in the County of Penobscot and State of Maine as trustee of Mary E. Page."

It is admitted that said Mary E. Page and Jennie H. Page had no knowledge of the change attempted to be made in the terms of the trust by inserting the names of Alphonso W. Page, Gertrude Simpson, Maud S. Simpson and Howard W. Simpson as beneficiaries under said Eastman's deed, and never consented thereto, unless the clause in the deed that it was done with their consent can be construed as knowledge and consent upon their part.

On February 7, 1901, said Aaron L. Simpson died, leaving the will set forth in plaintiff's Exhibit D, wherein, after disposing of certain property with which we are not concerned, he gave all the rest and residue of his estate to his wife, Corelli C. W. Simpson, for her life, with power to dispose of the same for her support, and then gave whatever remained of same at his wife's death to his daughter, Gertrude Simpson.

In March, 1910, said Jennie H. Page died, unmarried and without issue, leaving said Mary E. Page and Alphonso W. Page, her mother and father, as her only heirs.

In August, 1910, said Mary E. Page died testate, by her will giving all her property to the plaintiff, Matthew Laughlin, in trust, to use the same, principal and interest if needed, for the support of said Alphonso W. Page during his lifetime, with a gift over, at the death of said Alphonso, of all her said property then remaining to the defendant, Imogene P. Russell, absolutely and free from said trust.

Howard W. Simpson died intestate before February 7, 1901, and the defendant Grey Simpson De La Mater is his only child and only heir.

On the sixth day of December, 1910, the Probate Court for the County of Penobscot, under the provisions of chap. 70, R. S., duly appointed the plaintiff trustee to succeed said Aaron L. Simpson under the provisions of the deed of Frank W. Eastman to said Aaron L. Simpson, which trust the plaintiff duly accepted.

The rights of the parties can best be determined by ascertaining their rights under the deeds in the order in which they were given. The deed of Nathaniel Hatton conveyed to Delia S. Monks his entire estate in the property mentioned in the deed; it conveyed the same to her in fee simple. At the time of the conveyance there was an agreement between Nathaniel Hatton and Delia S. Monks that the property should be held by said Delia S. Monks in trust for Mary E. Page, the grantor's daughter. The validity of the trust was established by proceedings in court, wherein the creditors of said Hatton attacked its validity, and the trust was upheld. It was also recognized by Delia S. Monks in her deed of the same property to Aaron L. Simpson.

The property having been conveyed to Delia S. Monks in trust for the benefit of Mary E. Page, and there appearing to be no conditions attached to the trust whereby said Hatton retained any interest in the property, Delia S. Monks held the legal title, in trust, and Mary E. Page held an equitable fee simple in the trust property with the right to the entire beneficial interest therein.

By the conveyance Nathaniel Hatton parted with all his interest in the property, and neither he nor his heirs had or have any claim to the property conveyed by him to said Delia S. Monks, or to the property purchased with the proceeds thereof.

Mary E. Page, being the equitable owner in fee simple of the property described in the Hatton deed, gave her written consent that Delia S. Monks, the trustee, should convey her title in the trust property to Aaron L. Simpson as trustee. This agreement was assented to by Nathaniel Hatton.

On July 28, 1881, in pursuance of the agreement, Delia S. Monks conveyed the property, in trust, to Aaron L. Simpson. That conveyance was made with conditions inserted in the deed which operated to convey to Jennie H. Page certain rights in the trust property. By that deed an equitable remainder in estate tail was conveyed to Jennie H. Page, and Mary E. Page held an equitable estate for life with remainder to herself, or her heirs, in fee upon the death of Jennie H. Page without heirs of her body.

The equitable estate of Jennie H. Page was granted by Mary E. Page from her equitable estate in fee simple, although Mary E. Page was not the grantor in the deed which conveyed the interest to Jennie H. Page, but Mary E. Page was the equitable owner in fee simple before the deed was executed, and she consented that the deed might be executed in the manner in which it was executed, and thereby she became the donor of the equitable remainder granted by deed of Delia S. Monks to Aaron L. Simpson. Neither Nathaniel Hatton's nor Delia S. Monk's interest contributed in any degree toward the equitable remainder in tail.

Delia S. Monks, being the holder of the legal title in trust, conveyed the property to Aaron L. Simpson in trust, and thereby divested herself of all title to the property, and neither she nor her heirs had or have any rights in the property conveyed by her to Aaron L. Simpson, as trustee, or in the property purchased by him with the proceeds of that property.

By the Monks conveyance Aaron L. Simpson took the legal title to the property mentioned in the Hatton deed, Mary E. and Jennie H. having an equitable interest therein. The conveyance was not within the statute of uses, as by the deed the trustee was to exercise his discretion in the sale and management of the estate and in the investment of the proceeds. Pomroy Eq. Juris. sec. 984; Perry on Trusts, sec. 305.

March 28, 1905, Aaron L. Simpson, under the powers granted him in the Monks deed, sold the trust property and with the proceeds purchased the property in dispute from Frank W. Eastman, the consideration named in the deed being $2800. The conveyance purported to be in trust for the use and benefit of Mary E. Page,

and granted to Mary E. and Jennie H. Page the same interest in the property which they had in the property conveyed by Monks to Simpson, but for the following clause:

"If the said Mary E. Page and Jennie H. Page shall both die leaving no heirs of the body of said Jennie H. Page and shall leave Alphonso W. Page living, who is the husband of said Mary E. Page and the father of said Jennie H. Page, then the said trustee shall, out of the estate, if there is sufficient, give a good support and maintenance to the said Alphonso W. Page in such manner as he, said Trustee, may deem just and proper. It is intended that said premises shall be occupied by said Mary E. Page and said Jennie H. Page and while they are occupied by them, no responsibility is to rest upon or attach to said Trustee as to the care and management of said premises, and they are to have the full management and control of the same while they or either of them may occupy the premises. If the said Mary E. Page and the said Jennie H. Page shall both die leaving the said Jennie H. Page unmarried and without heirs of her body, then after the death of said Alphonso W. Page, said Trustee shall turn over and convey to his three children in equal shares, viz: Gertrude Simpson, Maud S. Smith and Howard W. Simpson and their heirs and assigns forever, then this trust shall cease. This conveyance is made to and accepted by said Aaron L. Simpson under said conditions at the special instance and request of said Mary E. Page and Jennie H. Page, and with their full knowledge."

The above clause, if valid, conveyed to Alphonso W. Page and the children of Aaron L. Simpson an interest in the property, neither of whom had any interest in the property conveyed by Monks to Simpson, and with the proceeds of the sale of which the Eastman property was purchased. It is claimed that Simpson, without the consent of Mary E. and Jennie H. Page, had no right to cause the names of Alphonso W. Page and the children of Aaron L. Simpson to be inserted in the deed, or to invest the trust fund so that any one other than Mary E. Page and Jennie H. Page would have any interest in the property, and that the interests of the said

Mary E. Page and Jennie H. Page under that deed should have been the same as were their interests in the property conveyed by Monks to Simpson.

This is admitted, but it is claimed that Mr. Simpson had their consent to take a conveyance of the Eastman property in the manner in which it was taken. It is admitted in the printed case that there is no evidence of their consent, except as it may be presumed from the trust deed of Eastman to Simpson. There being no evidence of their consent, the question arises, is the recital in the deed to the effect that they consented to the change evidence of their consent?

Mary E. and Jennie H. Page did not, and the trustee and legatee of Mary E. Page does not, claim the property under the Eastman deed. The interest of Jennie H. Page was created by the deed of Monks to Simpson from the property conveyed by Hatton to Monks. The interest of Mary E. Page was created by the deed of Hatton to Monks, out of which estate so granted was taken the interest conveyed to Jennie H. Page by deed of Monks to Simpson, and their interests were sold by Simpson, he having the right to sell, and Mary E. and Jennie H. Page had the same interest in the proceeds of the sale as they had in the property sold; it was their trust fund, and their claim to the Eastman property was because their trust fund, consisting of the property mentioned in the Monks deed, paid for the property conveyed by the Eastman deed. As said by the Court in *Land Co.* v. *Lewis*, 101 Maine, page 102, "the plaintiff's right does not arise from an express trust or from a resulting trust, but because the money which went into the farm was itself trust money. If so, they are charged with the trust." The same rule is laid down in *Cobb* v. *Knight*, 74 Maine, 253. The trustee and legatee of Mary E. Page claim by title anterior to the date of the Eastman deed which contains the recital. Parties and privies are bound by the recital in deeds under which they claim, but the estoppel does not bind strangers or those who claim by title paramount to the deed. "It is laid down, generally, that a recital of one deed in another binds the parties and those who claim under them. Technically speaking it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in

law. But it does not bind mere strangers, or those who claim by title paramount to the deed. It does not bind persons claiming by adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed." *Carver* v. *Jackson*, 4 Pet. 1.

The same question was before the same court in *Crane* v. *The Lessee of Morris et al.*, 6 Pet. 598, and the court said on the same question: "As upon a deliberate review we are entirely satisfied with the opinion and judgment pronounced on that occasion (which was indeed most thoroughly and anxiously considered) we do not propose to go at large into the reasoning now." The same doctrine was recognized in *Derry Lessee* v. *Cray*, 5 Wall. 805, and in *Stockley* v. *Cissna*, 119 Fed. Rep. 812. There are many cases in which the above doctrine is recognized, and which fully sustain the rule as laid down by this court in *Davis* v. *Callahan*, 78 Maine, 313, in the following language: "Further than this, estoppels are not only binding upon parties, but upon privies; privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc; privies in law, as those upon whom the law casts the estate. Co. Litt. 352, a; 1 Gr. Ev. 23; *Carver* v. *Jackson*, 4 Pet. 83; *Crane* v. *Morris*, 6 Pet. 611. They are not binding upon strangers, nor upon those claiming by title paramount to the deed or instrument creating the estoppel."

The above authorities clearly establish the proposition that Mary E. and Jennie H. Page, or the trustee or legatee of Mary E., are not bound by the recital in the deed that Mary E. and Jennie H. Page consented to the insertion in the Eastman deed of the names of Alphonso W. Page, or the children of the trustee, as beneficiaries of said trust after the death of Mary E. and Jennie H. Page.

When a trustee diverts property held by him in trust, he must be able to prove, by clear and satisfactory evidence, that all parties interested in the trust consent thereto. He stands in a fiduciary capacity to the cestui que trust, with authority to execute the trust, but with no authority to change or divert it. A trustee has no right to take a conveyance of property purchased with trust funds with the name of any person therein as a beneficiary other than the

cestui que trust of the trust fund, without the consent of the cestui que trust, and if he does so, the person whose name is so inserted takes no interest by the conveyance.

The names of Alphonso W. Page and the children of Aaron L. Simpson having been wrongfully inserted in the Eastman deed, without consideration, no interest in the trust property passed to them, and the trustee, Aaron L. Simpson, held the legal title to the property upon the same conditions, for the same purposes and for the same parties as mentioned in the Monks deed to him.

Aaron L. Simpson held the legal title to the property described in the Eastman deed to the time of his decease, February 7, 1901, for the benefit of the said Mary E. and Jennie H. Page as their rights were fixed by the Monks deed to him. That deed provided that said Simpson might convey the trust property to Mary E. Page, and thereby terminate the trust; but having died before making a conveyance, the legal estate followed by the trust descended to his heirs in trust, and his executrix and residuary legatee took and have no interest in the premises. *Richardson* v. *Woodbury*, 43 Maine, 210; *Abbott, Pet.*, 55 Maine, 580; *McClellan* v. *McClellan*, 65 Maine, 500. His heirs held it for the same purpose and upon the same conditions as Aaron L. Simpson held it, and continued to so hold it until August, 1910, when Jennie H. Page died without heirs of her body. Her interest during her lifetime was an equitable remainder to her and the heirs of her body. She having died without issue of her body before Mary E. Page, who was the donor to her of the equitable remainder, which was not to take effect until after the death of Mary E. Page, the equitable remainder determined and revested in the donor, Mary E. Page, and she thereby became the equitable owner in fee simple of the property mentioned in the Eastman deed. "Estates tail are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and, upon the extinction of such issue, the estate determines." 1 Wash. Real Prop. 5th ed. 72, 73.

Mary E. Page, after the death of Jennie H. Page, being the equitable owner in fee simple with the sole beneficial interest in the property, continued to use and occupy it until her death. The heirs of Aaron L. Simpson held the legal title to the property described in the Eastman deed up to the death of Mary E. Page; they held it for her benefit, and no other person had any beneficial interest therein. The trust was created for her benefit, and at her death the objects for which the trust was created were satisfied, and the estate of the trustees failed and their title became extinct by operation of law, as there was no other act that could be done in furtherance of the purposes for which the trust was created. *Doe* v. *Considine*, 6 Wall. 458; *Young* v. *Bradley*, 101 U. S. 782; 4 Kent Com. 233.

The objects of the trust having been satisfied, Mary E. Page the cestui que trust having died, there being no further act that the heirs of Aaron L. Simpson, as trustees, could do in furtherance of the objects of the trust, and the trust having become extinct by operation of law, the plaintiff, Matthew Laughlin, took no interest in the property mentioned in the Eastman deed by virtue of his appointment as trustee on the sixth day of December, 1910, by the Probate Court for the County of Penobscot. By the terms of the will of Mary E. Page, all her property was given in trust to the plaintiff Laughlin, with full power to sell and convey without license of court, the whole or any part of her real estate, and to give sufficient deed or deeds thereof, the entire estate to be held for the sole benefit of Alphonso W. Page during his lifetime, and upon the death of said Alphonso all of the estate remaining should become the absolute property of Imogene P. Russell. By the terms of her will the Eastman property, as well as all other property owned by her at her decease, was transferred to the plaintiff Laughlin, in trust, with remainder over to Imogene P. Russell.

In *Chauncey* v. *Salisbury*, 181 Mass. 516, the will contained the following clause: "The sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey, and they shall have the income." The court ruled that at the death of Sam the trust ceased, and the property

then being a part of his estate should be distributed as such. In *Hayward* v. *Rowe*, 190 Mass. 1, the testator left $500 to his housekeeper, "to be in trust of my executor and put in savings bank, the income to be paid to her yearly, and the executor can draw this money, and buy a cheap place for her to occupy during her life, if he thinks it would be for her good." The court ruled in that case that, "during her lifetime the housekeeper was vested with an absolute equitable title, and although the legal title was in the trustee this did not limit or diminish her interest. Upon her death, the trust having been fully executed, the legal title followed the equitable title, and the fund became part of the assets of her estate."

In *Holcomb* v. *Palmer*, 106 Maine, 17, there was a bequest whereby one-fifth of the remainder of the estate of the testator was to be held by Francis in trust for Clinton, to be used for his comfort and necessities, according to the discretion of Francis. In that case the court said: "The fair and true construction of this residuary clause therefore is that four of the children received their shares absolutely or in fee simple, and Clinton received his share in equitable fee simple or a fee simple in trust, the legal estate passing to the trustee Francis, the beneficial interest to the cestui que trust Clinton, and the trust terminating at the farthest at the death of Clinton, when any portion of the trust left would pass by his will, if he died testate, or descend to his heirs if he died intestate." See also *Stone* v. *McLain*, 102 Maine, 168; *Doe* v. *Considine*, and *Young* v. *Bradley*, supra.

These authorities demonstrate that Mary E. Page had a right to devise the property mentioned in the Eastman deed by will, free from the trust mentioned in the Monks deed to Simpson and the Eastman deed to Simpson; that it, with her other estate, passed by her will to Matthew Laughlin, the trustee named therein, to be held and used by him according to the trust created by her will, no construction of which is asked by the bill in this case.

This bill should be amended before filing the decree by making the plaintiff, Matthew Laughlin, as trustee under the will of Mary E. Page, a party, then all parties having any interest in the estate

of Mary E. Page, or any interest in the property mentioned in the Eastman deed and the Monks deed, will be parties to this proceeding, and their rights finally determined.

The heirs of Aaron L. Simpson having no title to the Eastman property, it is unnecessary for them to execute a release of the property in question. A decree drawn in accordance with this opinion and recorded in the Registry of Deeds, as authorized by sec. 30, chap. 79, R. S., will remove all cloud from the title that might be caused by the record of the trust deed. This bill having been brought to settle the rights of all the parties claiming an interest in the property, it is just that the property should bear the plaintiff's expense, and he is authorized to charge the trust property held by him under the will of Mary E. Page the sum of seventy-five dollars and taxable costs.

Bill sustained with costs. Decree in accordance with this opinion.

INHABITANTS OF ORONO *vs.* KAPPA SIGMA SOCIETY.

Penobscot. Opinion July 18, 1911.

Taxation. Exemptions. College Fraternities. Revised Statutes, chapter 9, section 6, paragraph II, section 8.

The Psi Chapter of Kappa Sigma Fraternity, in 1907 and 1908, was in possession of a chapter house built on the college campus of the University of Maine, under a contract to purchase the same from the University, and taxes for those years were assessed against the property by the town of Orono in which the University of Maine is located.

Held: 1. That the fraternity is neither a literary nor a scientific institution and therefore was not exempt from taxation under the provisions of Revised Statutes, chapter 9, section 6, paragraph II.

2. That being in possession of the property on the first day of April in the years 1907 and 1908, the fraternity, under the provisions of Revised Statutes, chapter 9, section 6, was liable for the taxes assessed against the property for those years.

On report. Judgment for plaintiffs.

Action of debt to recover taxes assessed against the defendant for the years 1907 and 1908. Reported to the Law Court on an agreed statement of facts with the stipulation that if "the action is maintainable, judgment is to be entered for the plaintiffs for the sum of $167.92, without interest or costs;" otherwise plaintiff to be nonsuited.

The case is stated in the opinion.

George E. Thompson, for plaintiffs.

Lawrence V. Jones, for defendant.

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

HALEY, J. This is an action of debt, brought by the inhabitants of the town of Orono for taxes assessed for the years 1907 and 1908. It is admitted that the assessment of the taxes and all the proceedings connected therewith are regular in form. The defendant denies its liability, claiming that the property taxed is exempt from taxation by R. S., chap. 9, sec. 6, paragraph II, which exempts from taxation, "the real estate of all literary and scientific institutions occupied by them for their own purposes or by any officer thereof as a residence." The building upon which the taxes were assessed was constructed by the Maine State College, now known as the University of Maine, and occupied by the defendant under the following agreement:

"At the request of the 'Psi Chapter of Kappa Sigma Fraternity,' the Trustees of the Maine State College agree to build a house for rent to the Corporation on the following conditions:—

1. The house shall be built upon the College Campus.

2. The corporation shall contribute $1000 to the College Treasury before taking possession of the house.

3. The corporation shall make all repairs, pay for insurance, which shall be taken out by the College and keep the College free from all expenses of any kind in connection with the building.

4. The rental shall be $1 and 6% interest on the cost of the house to the College diminished by the contributions of the Corporation.

5. The rent shall be paid semi-annually on the first day of April and October.

6. The house shall be held for the exclusive use of the Chapter.

7. The Corporation may increase its contributions at any time, and whenever the additional contributions shall amount to $500 or more, on an interest day, the rent shall be reduced from that time, by the 6 % of the contributions.

8. If the Chapter ceases to exist, the College shall, after two years hold itself as under no obligations to the Corporation; but this article shall not take effect until 60 days after the College, by its President, shall have served notice of the intentions of the College, upon the Corporation in the person of its President, or if he cannot be found, upon one of the most recent graduates of the Chapter.

9. If the Chapter fail to maintain the house in good condition to the satisfaction of the College, the College will make the needed repairs and charge the Chapter an annual rental of 10 % on the cost thereof.

10. If the Corporation fail to pay its rent when due, the rent in arrears shall bear interest at 10 % per annum.

11. If the Corporation be in arrears in rent or interest for three years, the College may require it to vacate the building but shall repay to the society such a part of its contributions as may be deemed fair by a board of three referees, one to be appointed by the College, one by the President of the Corporation of the Psi Chapter of the Kappa Sigma Fraternity, and the third by those two.

12. The house shall be built by the College but the Chapter may appoint two advisory members who shall act with the College representative as a building committee.

13. The house shall always be open to college inspection, and subject to college regulations."

Both the plaintiff and the defendant rely upon *Orono* v. *Sigma Alpha Epsilon Society*, 105 Maine, 214. A comparison of that case with the case at bar is decisive of this case. That case was an action of debt for taxes assessed upon a building as real estate on

the land of the University of Maine; this is an action of debt for taxes assessed upon a building as real estate on the land of the University of Maine. In that case the defendant was a corporation, and the building was occupied by students attending the University of Maine; in this case the defendant is a corporation, and the building was occupied by students attending the University of Maine. In that case no income or profit of any kind was divided among the stockholders; in this case no income or profit of any kind is divided among the stockholders. In that case the defendant, under a parol license granted it by the trustees of the University, erected the building; in this action the University erected the building on its own land to rent to the defendant. In that case and the case at bar the buildings were used for the same purposes. In that case no officer or professor of the University lived in the building or had any control or management of it other than the general supervision and control exercised over the general student body; in this case no officer or professor of the University lived in the building or had any control or management of it, other than the general supervision and control over the student body. In that case the money to erect the building was procured by the defendant giving its promissory notes, guaranteed by the trustees of the University (under authority of an act of the legislature); in this case the building was erected by the University of Maine, with its own funds, and was turned over to the defendant upon the conditions set forth in the agreement. In that case the defendant was occupying the building that it had erected with the aid of the University upon land of the University; in this case the defendant was occupying the building erected by the University with its own funds, upon land of the University.

Before the defendant took possession of the property it paid into the college treasury $1000 towards the cost of the building. The defendant was to make all repairs, pay all insurance and keep the college free from all expense of any kind in connection with the building, and pay the college 6% interest on the cost of the building, less the $1000 contributed, as aforesaid, with the right of the defendant to increase its contributions at any time, and that when-

ever the additional contribution should amount to $500, or more, on any interest day the rent should be reduced from that time by the 6% of such contribution. The college was given the right, if the defendant neglected to keep the buildings in a condition satisfactory to the college, to make the needed repairs and charge an annual rental of 10% on the cost thereof, and if the defendant was in arrears for rent or interest for three years, the college might require it to vacate the building, and should repay to the defendant such part of its contributions as might be deemed fair by a board of three referees, selected as provided in the agreement. The defendant made the payment of $1000 and took possession of the property under the agreement. Whether any other contributions have been made or not does not appear in the case.

The proper construction of the agreement is that the University erected the building and allowed the defendant to occupy it under a contract of purchase; that, when the defendant paid to the University the cost of the building, with 6% interest upon the money invested by the University, the property should become the property of the defendant. The defendant was in possession under a contract of purchase, with such an interest in the property that it could not be taken from it until it was three years in arrears on the payment of the interest on the money that the University had invested, and, even then, the defendant's interest in the property had to be ascertained by a board of referees, and the amount of that interest paid it by the University.

The University of Maine is a literary or scientific institution and holds the legal title to the property, but it was not occupied by them for their own purposes, or by any officer thereof as a residence. It was rented by them, under a contract of purchase, to the defendant. It was occupied by the defendant for its own purposes, paying as rent therefor 6% on the money invested at any rent day by the University, paying the insurance and making the repairs, with a contract of purchase upon which it had paid at least $1000. The defendant's corporate powers are neither literary nor scientific. The legal title to the property was in the University of Maine; but, as said by the court in *Orono* v. *Sigma Alpha Epsilon Society*, 105

Maine, 217, "Not all the real estate of literary and scientific institutions is exempt from taxation. It is only such as is occupied by them for their own purposes, or by any officer thereof as a residence. The lot on which this building was erected was occupied neither by the University nor by any officer thereof, but by an independent corporation for its own purposes, and therefore it lost the privilege of exemption which might under other conditions attach to it."

The defendant is neither a literary nor a scientific institution. It was in possession of the property taxed on the first day of April in the years the taxes sued for were assessed, and under R. S., chap. 9, sec. 6, are liable for the taxes which are admitted to have been legally assessed, and, in accordance with the stipulation of the parties, the entry must be,

Judgment for the plaintiff for $167.92, without interest or costs.

In Equity.

PHILADELPHIA TRUST, SAFE AND DEPOSIT INSURANCE COMPANY et al.

vs.

IRENE C. ALLISON,
Executrix of the Will of William C. Allison, Deceased.

Hancock. Opinion August 3, 1911.

Drunkards. Capacity to Consent to Sale of Trust Property. Jurisdiction of Courts. Conveyance by Trustee. Consent by Committee. Courts. Extra-Territorial Jurisdiction. Marketable Title. Constitution of Pennsylvania, Article 5.

By the terms of a trust deed, the trustee, which is the plaintiff in this case, was empowered to sell in fee simple or otherwise, the real estate thereby conveyed to it, but it was provided that certain real estate in Bar Harbor in this State should be subject to sale or rent only with the consent of the cestui que trust, and should be sold or rented by the trustee at any time upon the request of the cestui que trust, and for a price or sum acceptable to her. All the parties to the deed, as well as the cestui que trust, were, and still remain, residents of Philadelphia.

After the execution and delivery of the trust deed, the cestui que trust was adjudged, by the Court of Common Pleas of Philadelphia to be an habitual drunkard, and a committee of her person and estate was appointed by that court.

Afterwards, the plaintiff, as trustee, and the committee, so appointed, entered into a written agreement with one Allison, for the sale and conveyance to him, of the Bar Harbor property, and it was stipulated in the agreement that the title was to be good and marketable. The defendant is the executrix of Allison's will.

On petition of the committee, the Court of Common Pleas of Philadelphia made an order approving the sale and authorizing the committee to consent formally to the sale in behalf of his ward, the cestui que trust, and to join in the deed. The cestui que trust herself joined in the prayer of the petition, and formally assented to the making of the order.

A deed executed by the plaintiff as trustee, and consented to by the committee was seasonably tendered to Mr. Allison, who refused to accept it and pay according to the terms of his agreement to purchase.

This bill being brought to compel specific performance, it is *held:* —

1. That the cestui que trust, by reason of having been adjudged an habitual drunkard, and the appointment of a committee of her person and estate, was incapable of giving consent personally.
2. That under the constitution and statutes of Pennsylvania, as interpreted by the highest Court in Pennsylvania, the Court of Common Pleas of Philadelphia had jurisdiction to adjudge the cestui que trust to be an habitual drunkard, and to appoint a committee of her person and estate, and that that court having chancery powers, had jurisdiction to authorize the committee to consent to a conveyance by the trustee, for and in the place of his ward, and that the consent of the committee was as effectual, as if the consent had been given by the cestui que trust personally, while she was capable of so doing.
3. That the decree of the Court of Common Pleas of Philadelphia was effectual, although the land to be conveyed was in Maine.
4. That the deed tendered conveyed a good and marketable title to the Bar Harbor property.

In equity. On report. Bill sustained. Specific performance ordered.

Bill in equity praying for the specific performance of the written agreement of the defendant's testate, William C. Allison, to purchase and take a conveyance of certain real estate situate in Bar Harbor. The defendant demurred and answered. Reported to the Law Court on bill, answer and proofs, for determination and final judgment.

The case is stated in the opinion.

Symonds, Snow, Cook & Hutchinson, for plaintiffs.

E. B. Mears, and Deasy & Lynam, for defendant.

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

SAVAGE, J. Bill in equity praying for the specific performance of the agreement of William C. Allison to purchase and take a conveyance of certain real estate situated in Bar Harbor, in this State. The case is reported to the Law Court on bill, answer and proofs for its determination and final judgment. The present defendant is the executrix of the will of William C. Allison.

Omitting unimportant allegations, the bill shows and it is admitted or proved that on November 3, 1905, William C. Allison,

of Philadelphia, in accordance with a previous written agreement between himself and his wife, Lenore M. Allison, dated October 24, 1905, executed and delivered to the Philadelphia Trust, Safe Deposit and Insurance Company, a deed of trust, for the benefit of Lenore M. Allison, for life, with remainder over to such person or persons as Mrs. Allison should appoint by will or other written instrument, or in default of such appointment, to her next of kin. In that trust deed it was stipulated that the trustee should have full power "to sell in fee simple or otherwise the real estate thereafter to be conveyed to it, under and in accordance with the provisions of the agreement of October 24, 1905," and reinvest the proceeds, but it was provided "that the said cottage at Bar Harbor, Maine, should be subject to sale or rent by the said trustee only with the consent of the said Lenore M. Allison, and should be sold or rented by said trustee at any time upon her request, and for a price or sum acceptable to her." The agreement of October 24, 1905, between Mr. and Mrs. Allison, contained a similar stipulation. The "cottage at Bar Harbor" is the subject of the present controversy.

It appears that afterwards, on December 9, 1905, and in accordance with their previous agreement of October 24, 1905, referred to in the trust deed, Mr. and Mrs. Allison conveyed the Bar Harbor property to the plaintiff Trust Company in trust for the purposes and uses set forth in the deed of trust, for the benefit of Mrs. Allison for life, with remainder over, as already stated.

It appears that Mrs. Allison was divorced from her husband in 1907. It also appears that afterwards, in the same year, by virtue of proceedings instituted in the Court of Common Pleas for the county of Philadelphia, in which county Mrs. Allison resided, she was "duly declared" by that court to be an habitual drunkard, and the court appointed George F. Pettinos a committee of her person and estate. Mr. Pettinos joins in this bill as a party plaintiff.

Afterwards, on May 27, 1909, the plaintiff Trust Company, as trustee, and Mr. Pettinos, as committee of the person and estate of Mrs. Allison, entered into a written agreement with the defendant's testator, for the sale and conveyance to him by the Trust Company, with the consent of the committee, of the Bar Harbor

property. The agreement contained the stipulation that "the title is to be good and marketable."

Subsequently, on petition of Mr. Pettinos, the committee, the Court of Common Pleas of Philadelphia, which had appointed him, made an order approving the sale, and authorizing Mr. Pettinos, as committee, "to formally consent thereto on behalf of the said Lenore M. Allison, and to join therein." Mrs. Allison joined in the prayer of the petition and consented, so far as she had legal capacity to do so, to the making of the order. Under this order, Mr. Pettinos, as committee, and for and in behalf of Mrs. Allison, formally consented to the sale and conveyance, as a compliance with the provisions relating to the consent of Mrs. Allison, contained in the agreement of October 24, 1905, and in the trust deed.

A deed executed by the Trust Company and consented to by Mr. Pettinos, as committee, was seasonably tendered to the defendant's testator, who refused to accept it and pay according to the terms of the agreement. And this bill is brought to compel specific performance of his agreement to purchase.

The defense relied upon may be stated in these words:

1. That as appears by the bill and exhibits, the title tendered by the plaintiffs to the defendant was not good and marketable, as required by the contract set forth.

2. That the Philadelphia Trust, Safe Deposit and Insurance Company, trustee, was authorized to make sale of the property described in the bill only with the consent of Lenore M. Allison, and that it is not shown that Lenore M. Allison has consented to the sale of the described premises.

3. That the personal consent of Lenore M. Allison is necessary, and that no other person can be authorized by any court to exercise this consent for her.

4. That the giving of such consent is a necessary step in the transfer of title to land in Maine, and that if any person can be authorized to consent in behalf of Mrs. Allison, such authority must come from the courts of Maine, which have exclusive jurisdiction over the subject matter.

The pivotal question is whether Mrs. Allison's committee could, under the decree of the Court of Common Pleas of Philadelphia, give consent to the sale, with the same effect as if it had been given by Mrs. Allison personally, when not under guardianship. The fact that Mrs. Allison personally gave her consent to the decree may be disregarded, for it is practically conceded, and such is the law, that while Mrs. Allison is under guardianship as an habitual drunkard she is incapable of giving consent, the same as if she had been adjudged insane. She is conclusively presumed to be incapable of conducting her affairs. She cannot transact any business. She cannot make a valid deed or bond. She cannot waive the notice of protest on a bill. She cannot waive the provisions of her husband's will, and elect to take dower. She cannot do anything which involves the exercise of discrimination and judgment. *Cockrill* v. *Cockrill*, 79 Fed. Rep. 143; *L'Amoreux* v. *Crosby*, 2 Paige, 422; *Imhoff* v. *Witmer's Adm.*, 31 Pa. St. 244; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388; *Penhallow* v. *Kimball*, 61 N. H. 596; *Ashby* v. *Palmer*, 1 Merivale, 296; In re Wharton, 5 DeG. M. & G. 33. So here, the right to consent implies the right not to consent. The exercise of the right is an election, and involves the exercise of judgment, to do which Mrs. Allison is incapable.

So too we may dismiss the question whether the committee, irrespective of the decree of the court, had authority to consent for Mrs. Allison. The right to consent was personal to her. She might exercise it or not, according to her fancy or her judgment. No one else could exercise it for her, in the absence of statute authority, except under the decree of a court having jurisdiction to authorize its exercise. *Penhallow* v. *Kimball*, 61 N. H. 596; *Heavenridge* v. *Nelson*, 56 Ind. 90; *Merrill* v. *Emery*, 10 Pickering, 507; *Sherman* v. *Newton*, 6 Gray, 307; *Kennedy* v. *Johnston*, 65 Pa. St. 451; *Griswold* v. *Butler*, 3 Conn. 227; *Pinkerton* v. *Sargent*, 102 Mass. 568. We know of no case where the facts are like those in the case at bar. But the cases we have cited, all involving the right of personal election, are so closely analogous in principle to this one that they may be regarded as authorities on the question. And, too, this case must be distinguished from the class of cases,

some of which are cited by the plaintiff, in which it is held that a guardian may avoid or confirm the deed or other contract of his own ward, or may indorse a note payable to him, or may take an appeal for him, or may do many other things which are proper for the collection or conservation of the estate which has been committed to his management and control. These matters relate to the administration of the estate, and do not involve the exercise of a right of personal election, given to the ward by statute or contract. In this case, Mr. Pettinos, the committee, had nothing to do with the management or control of the trust estate.

It remains to inquire as to the effect of the decree of the court in Philadelphia. It is not disputed that the Court of Common Pleas of Philadelphia had jurisdiction to appoint a committee, or guardian, of Mrs. Allison. And it is clearly shown by the constitution and statutes of Pennsylvania which are made a part of the record that that court did have such jurisdiction. The extent of the power of that court under the constitution and statutes is stated in *Kennedy* v. *Johnston*, 65 Pa. St. 451, as follows: "In this State the Fifth Article of the Constitution, section 5, confers upon the Court of Common Pleas the power of a court of chancery, so far as relates (inter alia) to the persons and estate of those who are non compos mentis. The Act of 13th June, 1836, relating to lunatics and habitual drunkards, was passed to carry out the provision of the constitution." And again in *McGinnis* v. *Com.*, 74 Pa. St. 245;—"Under our statutes, an habitual drunkard is classed with a lunatic, and all such are special subjects in relation to whom the Court of Common Pleas are expressly invested with the jurisdiction and powers of a court of chancery. In effect the lunatic is the ward of the court, and his estate is in custodia legis." Thus it is seen that the Court of Common Pleas of Philadelphia not only has jurisdiction over the persons and estates of lunatics and habitual drunkards such as is commonly exercised by probate courts in this State, but also in the exercise of this jurisdiction it possesses broad chancery powers. It is a court of equity, as to matters within its jurisdiction. Such is the effect of the constitution and statutes of Pennsylvania as interpreted by the highest court in that State.

So the question now is,—Can a court having jurisdiction of the person and estate of a lunatic or drunkard, and being also possessed of chancery powers, authorize the committee or guardian to consent to a conveyance by the trustee, when the ward is no longer competent to consent? We think it can. It is true, as we have already said, that the right to consent was personal to Mrs. Allison. So long as she was sui juris, no one else could exercise it for her. But suppose the title to the property had been in her instead of in the trustee, the right to convey it would have been personal to her. The one right was no more personal than the other. It is not doubted that the court, after she was adjudged incompetent, might authorize, or even in some cases, order her committee to convey her estate. If it is competent for a court of equity to authorize or order a sale when the title is in her, why may it not authorize her committee to consent to a sale for her, if consent is a necessary prerequisite, when the title is in a trustee for her benefit? We perceive no valid distinction. In each case, it is in reality the court acting for the ward, doing what she can no longer do, consenting when she can no longer consent.

The underlying reason for the existence of such a power is, we think, because the good of the ward requires it. It seems to us to be a proper chancery power. It may be indispensable for the protection or conservation of the ward's interests. And it must be assumed that it will not be exercised except it be for the advantage of the ward.

No case precisely in point has been cited by counsel, nor have we found any. But there are cases which in principle are closely analogous. The right to elect between a testamentary provision and dower is personal to the widow. If she dies, it cannot be exercised by her heirs. *Sherman* v. *Newton*, 6 Gray, 307. If she is insane, her guardian, as such, cannot exercise it. *Pinkerton* v. *Sargent*, 102 Mass. 568. Nevertheless, the almost unbroken current of authority is that where the person entitled or bound to elect is a lunatic, the court having jurisdiction of the matter will make the election in her behalf. 1 Pomeroy Eq. Juris. sect. 510; *State* v. *Ueland*, 30 Minn. 277; *Washburn* v. *Van Steenwyk*, 32 Minn.

336; *Van Steenwyk* v. *Washburn*, 59 Wis. 483; *Penhallow* v. *Kimball*, 61 N. H. 596; *Kennedy* v. *Johnston*, 65 Pa. St. 451. So, in *Wilder* v. *Pigott*, L. R. 22 ch. Div. 263, it was held that the court could confirm a marriage settlement for an insane wife, though the right to confirm was personal to her.

We conclude that the Court of Common Pleas of Philadelphia had the power to authorize Mrs. Allison's committee to consent to the conveyance in her behalf.

The defendant contends next that the decree of the Philadelphia court could not have any effect, no matter what authority or jurisdiction may have been conferred upon that court by statute in Pennsylvania, because the land to be affected lay not in Pennsylvania, but in Maine, and because questions involving titles to land in a State are exclusively cognizable by the courts of that State.

It is true, as claimed, that the laws of the State in which land is situated control exclusively its descent, devise, alienation and transfer, and the effect and construction of instruments intended to convey it, and that the disposition of immovable property, in whatever manner, is exclusively subject to the government within whose jurisdiction the property is situated. *United States* v. *Fox*, 94 U. S. 315; *Hutchinson* v. *Caldwell*, 152 U. S. 65. It is true, also, that while a court having jurisdiction over the owner of land in another State may compel him to transfer, by proceedings in personam, it cannot empower its master, or committee, guardian, administrator or other officer to transfer the land. And the deed of the officer of the court of land outside the jurisdiction of the court is ineffectual. *Watts* v. *Waddle*, 6 Pet. 389; *Walkins* v. *Holman*, 16 Pet. 25; *Hotchkiss* v. *Middlekauf*, 96 Va. 649; *Davis* v. *Headly*, 22 N. J. Eq. 115.

But this is a different case. The Philadelphia court is not undertaking to transfer the title to land in this State, nor to make any decree which affects the title, or the mode of its conveyance. The Trust Company has the title in fee. It wishes to convey it, but its power to do so is limited, not by the laws of the State, but by the terms of the trust deed. The court creates neither the power nor the limitation. The giving consent does not transfer the title.

It merely affects the exercise of the power. It removes an obstacle to the exercise of the power. The court did not attempt to act upon the land, but upon one of the parties. It did not assume jurisdiction over lands in Maine. It merely exercised jurisdiction to do what its ward, if sane, might have done. It consented that the trustee having title might convey it. See *Washburn* v. *Van Steenwyk*, 32 Minn. page 356. If a court with appropriate jurisdiction over the parties may compel a transfer of land in another state by in personam proceedings, it is difficult to see why it may not permit a transfer,—which is this case,—by similar proceedings. And we are unable to perceive how the decree of the Philadelphia court, having jurisdiction of the parties, was in any sense an infringement of the exclusive jurisdiction of this State over the land.

The court are of opinion, accordingly, that the deed tendered by the plaintiffs to William C. Allison, as set forth in the bill, conformed to the agreement of sale of May 27, 1909, which we have referred to, and conveyed a good and marketable title to the real estate described in the agreement, subject, of course, to incumbrances mentioned therein, and that specific performance should be decreed as prayed for.

Bill sustained with costs. Decree for specific performance to be entered by a single Justice.

In Equity.

CHARLES W. MCKENNEY *vs.* FRANK W. WOOD.

Cumberland. Opinion August 4, 1911.

Equity. Judges. Death of Judge. Decree. Unsigned Decree. Trial. Findings. Judge's Signature. Equity Rule XXVIII. Statute, 1881, chapter 68, section 9. Revised Statutes, chapter 79, section 21.

When a Justice of this court who has heard a cause in equity dies, or otherwise becomes incapacitated, before signing the decree, it is not competent for another Justice to settle and sign the decree; and in such event the case must stand for a new hearing.

Under equity rule 28 only the Justice who hears a cause in equity can settle and sign the decree, except by consent.

Since a statement of findings and rulings is not required to be filed in chancery practice by any statute or rule of court, such findings and rulings, if filed, whether signed or unsigned, are not effective but are subject to modification until the decree itself is signed.

In equity. On report. Case remanded for a new hearing.

Bill in equity brought by the plaintiff to enjoin the defendant from entering into and upon a certain lot or parcel of land and from cutting down any of the wood and timber standing thereon and hauling the same away and converting it to his own use.

The case is stated in the opinion.

William Lyons, and Robert Treat Whitehouse, for plaintiff.

Foster & Foster, and Frank & Frank, for defendant.

SITTING: SAVAGE, SPEAR, CORNISH, BIRD, HALEY, JJ.

SAVAGE, J. This cause was heard on bill, answer and proof before the late Justice PEABODY, who on the very day of his death filed in the clerk's office an unsigned statement of his findings of fact and rulings thereon, the last clause of which was the following:— "A final decree to be signed accordingly."

After the death of Justice PEABODY, application was made to another Justice to settle and sign the decree. The adverse party objected. Thereupon the cause was reported to the Law Court, which is to determine (1.) whether the paper filed by Justice PEABODY is to be given the same effect as if it had been signed by him; and (2.) whether the final decree can now be settled and signed by any other Justice.

Whether the statement of "the findings of fact and rulings thereon" was signed by the Justice who heard the case, we do not regard as of any great importance. Such findings and rulings, signed or unsigned, are at the outset merely tentative, that is to say, they are subject to modification until the decree is signed. They may be added to, or diminished, or otherwise changed by the Justice, of his own motion, or upon the motion of either party.

There is no requirement in chancery practice, nor under any statute or rule of court, that such findings and rulings shall be filed. A decree alone is sufficient. *Pierce* v. *Woodbury*, 100 Maine, 22. If findings and rulings are filed and signed, they are not effective until the decree is signed, and of course it is the same if they are not signed. They are merely the basis for the decree. They are not the decree itself. If they are filed with the decree, or otherwise incorporated into it, it does not matter whether they have been signed or not.

A more important inquiry is involved in the second question. When the Justice who heard the cause is dead, or otherwise incapacitated, can another Justice settle and sign the decree? We think not. Equity Rule XXVIII, 103 Maine, 546, seems to be decisive. That rule, so far as material here, reads as follows:

"When a party is entitled to a decree in his favor, he shall draw the same and file it and give notice.

If corrections are desired, they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the Justice *who heard the case*, for approval. If they are not adopted, notice shall be given of the time and place when and where the matter shall be submitted to *such Justice* for decision, and *he shall settle and sign* the decree."

Under this Rule, only the Justice who heard the case can settle and sign the decree, except by consent. And justice, as well as the letter of the Rule, requires this interpretation. If such is not the Rule, it ought to be. Since the enactment of section 9 of chapter 68 of the Laws of 1881, it has been permissible, contrary to the ancient practice in equity, to take out the evidence in whole or in part, orally in the presence of the court, and not wholly by depositions. In fact, according to the present practice, nearly all of the testimony of witnesses is oral. The conclusions of the Justice hearing the cause may depend, and frequently do depend, not only upon the words of the witness, but upon his manner. The words can be reproduced afterwards, the manner cannot. As was said in *Young* v. *Witham*, 75 Maine, 536:—"When the testimony is conflicting, the Judge has an opportunity to form an opinion of the credibility of witnesses not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly on the stand and well in the record." The same observations apply to the case of one Justice who is called upon to settle a decree upon evidence taken out before another. He certainly is not bound by the conclusions of the Justice who heard the case, even if they have been expressed. The decree is his own judicial act, and must express his own conclusions. He cannot properly have any conclusions, except after hearing the case anew upon the record. But so far as the facts are concerned, the record, after all, is only a part of the case. Therefore it is that the Rule provides that the Justice who heard the case must settle and sign the decree. There are no exceptions. Fair dealing to the litigants will not permit any.

Rule XXVIII was amended in 1908, and the change in phraseology then made emphasizes the interpretation we place upon it. Previously the Rule provided that if proposed corrections to a decee were adopted, the new draft should be submitted to the *court* for approval. If not adopted, they were to be "submitted to the *court* for decision, in person or by sending the papers to some Justice, who shall settle and sign the decree," 82 Maine, 600. Under this

language it would seem that any Justice had authority to settle and sign decrees in cases heard by others. The limitation in the amendment to "the Justice who heard the case" is significant, and the reason for the amendment is apparent.

It may be added that Rule XXVIII in its present form conforms to the letter and spirit of R. S., chap. 79, sect. 21, which provides that "the Justice before whom such hearing [in equity] are heard. . . . shall make and enter such order and decree as seems just and proper to him."

In accordance with the stipulation of the parties, the case must be remanded for a new hearing upon the merits, before a single Justice.

So ordered.

FRED J. TABER *vs.* R. C. BARTON et als.

Knox. Opinion August 4, 1911.

Evidence. Intoxicating Liquors. Sale of Liquor. Recovery of Price. Pleading Statute. Revised Statutes, chapter 29, section 64.

1. The evidence is plenary that the intoxicating liquors whose price is sought to be recovered in this case were intended, when purchased out of the State, for unlawful sale in this State.
2. When intoxicating liquors are purchased by the steward of a club for a club, and are sold by him to the members, such sales are unlawful.
3. Revised Statutes, chapter 29, section 64, provides that "no action shall be maintained" upon any claim or demand contracted for any intoxicating liquors purchased out of the State with intention to sell the same or any part thereof in violation of the laws of this State. This statute affords a perfect defense in this suit.
4. Revised Statutes, chapter 29, section 64, is a police regulation, and was not enacted for the benefit of purchasers of intoxicating liquors. A defense based upon this statute need not be specially pleaded by way of brief statement, or otherwise.

5. Under Revised Statutes, chapter 29, section 64, forbidding any action for the price of liquors purchased out of the State for sale in violation of law, recovery is barred whether the seller knew the purchaser's intention, or not.

On motion by defendants. Sustained.

Assumpsit on an account annexed to recover $363.60 for intoxicating liquors alleged to have been sold by the plaintiff's assignor in Boston to the defendant Barton and forty others alleged to be "copartners doing business under the firm name and style of THE 1908 CLUB of Belfast." Plea, the general issue, with brief statement as follows: "That they were never in partnership, nor were they or any of them at the time this cause of action is alleged to have accrued, co-partners nor was any one of the defendants declared against a member of such partnership.

"And further the plaintiff in this action was himself a member of the said '1908' Club." Verdict for plaintiff for $360.60. Defendants filed a general motion for a new trial.

The case is stated in the opinion.

Alan L. Bird, and Rodney I. Thompson, for plaintiff.

Arthur Ritchie, for defendants.

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

SAVAGE, J. This is an action to recover for the price of intoxicating liquors sold by the plaintiff's assignor in Boston to "The 1908 Club of Belfast," of which club, it is claimed that the defendants were members. The verdict was for the plaintiff, and the case comes before us on a motion for a new trial. Several reasons are offered why the verdict was wrong, of which we shall notice but one.

The evidence leads us to observe that it might be difficult to determine whether "The 1908 Club" was a drinking club, pure and simple, or a saloon run under the guise of a club name. But it matters not which it was. The evidence is plenary that the liquors whose price is sought to be recovered now were intended, when pur-

chased, for unlawful sale in this State. If it was a real club, the liquors were ordered by their steward for the club, and sold by him to the members. Such sales were unlawful.

This case then comes within the terms of R. S., ch. 29, sect. 64, which provides that "no action shall be maintained upon any claim or demand, promissory note or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the State with intention to sell the same or any part thereof in violation thereof." Recovery is barred, whether the seller knew or did not know of the purchaser's intention. *McGlinchy* v. *Winchell*, 63 Maine, 31; *Meservey* v. *Gray*, 55 Maine, 540; *Pollard* v. *Allen*, 96 Maine, 455.

But the plaintiff says that this defense is not now open to the defendants, because the point was not made at the trial in the court at nisi prius; and because the statute was not specially pleaded, or set up by way of brief statement.

Whether or not this defense was offered below, the record before us does not show affirmatively, as it should do, if the defendants are to be precluded by it.

And we think it is not necessary to plead the statute referred to specially in defense of an action for the recovery of the purchase price of intoxicating liquors intended for unlawful sale. It is true that the phraseology of this statute is not unlike that of the general statute of limitations, which this court holds, must be pleaded specially. But it must be remembered that this statute was not designed, like the statute of limitations, as a statute of repose, nor to afford protection against stale claims. Under such a statute, if one sued neglects to claim for himself the benefit of the statute no one else can complain. And to promote the orderly course of trials in court, and to simplify the issues to be tried, it is wise and salutary to require that such special defenses shall be specially pleaded.

But the statute we are now considering is a police regulation. It was not enacted for the benefit of the parties, nor for simplifying litigation, nor for narrowing issues, nor for giving notice of intended defenses. It was enacted for the assumed good of the public. Its sole purpose is to aid in the prohibition of the unlawful

traffic in intoxicating liquors in this State. It is one of the provisions for the enforcement of the prohibitory liquor law. The court has no right to disregard its mandatory provisions, when they are called to its attention. Neglect to plead the statute does not change its prohibitive character. Considering the character and the purpose of this statute, we think the situation is such that one who sues for the price of intoxicating liquor in this State must come into court prepared to meet the defense afforded by the statute, whether it is pleaded or not.

Motion for a new trial sustained.

PEOPLE'S NATIONAL BANK *vs.* HANOVER S. NICKERSON.

Somerset. Opinion August 4, 1911.

Nonsuit. Directed Verdict. Writ of Entry. Declaration. Amendment. Review. Execution. Sheriff's Deed. Punctuation. Construction. Revised Statutes, chapter 78, sections 33, 36.

1. When a nonsuit is ordered, or a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not.
2. The burden is on the party who excepts to an order of nonsuit or the direction of a verdict to show that it was erroneous, and that it was erroneous cannot be determined without an examination of all of the evidence.
3. If the party excepting to an order of nonsuit, or the direction of a verdict, fails to present a transcript of all the evidence to the Law Court, his exceptions must be overruled, unless the omission is otherwise supplied.
4. When in a real action several, separate tracts of land are embraced in one count, the demandant may be allowed to amend by striking out one tract.
5. To support a sheriff's sale of land upon an execution, it is necessary to show, among other things, a valid judgment, upon which the execution issued. In this case, to support the plaintiff's title under an execution sale, formal proof of a judgment was not offered. But inasmuch as it appears that when the plaintiff was proceeding to prove a judgment, the

defendant's counsel interrupted saying, "I don't make any objection to that, the certificate on the back of the execution is to be the legal proof," and the plaintiff thereupon forebore to ask further questions, it is held that formal proof of a judgment was waived.

6. It is not indispensable that a sheriff's deed should show what court rendered the judgment, nor at what term it was rendered nor its date, nor its amount, nor the date of the execution, nor that the execution was alive at the time of the sale. The deed, as evidence of title, may be aided and supplemented by the judgment, execution and officer's return.

7. Punctuation, or the want of it, is not decisive in the construction of a deed; and it is considered that in the recital in a sheriff's deed, "having given notice in writing of the time and place of sale to the judgment debtors . . . . and having given public notice of the time and place of sale by posting up notifications thereof in a public place in the town of Pittsfield, and also by posting up notices thereof in one public place in each of the adjoining towns of Palmyra and Detroit thirty days before the time of sale," a fair construction requires that the words "thirty days" should be applied to all the notices.

8. An officer may embrace in one deed several parcels of land sold separately on the same execution, at the same time and place to the same purchaser. And the record shows that that was what was done in this case.

On exceptions by defendant. Overruled.

Writ of entry to recover certain real estate in Pittsfield. Plea, the general issue. At the conclusion of the evidence the presiding Justice ordered a verdict for the plaintiff and the defendant excepted to that ruling and also to other rulings made during the trial. See *Bank* v. *Nickerson*, 106 Maine, 502.

The case is stated in the opinion.

Johnson & Perkins, for plaintiff.

David D. Stewart, for defendant.

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

SAVAGE, J. Writ of entry. The writ contained one count, and described four separate tracts of land by metes and bounds. Before proceeding to trial, the plaintiff, against the objection of the defendant, had leave to amend by striking out one of the tracts described. The defendant took an exception. The plaintiff claimed title under an execution sale and sheriff's deed, and introduced in evidence,

subject to objection and exception, the execution and return thereon, and the deed. These will be noticed later. Other evidence was also admitted.

At the conclusion of the trial, the presiding Justice directed a verdict for the plaintiff, and the defendant excepted. And the case is now before us on all these exceptions.

Before considering the exceptions on their merits, we must first notice a question of practice. The case as made up and printed, and as first presented to this court, contained only the evidence which was specifically mentioned in the bill of exceptions. It was conceded at the argument that there was testimony which had not been printed. A transcript of this testimony was submitted to the court, and it was agreed by counsel that it should be considered as a part of the record in the case, if the court were of opinion that this testimony should have been printed as a part of the case originally. We are of that opinion. When a nonsuit is ordered, or a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not. Such a ruling is based upon the entire evidence, and will stand unless it is shown to be erroneous. The burden is on the excepting party to show that it is erroneous, and that he is aggrieved. And it cannot be determined to be erroneous without an examination of all of the evidence. For it may be that the errors complained of are cured, or the omission supplied, by the evidence omitted in making up the case. In this case it would have been our duty to overrule the exception to the direction of a verdict, without further examination, had not the omission been remedied by the transcript submitted.

When this case was in this court before, 106 Maine, 502, the defendant complained because the plaintiff had embraced four separate tracts of land in one count, but the court held that the practice was allowable. He now complains that the plaintiff has been permitted to reduce the number from four to three by amendment. And this is the subject of his first exception. His contention, as stated in the brief of counsel, is that having alleged one joint disseizin of four tracts, he must prove it as alleged, or he must fail.

Of course, he must prove whatever he has alleged that is essential, but that does not mean necessarily that he must prove whatever was alleged in the original declaration, but rather what is alleged in the amended declaration, if it is amended.

Of the propriety of such an amendment there can be no question. To allow a plaintiff to diminish the extent of his claim in a real action, either in quantity or character, does not introduce a new cause of action. Such an amendment is allowed almost as a matter of course. *Plummer* v. *Walker*, 24 Maine, 14; *Howe* v. *Wildes*, 34 Maine, 566. There is no difference in principle between the allowance of such an amendment and permission to strike out items from an account annexed. Such permission has been granted times without number. *Fogg* v. *Greene*, 16 Maine, 282; *Wight* v. *Stiles*, 29 Maine, 164; *Towle* v. *Blake*, 38 Maine, 528; *Boyd* v. *Eaton*, 44 Maine, 51; *Monroe* v. *Thomas*, 61 Maine, 581; *Goodwin* v. *Clark*, 65 Maine, 280; *South Thomaston* v. *Friendship*, 95 Maine, 201. The defendant can take nothing by this exception.

The other exceptions relate to the admissibility and sufficiency of the proof of the plaintiff's title under the execution sale and deed, and may be considered together.

The defendant contends first, that, although an execution and return of sale and a sheriff's deed, such as it was, were introduced, there was no proof of any judgment, and that without proof of a valid judgment, the subsequent proceedings,—execution, return and deed,—however correct in form, were not sufficient to prove title. And such is the law. *Hill* v. *Reynolds*, 93 Maine, 25. And it is true that no judgment was proved. But upon examination of the transcript of evidence not printed, but which is now a part of the case, we find that the plaintiff had placed the clerk of the Supreme Judicial Court for Kennebec County upon the stand as a witness, with his book of records, and was proceeding, as we think we should assume, to prove a judgment by the record, when the defendant's counsel interrupted, saying, "I don't make any objection to that. The certificate on the back of the execution is to be the legal proof." Thereupon counsel for plaintiff forebore to ask further questions. We think that we should now hold that formal

proof of a judgment was thereby waived, and the defendant should not now be heard to say there was no proof of any judgment.

The defendant contends in the next place that the sheriff's deed was not "sufficient." The statute, R. S., ch. 78, sect. 36, provides that an officer selling land on an execution "shall make and deliver to the purchaser a sufficient deed thereof," but it does not specify what shall be the essentials of such a deed. It is contended that the deed in this case is not "sufficient" because it does not show what court rendered the judgment, nor at what term it was rendered, nor its date, nor its amount, nor the date of the execution, nor that the execution was alive at the time of the sale. If it be conceded that proof of all these particulars is necessary to establish a valid sale, it is not necessary that they be shown by the deed. In *Hill* v. *Reynolds*, 93 Maine, 25, a case singularly on all fours with this case in these respects, it was held that the deed, under a sheriff's sale, is not the only evidence of title; that standing alone it is not sufficient evidence. But the judgment, execution and officer's return, as well as the deed, are constituent elements of the evidence of title. It was decided in that case that the deed may be aided, if necessary, by the return. The deed in *Hill* v. *Reynolds* was lacking in the same particulars that this deed lacks. But upon full consideration it was held to be sufficient. The reasoning need not be repeated. That case is decisive of this one so far as these particulars are concerned.

It is contended further that it nowhere appears that the execution debtors had thirty days' notice of the sale, as required by statute. R. S., ch. 78, sect. 33. But it does appear distinctly in the return of the officer. But irrespective of that we think it appears sufficiently in the deed. And it is the deed which counsel attacks. Recitals in a sheriff's deed of his doings in giving notice of the sale are themselves evidence. *Cutting* v. *Harrington*, 104 Maine, 96. The language of the deed, so far as necessary to quote it, is "having given notice in writing of the time and place of sale to the judgment debtors in the execution hereinafter mentioned and having given public notice of the time and place of sale by posting up notifications thereof in a public place in the town of Pittsfield, and also

by posting up notices thereof in one public place in each of the adjoining towns of Palmyra and Detroit thirty days before the time of sale." The defendant urges that the words "thirty days" are applicable only to the notices posted in adjoining towns, and not to the notice given to the debtors. We think a fair construction requires that the words should be applied to all the notices. It was obviously so meant, and it should be so read. The comma after the word "Pittsfield" raises the only doubt. But punctuation, or the want of it, is not decisive in the construction of an instrument, or a statute even, if the meaning is clear. *State* v. *McNally*, 34 Maine, 210; *Palmyra* v. *Nichols*, 91 Maine, 17.

Lastly, it is contended that it appears "by the deed that four separate tracts of land, entirely distinct, acquired by the execution debtors at different times and from different grantors, were sold, uno flatu, for the round sum of $3751," a proceeding, so it is claimed, wholly forbidden by all the authorities. Without stopping to inquire or decide what would have been the effect if the sale in this case had been made in that manner, we may say that the record shows that the different parcels were sold separately, for separate prices. Even the deed itself is not necessarily to be construed as meaning that all of the parcels were sold together for a lump sum. The language, "I (the sheriff) . . . in consideration of the sum of $3751 paid by the said People's National Bank of Waterville, it being the highest bidder therefor, do hereby give, grant, bargain, sell and convey to it . . . . the following described pieces and parcels of land," would be equally true whether the parcels were sold together for $3751, or sold separately for prices aggregating $3751.

But the officer's return states that the parcels were in fact sold separately, for separate prices, which amounted in all to $3751. The return is evidence and aids the deed. *Hill* v. *Reynolds*, supra. We can conceive of no reason why an officer may not embrace in one deed several parcels of land sold separately on the same execution, at the same time and place, to the same purchaser. The cases cited by the defendant, *Stone* v. *Bartlett*, 46 Maine, 438; *Smith* v. *Dow*, 51 Maine, 21; *True* v. *Emery*, 67 Maine, 31, and

Bartlett v. *Stearns*, 73 Maine, 17, are not applicable. These cases related to sales of two or more equities of redemption at the time for a gross sum. That is not this case.

We conclude that none of the grounds taken in support of the exceptions are tenable. And the certificate must be,

Exceptions overruled.

FRANK W. TITCOMB *vs.* MATTIE A. POWERS, Executrix.

Aroostook. Opinion August 16, 1911.

Money Had and Received. Bills and Notes. Evidence.

Under the count for money had and received, it is incumbent upon the plaintiff to prove, not only the receipt of the money by defendant, but also that it was received by him to plaintiff's use, that is, the plaintiff's title to it.

Although the legal property in a note may pass to the holder, it is competent under a count for money had and received by indorser against indorsee to show by parol testimony that such note was held in trust to be accounted for in a particular manner, but in such case the possession of the note is prima facie evidence that it is the property of the holder.

To establish such trust the evidence must be full and clear. Vagueness and indefiniteness of proof are as much an objection to sustaining a count for money had and received as in other actions. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative.

A negotiable note expressing value received may be given in evidence in support of counts for money had and received and money paid between the immediate parties to the note.

On motion by defendant. Sustained.

Action for money had and received, brought by the plaintiff against the defendant as executrix of the last will and testament of Llewellyn Powers, late of Houlton, deceased testate. The plaintiff's specifications were as follows:

"Estate of Llewellyn Powers to Frank W. Titcomb, Dr.

"To cash paid to Llewellyn Powers, being the proceeds of two certain notes of one thousand dollars each, given by Thayer & Collins of Keene, New Hampshire, to Frank W. Titcomb and sold by the said Frank W. Titcomb to the said Llewellyn Powers.

"Which said money said Llewellyn Powers agreed to credit to said Frank W. Titcomb on notes held at that time by said Powers against said Titcomb, which said credit was never given to said Titcomb and afterwards all of said notes then held by said Powers against said Titcomb including interest was collected by the estate of said Llewellyn Powers of the said Frank W. Titcomb, and the said Frank W. Titcomb paid to the estate of said Llewellyn Powers all of said notes and interest and was never allowed the said sum of two thousand dollars, the proceeds of said Thayer & Collins notes, except a small check for between fifty and sixty dollars given at said time by said Llewellyn Powers to said Titcomb, which check is in the possession of the executrix of said estate . . . $1950.00
To interest on same eighteen months 175.50

"$2125.50"

Plea, the general issue. Verdict for plaintiff for $2002.65. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Ransford W. Shaw, for plaintiff.

Roland E. Clark, and Walter A. Powers, for defendant.

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

BIRD, J. Under the count for money had and received it is incumbent upon the plaintiff to prove not only the receipt of the money by the defendant, but also that it was received by him to plaintiff's use— that is, the plaintiff's title to it. II Starkie on Ev. (Met. Ed.) 106; II Saund. on Pl. & Ev., pages 364, 371; *Hearne* v. *Hearne*, 55 Maine, 445, 447.

It is well established that a note, negotiable and expressing value received, may be given in evidence in support of the counts for

money had and received and money paid between the immediate parties to the note, as for instance, indorsee against indorser or maker and in such case the note is prima facie evidence in favor of the plaintiff: *State Bank* v. *Hurd*, 12 Mass. 171, 172; *Fairbanks* v. *Stanley*, 18 Maine, 296, 303; *Goodwin* v. *Morse*, 9 Met. 278, 279; *Sturtevant* v. *Randall*, 53 Maine, 149; II Greenl. Ev. page 112. See also *Raborg* v. *Peyton*, 2 Wheat. 385. And so, also, although the legal property in a note may pass to the holder, it is competent under a count for money had and received by indorser against indorsee to show by parol testimony, that such note was held in trust, to be accounted for in a particular manner, but in such case the possession of the note is prima facie evidence that it is the property of the holder: *Scott* v. *Williamson*, 24 Maine, 343, 347; *Lord* v. *Appleton*, 15 Maine, 270, and to establish the trust the evidence must be clear and full.

Vagueness and indefiniteness of proof are as much an objection to sustaining a count for money had and received as they are in other actions: *Perkins* v. *Cushman*, 44 Maine, 484, 491. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative. To choose between two possibilities is guess work, and not decision, unless there is something more which may lead a reasoning mind to one conclusion rather than to the other. *McTaggart* v. *Railroad Co.*, 100 Maine, 223, 230, 231: See also *Steward* v. *Church*, 108 Maine, 83; *Smith* v. *Lawrence*, 98 Maine, 92, 97; *Seavey* v. *Laughlin*, 98 Maine, 517, 519. See also *Haskins* v. *Haskins*, 9 Gray, 390, 393.

A careful examination of the evidence in this case makes it manifest that the verdict cannot stand. Irrespective of the presumption arising from possession of the notes by the testator and the express statement in the specifications of the plaintiff that the notes were sold to the testator and disregarding also the testimony of the attorney of the testator that testator bought and paid for the notes and the testimony of plaintiff after the notes were transferred by defendant that he stated to defendant's attorney that the amount paid to her was too large (which was clearly incompetent, *Goddard* v. *Cutts*,

11 Maine, 440, 443; *Smith* v. *Lawrence*, 98 Maine, 92, 97) the evidence indicates the possibility that the notes were sold to and paid for by the testator at the time of their indorsement to him at least as strongly as the possibility that they were transferred to testator in payment of the existing indebtedness of plaintiff. There is no evidence in the case warranting the verdict.

Motion sustained.
Verdict set aside.

FRED W. SPROWL, Appellant, *vs.* CHARLES L. RANDELL.

Lincoln. Opinion September 30, 1911.

Courts. Probate Courts. Right of Appeal. Statute 1881, chapter 90. Revised Statutes, chapter 65, sections 28-33, 34; chapter 89, section 7.

Neither Revised Statutes, chapter 65, sections 28-33, nor Revised Statutes, chapter 89, section 7, gives a right of appeal to an executor or an administrator of one aggrieved in his lifetime by an order of a judge of probate.

Under Revised Statutes, chapter 65, section 34, providing that any person claiming under an heir at law shall have the same rights as the heir in all proceedings in the probate court, including rights of appeal, an executor or administrator of a deceased heir at law has the same rights of appeal that the heir at law would have if living.

On exceptions by defendant. Overruled.

Probate appeal. (This cause has already been before the Law Court and is reported in 107 Maine, 274, under the title *Benjamin E. Sproul, Petitioner*, v. *Charles L. Randell et als.*, and under which said title it was sent to the Law Court, and the name of the deceased testate, Adelia E. Sprowl, was stated and given in the record as Adelia R. Sproul.)

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

Rodney I. Thompson, and W. H. Miller, for defendant.

SITTING: SAVAGE, SPEAR, CORNISH, BIRD, HALEY, JJ.

BIRD, J. This cause has already been before this court upon exceptions to the action of the Supreme Court of Probate in overruling the motion of defendant to dismiss the petition of the present appellant's intestate for leave to enter an appeal from the decree of the Judge of Probate of Lincoln County admitting to probate the will of Adelia E. Sprowl (Sproul) whose heir-at-law intestate was, 107 Maine, 274. Pending the consideration of the exceptions, intestate died. The exceptions having been overruled by this court the appellant filed his appeal and reasons of appeal in the Probate Court at its term held on the first Tuesday of December, 1910, returnable at the April term, 1911, of the Supreme Court of Probate for said county. In the appeal he states that appellant was duly appointed administrator of the estate of Benjamin E. Sprowl, late of Waldoborough, deceased, and alleges that he, as such administrator and as representing Benjamin E. Sprowl, is aggrieved by the decree of the Judge of Probate allowing the will and appointing the appellee executor. Upon the entry of the appeal in the Supreme Court of Probate, the appellee moved its dismissal for the following reasons:

1. Because neither said appeal nor reasons of appeal show any right of appeal and are insufficient in law.

2. Because neither said appeal nor reasons of appeal show that Fred W. Sprowl has any right of appeal.

3. Because neither said appeal nor reasons of appeal show that said appeal was seasonably taken.

The appellee states the question really raised to be the construction of section thirty-four of chapter sixty-five of the Revised Statutes.

The appellant claims that he has a right of appeal under the general provisions found in R. S., c. 65, §§ 28-33 and c. 89, § 7 and, if not, that such right is certainly his by virtue of R. S., c. 65, § 34.

We must conclude that appellant has no right of appeal under the general provisions above referred to either alone or in connec-

tion with R. S., c. 89, § 7. The right of appeal from any decree or order of the probate court is conferred by statute only, can extend no further than the statute provides, and must be affirmatively alleged and established by the case presented: *Abbott, Appellant*, 97 Maine, 278; *Hayford* v. *Bangor*, 103 Maine, 434, 438; *Briard* v. *Goodale*, 86 Maine, 100; *Pettingill* v. *Pettingill*, 60 Maine, 411, 419. In sections 28-33, c. 65, R. S., is found no provision for the taking of an appeal by an executor or administrator of a person aggrieved and R. S., c. 89, § 7, providing for the prosecution and defense by executor or administrator of certain actions pending or commenced during the life of the testator or intestate, is, in the case of appeal, strictly limited to those which have been made. A petition for leave to enter an appeal, even if granted, cannot be held to be an appeal made or taken. In the case under consideration the intestate, Benjamin E. Sprowl, was the person aggrieved, not his administrator.

Has the appellant the right which he asserts under R. S., c. 65, § 34? This provision was originally enacted as follows: "Any person claiming under an heir-at-law shall have the same rights in all proceedings in probate courts, including rights of appeal, that the heir may have." Pub. Laws 1881, c. 90. The appellee apparently confines the application of this provision to the heirs of an heir-at-law but we think the construction too narrow. As the real estate of a deceased person descends or passes to his heirs-at-law, so his personal assets descend or pass to his executor or administrator; *Strout* v. *Lord*, 103 Maine, 410, 415; *Hemmenway* v. *Lynde*, 79 Maine, 299, 301; they vest immediately in the executor or administrator; *Dalton* v. *Dalton*, 51 Maine, 170, 172-3: and it has been held that the administrator represents the person of his intestate in relation to his personal estate; *M' Vaughters* v. *Elder*, 2 Brev. (S. C.) 307, 313. Such being the case, the administrator is certainly as much one who claims under the heir-at-law as an assignee of the heir-at-law; *Stilphen, Appellant*, 100 Maine, 146, 148. The interest of the deceased heir goes to his administrator, not to his heirs: *Storer* v. *Blake*, 31 Maine, 289. If, under this provision, the heir (or his assignee) of the heir-at-law alone may

appeal, the administrator who is in possession of and responsible for all the goods and chattels, rights and credits of his intestate is without remedy, if the heir or his assignee refuses to act. As representatives of the same estate, we should have the administrator prosecuting an appeal made by the deceased heir and an heir prosecuting another which the deceased had not made. If success attended the latter, the fruits of the appeal would immediately pass to the administrator of the deceased heir and not to his successful heir—the appellant. The administrator is directly affected in his pecuniary interest, the heir but indirectly. The construction we give it, renders section thirty-four of chapter 65, R. S., in harmony with the other provision of statute as interpreted by prior adjudications; *Downing, Appellant* v. *Porter*, 9 Mass. 385; *Veazie Bank* v. *Young*, 53 Maine, 555, 560; *Grant* v. *Bodwell*, 78 Maine, 462; *Stilphen, Appellant*, ubi supra.

The deceased intestate, Benjamin E. Sprowl, upon the decision of the Law Court above referred to would, if living, have had the right to enter his appeal and prosecute it to conclusion. His administrator, as one claiming under him, has the same right as his intestate to do so.

Notice is called to the fact that the appeal alleges that the appellant is aggrieved, but it is fairly inferable from the other facts stated that his intestate was aggrieved and that the appellant prosecutes the appeal as his administrator.

Exceptions overruled.

MARSH BROS. & CO., LTD., *vs.* ABSOLOM C. BELLEFLEUR.

Cumberland. Opinion September 30, 1911.

Scire Facias. Alias Execution. Amendment. Election of Remedies. Revised Statutes, chapter 78, section 19; chapter 84, section 10.

Scire facias on a judgment to obtain an alias execution does not lie under Revised Statutes, chapter 78, section 19, where upon the original execution real property has been sold and not levied upon by appraisement and set-off.

A writ of scire facias is amendable in the same manner as declarations in other cases.

A bill in equity seeking to convert an equitable title supposedly obtained by a sale on execution into a legal one does not seek substantially the same relief as scire facias to obtain an alias execution, so that the doctrine of election of remedies does not apply.

Election exists where a party has alternative and inconsistent rights, and is determined by choice, but a mistaken selection of a remedy that never existed and its fruitless prosecution until adjudged inapplicable does not prevent the exercise of another, if appropriate remedy, even if inconsistent with that first adopted.

On report. Demurrer sustained. Amendment allowable.

Scire facias to obtain an alias execution upon a judgment. The defendant demurred, and the case was reported to the Law Court.

The case is stated in the opinion.

Harry L. Cram, for plaintiff.

Reynolds & Sanborn, for defendants.

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

BIRD, J. Scire facias to obtain an alias execution upon a judgment.

It appears from the writ that plaintiff corporation recovered judgment in the Supreme Judicial Court of Cumberland County on the twenty-second day of June, 1909, against the defendant, Absolom C. Bellefleur, for the sum of $892.88, damages and costs taxed at

$16.70: that on the twenty-sixth day of June, 1909, plaintiff took out execution upon this judgment in due form of law: that a deputy of the sheriff of the county on the seventeenth day of July, 1909, by virtue of the execution, made a seizure and levy on certain real estate as the property of defendant and, after legal notice, sold the same on the twenty-first day of August at public auction to the plaintiff and that the execution was returned as fully satisfied; that on the thirteenth day of September, 1909, the plaintiff brought its bill in equity against said Absolom C. Bellefleur and Mabel Bellefleur, praying that the deed by which said Absolom had previously conveyed the real estate to said Mabel be decreed fraudulent and void; that, a hearing being had on said bill, answer and replication, the court found the allegations of the complainant's bill, not admitted by the answer, had not been proved by evidence sufficient to warrant a decree against defendants; that, whereas said real estate has not passed by the seizure, levy and sale and the judgment remains wholly unsatisfied and not reversed or annulled, the plaintiff is in danger of losing all benefit from its judgment. The writ directs defendant to show cause why an alias execution should not be issued on the judgment in accordance with the provisions of section 19 of chapter 78 of the Revised Statutes.

To plaintiff's writ defendant demurs upon the grounds following:

1. There is no authority or warrant either in statute or common law for the remedy by scire facias as invoked by the plaintiff, where property of a judgment debtor attached upon the original writ has been seized by a deputy sheriff and sold at public auction, as is alleged to have been done by the plaintiff in his writ.

2. If such authority or warrant is held to exist the plaintiff has, by his election to pursue his remedy by bill in equity as alleged in his said writ, deprived himself of the right to any relief under, or benefit of, his action by scire facias.

Upon the first ground, rejecting the words "or common law" as surplusage, the demurrer must be sustained. Scire facias does not lie under R. S., c. 78, § 19, where upon the original execution real property has been sold and not levied upon by appraisement and set off: *Piscataquis* v. *Kingsbury*, 73 Maine, 326, 331.

The plaintiff, after demurrer filed, moved the amendment of his writ by striking out the words "in accordance with the provisions of section 19 of chapter 78 of the Revised Statutes of Maine," and it is stipulated by the parties that, if the Law Court sustains the demurrer, it shall determine also if the writ is amendable, and, if so, if the proposed amendment may be allowed.

However formerly held, a writ of scire facias is unquestionably amendable in the same manner as declarations in other cases: 2 Tidd's Prac. (1st Am. Ed.) 1036-7; Foster on Scire Facias 20, 349, 373, 375; *Jackson* v. *Tanner*, 18 Wend. 526; *Peacock* v. *People*, 83 Ill. 331. Whether, after plea of nul tiel record, amendment may be made is not necessary to be determined. It has been held that scire facias being a judicial writ shall not abate for want of form: Foster on Scire Facias, 349: that errors in matter of form will not be noticed on general demurrer: *McLellan* v. *Codman*, 22 Maine, 308; that a general demurrer cannot reach a defect in the prayer; *Barton* v. *Vanzant*, 1 Mo. 192; and that the court will give judgment according to law and not according to the prayer of the plaintiff; *Snowden* v. *State*, 8 Mo. 483, 487. The defect which is the subject of the first ground of the special demurrer, being one of form, may be amended: R. S., c. 84, § 10.

Upon the second ground the demurrer cannot be sustained. The doctrine of election of remedies does not apply. The bill in equity and the writ of scire facias do not seek substantially the same relief. The former sought to convert an equitable title supposedly obtained by sale upon execution into a legal title. In this the plaintiff failed. The execution remains in fact unsatisfied. The present suit seeks revival of the judgment and a new execution thereon: *Fleming* v. *Courtenay*, 95 Maine, 135; *Weeks* v. *Edwards*, 176 Mass. 453. Moreover the doctrine invoked, as between proceedings at law and in equity at least, relates only to original suits: *Laraussini* v. *Carquette*, 20 Miss. 151.

The cases cited by defendant, *Hussey* v. *Bryant*, 95 Maine, 49; *Jordan* v. *Haskell*, 63 Maine, 193; *Marston* v. *Humphrey*, 24 Maine, 513, as well as *Foss* v. *Whitehouse*, 94 Maine, 491, and *Larrabee* v. *Lumbert*, 34 Maine, 79, are readily distinguishable from the facts in the case before us.

In short, election exists when a party has alternative and inconsistent rights and it is determined by a manifestation of choice. But the mistaken selection of a remedy that never existed and its fruitless prosecution until it is adjudged inapplicable, does not prevent the exercise of another, if appropriate, even if inconsistent with that first adopted: *Snow* v. *Alley*, 156 Mass. 193, 195; *Bamsdall* v. *Waltmeyer*, 142 Fed. 415, 420: 5 Ann. Cas. 962; See also *Fleming* v. *Courtenay*, 95 Maine, 135; *Weeks* v. *Edwards*, 176 Mass. 453.

Demurrer sustained.
Amendment allowable on such terms as may be ordered at nisi prius.

PHILOMEN FOURNIER, Admx., *vs.* YORK MANUFACTURING COMPANY.

York. Opinion October 2, 1911.

Master and Servant. Injury to Servant. Contributory Negligence. Burden of Proof. Evidence. Statute, 1909, chapter 258.

The burden is on the plaintiff to show affirmatively that the decedent did not, by his own fault, either directly or by legitimate inference, contribute to the accident which caused his death.

Where the death of an employee was caused by his own act in producing a contact with a fuse box in a power house, it must affirmatively appear that in doing the act he was not negligent, but in the exercise of due care.

Where an employee in a power house was injured apparently by coming in contact with a fuse box, and there was no evidence whether he was reasonably attentive and alert to avoid such contact, and he had worked for defendant some time, during which the power house was constructed, and had worked in the power house, the burden was on the plaintiff to show that the intestate was in the exercise of due care, and did not negligently contribute to the injury which caused his death.

On report. Judgment for defendant.

Action of tort brought under the provisions of the Public Laws of Maine, 1909, chapter 258, known as the "Employer's Liability Act," to recover damages for the death of the plaintiff's intestate while he was employed in the defendant's power house, and caused by the alleged negligence of the defendant. Plea, the general issue. At the conclusion of the evidence counsel for the defendant moved that a verdict be directed for the defendant. The motion was overruled. The case was then withdrawn from the jury and reported to the Law Court with the stipulation that "if the motion for the direction of a verdict for the defendant, should have been granted, or if the decision shall otherwise be for the defendant, judgment shall be entered for the defendant. If the decision be for the plaintiff, the Law Court is to assess the damages."

The case is stated in the opinion.

NOTE. Mr. Justice HALEY having been of counsel did not sit.

Geo. F. & Leroy Haley, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

KING, J. Action of tort, by the administratrix of the estate, and widow, of Charles Fournier, under the provisions of Chapter 258, Laws of 1909, to recover damages for the death of the plaintiff's intestate while he was employed in the defendant's power house, alleged to have been caused by the defendant's negligence in not warning him of a danger incident to the place where he was directed to work. The case is before this court on report.

The plaintiff's intestate and two other workmen were directed by the defendant's "boss piper" to remove a short section of a six inch iron pipe connecting two pumps in the power house and replace it with another piece of pipe to which was to be attached an air chamber. One of the three workmen, Charles Dawley, was an experienced pipe fitter, and the other two, Fournier and Evans, were common laborers or helpers. The six inch pipe was parallel

with the floor of the power house and its top eight feet and ten inches above the floor. The distance from the top of this pipe to the ceiling was seven feet and one inch. Sixteen inches behind and about thirty-two inches above the six inch pipe, and apparently parallel with it, was a three inch steam pipe. The distance from the steam pipe to the ceiling was four feet and five inches. Upon the ceiling of the power house was a "net work" of insulated electrical wires carrying a strong and dangerous current of electricity. Nearly directly over the piece of pipe to be removed and attached to the ceiling was a "fuse box," so called, about seven inches square and projecting down from the ceiling about two inches and a half. To be more descriptive, there were three fuse "blocks" each about seven inches long and two and one-half inches wide placed side by side. These fuse blocks were of porcelain with brass or copper "terminals" inserted into them to which the wires were attached, and between the terminals was a "fuse," so constructed that in case of a short circuit it would quickly melt or burn out, thus serving as a safety device. The evidence tends to show that if some part of a person should come in contact with two of the terminals at the same time, or should come in contact with one terminal while the person was standing on an iron pipe or some other thing connected with the ground, when a current of electricity is on the wires, a short circuit would result and the person would receive a shock. The fuse box was not covered in, and accordingly the terminals were exposed.

Mr. Dawley, the experienced pipe fitter, having screwed an eye-bolt into the ceiling about twelve inches from the center of the fuse box, directed the plaintiff's intestate to attach a chain tackle and fall to the eye-bolt for use in removing and replacing the piece of pipe. Dawley thus described what he saw of the accident to Fournier: "Q. How did he start to get up? A. He passed the chain and fall to Evans on the pump, got up on the pipe himself, and Evans passed him the fall. . . . Q. What happened then, what do you next know? A. The next I knew Mr. Evans hollered. . . . Q. Did you look up? A. I looked. Q. Where was Fournier? A. Well, he appeared to be hanging up in

some way. Q. Hanging on the pipe? A. No, up overhead somewheres. Q. Seemed to be hanging to the ceiling, didn't he? A. Yes. Q. Did he still hold the tackle and fall? A. He did. Q. What did you do? A. I hollered for them to shut off the power. . . . Q. Did they shut it off? A. They did. Q. What happened then? A. He dropped. Q. To the floor? A. Yes. Q. What he had in his hands dropped with him? A. It dropped first. . . . Q. He never showed any signs of life, did he? A. No, sir: he didn't."

In cross examination Mr. Dawley was asked if he did not state to a representative of the defendant company on the day of the accident that when he looked up Fournier's feet were on the six inch pipe, and he answered "That is the way it looked to me." "Q. That is the way it looks to you now as you recall it? A. Yes." He further stated that as he looked up it appeared to him that Fournier was standing apparently erect with his hands in front of him still holding the chain tackle. Evans was not at the trial, neither party knowing of his whereabouts. Dr. Thompson who was called to the power house immediately after the accident and examined the body before it was removed noted a small abrasion, "a place where the skin was scraped off," above the eyebrows, but discovered no other marks or external evidence of injuries. The undertaker, Mr. Bradbury, testified that in addition to the slight abrasion of the skin which the Dr. noted he discovered, in his examination of the body at the morgue, "a small red spot on the top of the head. Q. What did the red spot have the appearance of? A. Well, that would indicate several things, of course, but it was similar to a little burn, not a wound or any thing of the kind, a very small place it was. . . . Q. As large as what? A. I should say about the size of a dime, as I recall it now. Q. It looked red? A. Just a little red." The foregoing is substantially all the evidence relating to the cause of Fournier's death.

The plaintiff contends that it can be reasonably and logically inferred from this evidence that Fournier's death was caused by an electric shock resulting from a contact of the top of his head with the fuse box.

On the other hand the defendant insists that such is not a reasonable inference, contending that if a current of electricity sufficient to produce instant death had entered Fournier's body there would have been more external evidence of it than the very small red spot on the top of the head, as testified to by the undertaker, but not discovered by the physician; also that if Fournier stood on the six inch pipe, as it appeared to Dawley he did, or if he stood with one foot on that pipe and the other on the three inch steam pipe, it would have been physically impossible for his head to have come in contact with the fuse box; and, still further, that it is unreasonable to suppose that he attempted to stand with both feet on the three inch steam pipe which was only four feet and five inches below the ceiling. Moreover, the defendant urges that under all the circumstances disclosed in the case it is not unreasonable to conclude that Fournier's death was the result of heart disease, and in support of this the plaintiff relies upon the testimony of Dr. Thompson as tending to show that death from heart disease might be as sudden as the death of Fournier, and that he discovered nothing in his examination of the body that enabled him reasonably to determine whether his death was caused by an electric shock or by heart disease.

The defendant also claims that there was no negligence on its part in not expressly warning Fournier of the fuse box and its dangerous character, because either he knew of it, or by the exercise of ordinary care would have known of it, and further because it was not reasonably to be anticipated that the three workmen would undertake to secure a tackle to the ceiling of the power house among the electric wires and beside the fuse box, when the work to be done could have been performed in an easier and safer way from the floor. Again the defendant contends that Dawley, who directed Fournier to hook the tackle to the eye-bolt, was not a person "who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or in the absence of such superintendent" was "acting as superintendent with the authority or consent" of the defendant, within the meaning of Chapter 258, Laws of 1909.

We do not find it necessary however to determine the question of the defendant's negligence, nor whether Dawley was a superintendent, within the terms of the statute, since in the opinion of the court the plaintiff's case is otherwise fatally defective.

The defendant's contention that the cause of Fournier's death is not sufficiently proved, but is left as a matter of conjecture only, is not without much weight, and yet, if that were the only objection to the plaintiff's case we might hesitate to decide that from all the evidence an inference might not reasonably be drawn that in some way Fournier received an electrical shock which caused his death. But assuming that inference in the plaintiff's favor, still the case is fatally defective, for there is no evidence to show that the deceased was in the exercise of due care. The burden was on the plaintiff to show affirmatively, either directly or by legitimate inference, that Fournier did not by his own fault contribute to the accident which caused his death. This principle is firmly settled in the decisions of this court. See *Gleason* v. *Bremen*, 50 Maine, 222; *State* v. *Maine Central R. R. Co.*, 76 Maine, 357; *McLane* v. *Perkins*, 92 Maine, 39; *Cunningham* v. *Iron Works*, 92 Maine, 501. The case is clearly distinguishable from those where a plaintiff is injured while merely passive in the care of the defendant, without any active agency on his own part in the matter, or, where a laborer, rightfully in his place in the performance of his duty, is negligently injured by some extraneous interference not reasonably to be anticipated in the exercise of the care to be expected of prudent men in like situations, or where he has an assurance, express or implied, that he will receive timely warning of any such interference, as pointed out in *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. In this case Fournier was not passive in the care of the defendant, but active. It was his act that produced the contact with the fuse box, if there was a contact, and therefore it should affirmatively appear that in doing that act he was not negligent but in the exercise of due care. But of this there is no evidence. Dawley says that he (Fournier) "got up on the pipe himself, and Evans passed him the fall." What he did further does not appear — it is wholly left to conjecture.

There is no evidence tending to show that he did not know of the fuse box and of its dangerous character. He was an intelligent person, had worked for the defendant some time, during which the power house was constructed, and had worked some, at least, in the power house. The room was light and there was nothing to prevent his seeing the net work of wires on the ceiling, and the fuse box was directly before his eyes when he looked up to the eye-bolt. Whether he did in fact know of it before, or then saw it, and appreciated the danger from contact with it, we do not know. He may have. No person who saw the accident itself has informed us how it happened that Fournier came in contact, if he did, with the fuse box. Whether he was reasonably attentive and alert to avoid such a contact, or in a moment of thoughtless inattention by some careless move came against it, does not appear in evidence. The burden was on the plaintiff to show that her intestate was in the exercise of due care and did not negligently contribute to the injury which caused his death. This, in the opinion of the court, she has failed to do, and in accordance with the stipulation of the report the entry must be,

Judgment for defendant.

In Equity.

CHARLES B. WITHAM *vs.* FLORA J. WING et als.

Kennebec. Opinion October 5, 1911.

Liens. Proceedings. Statement of Lien. Variance. Parties. Pleading. Waiver. Demurrer. Vendor and Purchaser. Revised Statutes, chapter 93, sections 31, 39, 40, 41.

In an equity suit to enforce a lien for labor and materials, the plaintiff offered in evidence a copy of the record of the lien statement filed in the town clerk's office pursuant to Revised Statutes, chapter 93, section 31, within 60 days after cessation of labor, in order to preserve his lien, stating the name of the owner, the amounts due, description of the property, etc., as required by the statute, and in addition stating the name of the person with whom the contract was made, which the statute does not require. *Held* that, as the statement was received in evidence, and was admissible, only to show that the plaintiff had taken the necessary steps to preserve his lien, and not to prove the contract, any variance in the name of the persons contracted with, as alleged in the bill and shown in the statement, would not defeat the lien, only being available to impeach the plaintiff's testimony that the contract was made with the person alleged in the bill.

Where after demurrer was filed to the original bill for improper joinder of the defendants, an amendment to the bill was filed by consent, to which the defendants did not demur, but answered by a denial, exceptions to overruling the demurrer to the original bill will not be considered, though the objections urged are open to the defendants on appeal.

Paragraph 6 of the original bill in an equity suit to enforce a materialman's lien alleged that the contract for the work and material was made with W., while paragraph 9 alleged that certain other labor was performed and material furnished by virtue of a contract with W., F., and L. An amendment to the bill alleged that the items sought to be recovered for under paragraph 9 were furnished in carrying out the original contract, with W., being additions thereto made necessary by changes which were, consented to by him and made by his authority. *Held*, that the amendment alleged a different contract than the original bill with reference to the work and material mentioned in paragraph 9, alleging in effect that such work and material were furnished to W., so that it operated as a discontinuance as to F. and L.

Since the joinder of unnecessary parties defendant is ordinarily harmless error, which may be corrected on final decree by making the judgment several, the fact that there was no discontinuance in an equity suit to enforce a materialman's lien as to a defendant who had no interest in the property would not defeat the plaintiff's claim.

Under Revised Statutes, chapter 93, section 39, providing that, when any bill in which a materialman's lien is claimed is filed with the town clerk, he shall file in the registry of deeds a certificate stating the names of the parties and describing the property, etc., the town clerk's certificate, so filed, is notice to the world that the lienor asserts a lien upon the property described, so that one thereafter purchasing it does so at his risk.

A materialman's lien is created by law when the labor and materials are furnished; the lienor being required, to perfect his lien for enforcement by bill in equity, only to record his statement of lien in the town clerk's office, as required by statute.

In equity. On exceptions and appeal by defendants. Exceptions overruled. Appeal dismissed. Decree affirmed.

Bill in equity brought by the plaintiff under the provisions of Revised Statutes, chapter 93, section 33, against Flora J. Wing, L. B. Wing, G. Harold Grant Wing and the Lewiston Trust & Safe Deposit Company, to enforce a lien upon land and certain buildings thereon, situate in Farmingdale, for labor and materials furnished in altering and repairing said buildings. The last named defendant was the mortgagee of the premises. The case went to the Law Court on exceptions and appeal by defendants.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Oakes, Pulsifer & Ludden, and Eaton, Keene & Gardner, for defendants.

SITTING: SAVAGE, SPEAR, CORNISH, BIRD, HALEY, JJ.

HALEY, J. This is a bill in equity brought by Charles B. Witham to enforce a lien upon land and buildings thereon, situated in Farmingdale, owned by Flora J. Wing, for labor and material furnished in altering and repairing said buildings.

Paragraph 6 of the bill alleges that, by virtue of a contract between the plaintiff and the defendant G. Harold Grant Wing, a son of Flora J. Wing who is alleged to be the owner of the land and

buildings, executed for said G. Harold Grant Wing by his attorney Charles C. Keene, the plaintiff furnished material and labor, all of which entered into and were used in erecting, constructing, altering and repairing the buildings upon which the lien is claimed, and refers to Exhibit A, which reads:

"To making piazza for house in Farmingdale and furnishing material, and to making alterations in said house, as per contract dated March 21, 1910,		$800.00
Credit.		
By discount in not furnishing door and stair rail as per contract,	$ 18.00	
By cash,	$200.00	$218.00
Balance due,		$582.00

Paragraph 9 of the bill reads as follows:

"That, by virtue of a contract with the said G. Harold Grant Wing, Flora J. Wing and L. B. Wing, and with the knowledge and consent of said owner and mortgagee, the plaintiff performed certain other labor, and furnished certain other labor and materials, and made certain changes in the specifications of said written contract, all of which are mentioned and described in the statement hereunto annexed and made a part hereof and marked Exhibit B, all of which entered into and were used in altering, constructing and repairing the building located on said lot."

Exhibit B contains twenty-six items for labor and material furnished from March 28th to May 2d, inclusive. The bill was filed in the clerk's office in Kennebec County and subpœna issued, as prescribed by the rules of court, to Flora J. Wing, L. B. Wing, G. Harold Grant Wing and the Lewiston Trust and Safe Deposit Company. The defendants filed an answer with a demurrer therein. Afterwards, with the consent of the defendants, an amendment was filed and allowed. So much of the amendment as is material is as follows:

"All the labor and material referred to in Exhibit A of the plaintiff's bill for which the plaintiff seeks to recover, were furnished by the plaintiff by virtue of and in pursuance of a contract with the said G. Harold Grant Wing, and the other contract alleged in the plaintiff's bill to have been made by G. Harold Grant Wing, Flora J. Wing and L. B. Wing as stated in paragraph 9 and Exhbt. B of the plaintiff's bill were merely additional to and modifications of the said original contract with G. Harold Grant Wing, mentioned in Item 6 of the plaintiff's bill, and were made by his authority and with the consent and knowledge of the owner." . . . . .

The case was afterwards set down for hearing and was heard, as appears by the record, upon amended bill, answer, admissions of record and proof. The Justice who heard the case dismissed the bill as to the Lewiston Trust and Safe Deposit Company and L. B. Wing, with costs for each, sustained the bill against G. Harold Grant Wing for $641.46 with interest and cost, with a lien upon the buildings and land described in the bill, and ordered the property sold to satisfy the judgment. The defendant G. Harold Grant Wing claimed an appeal. The case is before the court upon exceptions and appeal.

The plaintiff offered in evidence a copy of the record of the town clerk of the town of Farmingdale, where the property in question is located, which was admitted subject to objection and exception by the defendant. This was a record of the lien statement filed by the plaintiff in the town clerk's office, under the provisions of section 31, chapter 93, R. S., in his attempt to preserve his lien, within sixty days of the time he ceased to labor or furnish material in the construction, altering and repairing the buildings. The objection was that it was a variance, and did not set forth such a lien statement as corresponded to the claim in the bill.

It contained all the necessary statements prescribed by the statute to preserve the lien: a statement of the amount due, credits given, a description of the property sufficiently accurate to identify it, the name of the owner, and was subscribed and sworn to. In addition, it contained the statement that the material and labor were fur-

nished, by virtue of a contract with G. Harold Grant Wing and L. B. Wing, upon the dwelling house described in the bill owned by Flora J. Wing.

The defendant contends that, by the statement in said claim that it was "for labor done and materials furnished by virtue of a contract with G. Harold Grant Wing, of Portland in the County of Cumberland and State of Maine, and L. B. Wing of Farmingdale in the County of Kennebec," afterwards followed by a charge of $800 for making a piazza on the house and furnishing materials, as per contract dated March 21, 1910, and by the further statement, "To other work and other materials furnished by contract with G. Harold Grant Wing and consent of the owner," two separate lien contracts are shown, and that the plaintiff cannot prove and recover in this action judgment against G. Harold Grant Wing and the land and buildings mentioned upon his individual contract, and upon the joint contract of G. Harold Grant Wing and L. B. Wing.

The statute does not require the claim filed in the town clerk's office to contain the name of the person with whom the lienor contracted. The paper was offered in evidence to show that the plaintiff had complied with the statute in regard to filing his statement in the town clerk's office within sixty days of the time he ceased to labor or furnish material, and was admitted in evidence for that purpose. It was admissible for no other purpose when offered by the plaintiff. If it contained more than the statute required, it still contained all the statute required, and was admissible for the purpose of proving that the plaintiff had filed the statement required by law. The fact that the plaintiff stated therein that the work was done and the material furnished by virtue of a contract with G. Harold Grant Wing and L. B. Wing not being required by statute would not defeat the lien, but would be evidence that the defendants might use to impeach the testimony of the plaintiff when he claimed that the contract was made with G. Harold Grant Wing individually, and was undoubtedly used for that purpose at the argument. In order for the plaintiff to maintain his case it was necessary for him to prove that he had filed in the town clerk's office

a certificate containing the statements prescribed in section 31, chapter 93, R. S., and the record was offered and admitted to prove that he had complied with the statute, not as proof of his claim, but as proof that the lien claimed had not been dissolved by his neglect to file the statement required by statute within sixty days from the time he had ceased to labor or furnish material.

The case of *Thurston* v. *Schroeder*, 6 R. I. 272, cited by the defendant, does not apply. That was a petition (corresponding to the bill in equity in this case), for a lien filed against two persons as joint contractors for work done and material furnished by the petitioner, and the court held there was not sufficient evidence submitted to prove that the contract as set forth in the petition was made by the two respondents, and that the plaintiff suing upon a joint contract of Patterson and Schroeder had, by their written evidence, shown only a several contract with Patterson, which their parol evidence had no tendency to vary. In other words, the court held that all the evidence introduced by the plaintiff had failed to prove the contract alleged. In this case the claim filed in the town clerk's office was not offered or received as evidence of the contract. The defendant's position that a different contract was proved than the one alleged could only be taken after the evidence was all in, at which time the statement in the record of the town clerk's office should have been considered with the other evidence to show whether the labor and material were furnished upon the individual contract of G. Harold Grant Wing, or upon the joint contract of G. Harold Grant Wing and another.

In the case of *Palmer* v. *Lavigne*, 104 Cal. 30, also cited by the defendant, there was a demurrer to the complaint because it could not be ascertained from an inspection whether the contract alleged in the complaint to have been entered into by the plaintiff and the defendants was made by Mary C. Lavigne or by the defendant John E. Lavigne, or both, and that it could not be ascertained therefrom whether the plaintiff sought to hold the defendant Mary C. Lavigne under an alleged contract made with her, or on account of some interest which she held in the land. The demurrer was sustained.

The exception under discussion is not to the pleadings, but to the admissibility of evidence to show that the statement required by statute to be recorded in the town clerk's office to preserve the lien, had been recorded.

In *Garrison* v. *Hawkins*, 111 Ala. 308, a lien case, also cited by the defendant, the plaintiff alleged that the contract for lumber which was sued on was made with two defendants, Jerome and Mahale B. Garrison, the court in discussing the case says: "There is no proof that Mahale ever had anything to do with the purchase of the lumber, and what relation, if any, she sustained to her co-defendant. But the plaintiff's evidence is full and clear that they contracted with Jerome Garrison alone and furnished the labor to him." That was a case in which the claim of a misjoinder of parties was taken after the evidence was all in, so that the court might see whether one or both parties were liable. There are many cases holding the same as the above cases, but they do not hold that the lienor had lost his lien by inserting in his statement recorded in the town clerk's office statements not required by law. The record was properly admitted for the purpose for which it was received; viz., that the plaintiff claimed a lien upon the land and buildings therein described, and had recorded the statement required by statute within the time fixed by statute to preserve his lien, if entitled to the lien.

The second exception is to the ruling of the court upon the demurrer, which set forth the improper joinder of parties defendants under paragraphs 6 and 9 of the bill. The demurrer was filed to the original bill, and assigned as cause of demurrer the improper joinder of defendants. After the demurrer was filed an amendment was allowed with the consent of the defendants, and the defendants answered the amended bill by the denial of the matters therein contained. If they had wished to object to the amended bill by demurrer, they should have filed a new demurrer to the amended bill. It was not permissible to argue upon the demurrer filed to the original bill for causes set forth therein after the bill had been amended by consent and an amendment filed by defendants to their answers, but a new demurrer should have been filed, specifying the

objections to the amended bill, so that the record would have shown that it was passed upon after the amendment. As no demurrer was filed to the amended bill, exceptions to the overruling of the demurrer are not properly before the court; but the objections urged are open to the plaintiff upon appeal.

It is objected that the amended bill alleges the existence of the same contract as alleged in the original bill. The position of the defendant is that the contract in paragraph 6 was the individual contract of G. Harold Grant Wing, and the contract alleged in paragraph 9 was the joint contract of G. Harold Grant Wing, Flora J. Wing and L. B. Wing; that they are separate claims and should have been enforced by separate suits against each of the contracting parties; that the plaintiff cannot maintain this action and recover judgment against G. Harold Grant Wing and the land and buildings upon his individual contract, and his joint contract with Flora J. Wing and L. B. Wing, and that he is seeking to do so by this action.

This objection was well taken by demurrer to the original bill, but the amendment, made by consent, seeks to remove that objection.

Paragraph 6 of the bill alleges the individual contract of G. Harold Grant Wing, and he admits it to be his contract. The amendment set forth that the charges in paragraph 9 of the bill, which allege the labor and material set forth in Exhibit B, were furnished upon the credit of G. Harold Grant Wing, Flora J. Wing and L. B. Wing, were merely additional to and modifications of said original contract mentioned in paragraph 6, made by the authority of G. Harold Grant Wing. If so, then all the items charged for were furnished upon the individual contract of G. Harold Grant Wing. If it was modified and added to with the consent of G. Harold Grant Wing, he was liable for their value and the amendment was, in fact, a discontinuance of the suit against L. B. Wing, and Flora J. Wing, except as she appeared as owner of the property sought to be charged with the plaintiff's lien, and the court would have so ruled if either party had requested. In fact, the court did so rule by the final decree dismissing the bill as to him with cost.

The fact that there was no discontinuance as to L. B. Wing cannot defeat the plaintiff's claim, for "all persons interested must be parties, either plaintiffs or defendants, and if from over-caution too many be joined, the mistake is harmless and may be corrected on final decree, as the judgment may be several and so framed as to work full and substantial justice." *Brown* v. *Lawton*, 87 Maine, 86; *Bugbee* v. *Sargent*, 23 Maine, 269. The effect of the amendment was to make plain the claim of the plaintiff, that the items sought to be recovered for under paragraph 9 were furnished in carrying out the original contract made with G. Harold Grant Wing, being additions to that contract made necessary by changes and additions thereto which were all consented to by G. Harold Grant Wing, and that the plaintiff relied upon that contract without regard to who ordered the changes, or who ordered the work done, that he intended to prove that whoever did order the changes and the work, did so as the agent of G. Harold Grant Wing.

The claim of the defendant that the amended bill alleges the same contract as the defendant claims the original bill alleged, and that there is a fatal variance either of proof or allegations cannot be sustained, and it is unnecessary to discuss the cases cited to sustain the position that if there was a fatal variance the bill cannot be maintained.

It is next objected that, "If the amendment did change the original bill, the effect must be to void attachments of real estate, and in this case, as the lien depends upon the attachment, no right remains for the court to render a valid lien judgment."

No authorities are cited in support of the above proposition. The plaintiff is not seeking to enforce his claim by attachment in an action at law under section 41, chapter 90, R. S. The case was begun by filing the bill in the clerk's office, not by inserting it in a writ of attachment. No attachment was made. The clerk undoubtedly complied with section 40, chapter 90, R. S., and the certificate filed by him in the Registry of Deeds office was notice to the world that the plaintiff claimed a lien upon the property described therein, and that whoever purchased it did so at their risk.

The lien, if there was one, was created by law when the plaintiff furnished the labor and materials used in altering and repairing the house. The plaintiff, by recording his statement in the form required by law in the town clerk's office, within the time fixed by statute, and by bringing his bill to enforce his lien within the time fixed by statute, did all the law required of him to preserve the lien and prevent it from being dissolved, and to subject the property to the payment of the lien judgment he might recover in this bill in equity.

It is next objected that the plaintiff did not run the piazza the full length of the east side of the house; that he stopped 14 inches south of the north corner; that he refused, wilfully and intentionally, to extend it. The evidence is clear and convincing that the piazza was built with the knowledge of the agent of the defendant, G. Harold Grant Wing, after it had been discussed whether it would be better to extend it the whole length or to stop 14 inches from the corner, and that the plaintiff stated he would build it as they wanted it, and he was told to use his own judgment. The objection is without merit. The Justice who heard the case found that the plaintiff furnished the material and labor charged for in altering and repairing the premises described in the bill, and statement filed in the town clerk's office, and that it was furnished upon the contract of G. Harold Grant Wing and with the consent of the owner, who, as a matter of fact, saw the work being done and gave some orders as to what should be done and how it should be done.

No objection is made to the sufficiency of the proof authorizing the judgment ordered by the Justice who heard the case if the objections already considered are not sufficient to defeat the action. It is the opinion of the court that the objections are without merit, and that the entry should be,

Exceptions overruled. Appeal dismissed. Decree appealed from affirmed with cost of appeal.

GUSTAF A. ANDERSON *vs.* EASTERN COUPLING COMPANY.

Knox. Opinion October 5, 1911.

Pleading. Admission by Demurrer. General Demurrer. Patents. Royalties. Action.

A demurrer admits all facts well pleaded.

A general demurrer reaches only matters of substance, and waives all matters of form.

If a declaration contains one good count, or one good assignment of a breach of an agreement declared upon, a general demurrer must be overruled.

Objection to a declaration for duplicity can be taken advantage of by special demurrer only.

A declaration setting out an agreement by defendant to pay, on October 1, 1909, patent royalties on all goods manufactured by or for it during the preceding 90 days, and alleging that the plaintiff had performed his undertakings, that the defendant had manufactured large quantities of goods mentioned in the agreement, and thereby became liable to the plaintiff for the payment of royalties as fixed by the agreement, that the defendant, though requested, had neglected and refused to pay, the date of the writ being long after October 1st, sufficiently alleged performance by the plaintiff and breach by the defendant, as against general demurrer.

On exceptions by defendant. Overruled.

Assumpsit on a written contract to pay royalties for the right to manufacture and sell invented articles under the plaintiff's patent. The defendant filed a general demurrer to the declaration. The demurrer was overruled and the defendant excepted. It was stipulated in the bill of exceptions that if the exceptions were overruled judgment should be entered for the plaintiff for $500.

The case is stated in the opinion.

M. T. Crawford, and Reuel Robinson, for plaintiff.

J. H. Montgomery, for defendant.

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

HALEY, J. This is an action of assumpsit on a contract to pay royalties for the right to manufacture and sell invented articles under plaintiff's patent. The contract between the parties is in writing, and is set out in full in the declaration. The defendant filed a general demurrer to the declaration.

The defendant contends that the allegation in the declaration varies from the terms of the contract as set forth in the declaration:

1. Because the agreement purports to have been made and entered into on the first day of July, 1909, wherein the defendant agreed to pay the plaintiff the royalties for which this action is brought on all hose and nozzle couplings, and on all nozzles manufactured by it or for it, or manufactured by it's or for it's assigns or legal representatives, during the preceding ninety days, the first payment of royalties to be made on October first. And the declaration avers that the royalties were to be paid at the expiration of ninety days after the date of said agreement, which would be on September 28th, or two days before October first.

2. That the declaration is not definite as to the damages claimed or cause of damages.

3. That the declaration also contained two counts in one, and is therefore bad for duplicity.

The demurrer admits all facts well pleaded. The demurrer being general, it reaches only matters of substance and waives all matters of form, for the rule is well established that matters of form and duplicity in pleading can be taken advantage of on special demurrer, but not on general demurrer, and that, if the declaration contains one good count, or one good assignment of the breach of the agreement declared upon, the demurrer must be overruled and the declaration adjudged good.

"It expressly allows several breaches of the same contract or duty to be assigned, for otherwise the plaintiff would be precluded from recovering damages to the full extent of the injury, or the defendant would not be sufficiently apprised by the declaration of the extent of the claim he would have to answer." Chitty Plead. 228. Oliver's Precedents, 4th ed. 155.

The demurrer being general, the objection of duplicity cannot prevail, for that can only be taken advantage of on a special demurrer. *Blanchard* v. *Hoxie*, 34 Maine, 376; *Briggs et als.* v. *Railway Co.*, 54 Maine, 375; *Neal* v. *Hanson*, 60 Maine, 84; *Bank* v. *Abell*, 63 Maine, 346; *Concord* v. *Delaney*, 56 Maine, 201; *Dexter Sav. Bank* v. *Copeland*, 72 Maine, 220.

The declaration sets out the agreement wherein the defendant promised to pay on October 1st, 1909, royalties on all of the goods manufactured by it or for it, as authorized by said agreement, during the preceding ninety days, according to the schedule which is set forth in said declaration. The declaration further avers that the plaintiff has performed each and every undertaking by him to be performed, and that the defendant has manufactured large quantities of the goods mentioned in the schedule, and thereby became liable and indebted to the plaintiff for the payment of royalties as specified and fixed by the terms of said agreement and schedule, with the usual averment that the defendant, although requested, has neglected and refused to pay, the date of the writ being long after October 1st, 1909. This is a sufficient allegation of performance by the plaintiff, and a sufficient assignment of one breach by the defendant. If the defendant had desired a more particular statement of what the plaintiff would attempt to prove under the breach, he should have asked for a bill of particulars, or demurred specially. The declaration, containing a sufficient allegation of performance by the plaintiff, and one, at least, sufficient assignment of a breach by the defendant, is good upon general demurrer, and by the stipulation of the parties the plaintiff is entitled to judgment for $500.

Exceptions overruled. Judgment for plaintiff for $500, as stipulated.

In Equity.

PATRICK J. FLAHERTY *vs.* CHARLES E. LIBBY.

Cumberland. Opinion October 5, 1911.

Contracts. Restraint of Trade. Validity. Equity. Injunction.

An agreement by a seller of a business not to re-engage in a similar business in the same city for five years, if made on a sufficient consideration, is enforceable in equity.

The defendant, the owner of a trucking business in the city of Portland, on the first day of August, 1910, sold, transferred, and delivered the same to the plaintiff, the bill of sale containing the following agreement: "I also, in consideration of above, and other considerations named in the mortgage which is a part of this transaction, agree not to engage in any similar business in Portland, or vicinity, for the term of five years from the day of the date hereof." Afterwards in May, 1911, the defendant entered into the employment of another person who was engaged in the trucking business in Portland, the defendant being employed as a lumper, assisting the teamsters of his employer in loading and unloading teams engaged in the trucking business. The plaintiff then brought a bill in equity to have the defendant enjoined.

Held: That the defendant be "enjoined and restrained, during the pendency of the suit and during the remainder of the term of five years yet to elapse, as specified in said agreement, from carrying on, either alone or jointly with or as agent or servant of any person or persons, or agent, director, or servant of any other company, or otherwise, directly or indirectly, to assist in carrying on any business of a similar nature to the business transferred by him to the plaintiff at said Portland."

In equity. On report. Defendant enjoined.

Bill in equity brought by the plaintiff praying that the defendant be enjoined from engaging either directly or indirectly in the trucking business in the city of Portland for five years. The defendant had previously sold his trucking business in said city to the plaintiff and had agreed in writing that he would not engage in "any similar

business in Portland, or vicinity," for the term of five years from the date of the agreement. An agreed statement of facts was filed and the cause reported to the Law Court for determination.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

Percy M. Andrews, for defendant.

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

HALEY, J. This is a bill in equity, reported to this court upon an agreed statement of facts.

On the first day of August, 1910, and for several years prior thereto, the defendant, Charles E. Libby, was the owner of a trucking business in the city of Portland, and on that day sold, transferred and delivered said business to the plaintiff, the bill of sale being in the ordinary form, with a full description of the property sold, and containing the following agreement:

"I also, in consideration of above, and other considerations named in the mortgage which is a part of this transaction, agree not to engage in any similar business in Portland, or vicinity, for the term of five years from the day of the date hereof."

The first week in May, 1911, the defendant entered into the employment of one Joseph F. Stephenson, who was engaged in the trucking business in Portland, being a business similar to that sold by the defendant to the plaintiff. The defendant was employed as a lumper, assisting teamsters of Stephenson in loading and unloading the teams engaged in the trucking business. He had been so employed for about two weeks when the plaintiff brought this bill in equity, asking that he be "enjoined and restrained, during the pendency of the suit and during the remainder of the term of five years yet to elapse, as specified in said agreement, from carrying on, either alone or jointly with or as agent or servant of any person or persons, or agent, director or servant of any other company, or otherwise, directly or indirectly, to assist in carrying on any business of a similar nature to the business transferred by him to the plaintiff at said Portland."

It is customary and oftentimes necessary that a person purchasing the business of another, with the good-will that should follow the transaction, enters into an agreement with the seller whereby the seller is restricted from engaging in a similar business within specified districts. If these agreements are not made the seller, if he sees fit, can immediately begin business upon his own account, or in the employment of a rival of the purchaser and completely destroy the good-will which he has sold and for which he has received a valuable consideration. When an agreement of this kind is made for a sufficient consideration, (which is not questioned in this case), the parties are bound by it, and cannot do indirectly what they have no right to do directly. As said by this court in *Emery* v. *Bradley*, 88 Maine, 357, which was a bill in equity asking for an injunction restraining the defendant from remaining in the employment of his son as a photographer, he having previously sold out his photograph business to the plaintiff and agreed to do no more of that business in the town. "The spirit of the agreement requires that he (defendant) should not compete in the business with the plaintiff, either directly in his own name or indirectly as clerk or agent of some one else." And in the case of *Whitney* v. *Slayton*, 40 Maine, 224, the defendant had sold his business of manufacturing iron castings and given a bond not to engage in the iron casting business within sixty miles of the place where the business was located, and he afterwards became a stockholder in a corporation engaged in the manufacture of iron castings in the same place, the court held that, by becoming a stockholder in the corporation, he had violated the conditions of his bond as he also had by being in the employment of the corporation.

In this case the defendant is employed as a servant of a business rival of the plaintiff, and by being in the employment of a rival undoubtedly may influence, to a greater or less extent, some of his former customers who should now be the customers of the plaintiff, to employ the rival of the plaintiff. It is but just that the parties to an agreement of this kind, entered into for a valuable consideration, should not only live up to the letter of the agreement, but also to its spirit. It is so easy for one indirectly, by word or con-

duct, to utterly destroy the good-will of a business which he has sold, and which another in good faith has purchased, adequate damages for which, owing to the rules of law governing the assessment of damages, cannot be awarded, that equity carefully scrutinizes the conduct of the seller, and if, directly or indirectly, he so conducts himself that his agreement not to engage in the business is violated, promptly restrains with its writ of injunction further acts that tend to take from the purchaser the rights that he acquired by purchase from the seller. Good faith upon the part of the defendant required that he should not, by word or conduct, directly or indirectly, obtain business for competitors of the plaintiff within the territory named in the agreement, or directly or indirectly give the public within that territory to understand that he was still engaged, for himself or in the employment of another, in the same business he had agreed not to engage in for the period mentioned in the agreement. This the defendant has not done, but, according to the agreed statement, he has directly violated, and at the time this bill was filed, by his conduct and employment, was violating both the letter and the spirit of his agreement. Equity does not sanction such conduct. The defendant should neither directly nor indirectly violate his agreement.

Bill sustained with cost. Injunction to issue as prayed for.

LEROY LORD, Admr., *vs.* JOHN C. JONES.

York. Opinion October 9, 1911.

Statute of Limitations. New Promise. Revised Statutes, chapter 83, section 100.

The defendant, who was the maker of a promissory note dated June 9, 1900, on May 6, 1910, wrote to the plaintiff, who was the holder of the note, a letter which contained the following: "I was at your place Sunday, but you were not there. I have some money due me in a number of places, but I couldn't collect in any. . . . . Now can't I fix it up with you by giving you my note for the amount, and then I will take it up as soon as I can, and I will do it before October 1st." The statute of limitations having been pleaded as a bar to a suit on the note it is *held*,

1. That it was competent for the plaintiff to show that the letter referred to the note, by showing that he had no other claim against the defendant.
2. That to take an indebtedness, otherwise barred, out of the statute of limitations by an acknowledgment in writing, it must appear that the acknowledgment was made under such circumstances and in such terms as reasonably and by fair implication to lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract.
3. That the letter was a sufficient acknowledgment of the indebtedness to take the note out of the statute of limitations.

On report. Judgment for plaintiff.

Assumpsit on a promissory note. Plea, the general issue with a brief statement invoking the statute of limitations. At the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

Frank Wilson, for defendant.

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

SAVAGE, J. This is an action upon a promissory note dated June 9, 1900. The action was commenced August 30, 1910. The defense is the statute of limitations. The case comes up on report. The plaintiff seeks to take the note out of the apparent bar

of the statute by proving an acknowledgment or new promise. The plaintiff relies upon a letter dated May 6, 1910, written and signed by the defendant, and sent by him to the plaintiff. The body of the letter, so far as material, is as follows:—"I was at your place Sunday, but you were not there. I have some money due me in a number of places, but I couldn't collect in any. I rode Saturday night till ten o'clock. Now can't I fix it with you by giving you my note for the amount and then I will take it up as soon as I can, and I will do it before October 1st. . . . I will be over and see you as soon as I get home."

It is provided by Revised Statutes, ch. 83, sect. 100, that "No acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby."

It is clear enough from the oral testimony in the case that in the expression in the letter "Can't I fix it," the defendant was referring to the note in suit, and that the defendant was not indebted to the plaintiff for anything else. But the defendant insists that the identity of the subject matter must appear in the letter itself, and cannot be shown by extrinsic oral evidence. But we think the point cannot avail the defendant. The letter on the face of it evidently refers to some claim or demand which the plaintiff had against the writer, and to a single claim. We think it was competent for the plaintiff to show, as he did, that he had no other claim than the note in suit. And if so, the word "it" in the phrase "can't I fix it" necessarily referred to that note. In *Bailey* v. *Crane*, 21 Pick. 323, a case cited by the defendant, the court, after stating the undoubted rule that an acknowledgment, to take a debt out of the statute, must satisfactorily appear to refer to the very debt in question, said also, with reference to the facts in that case,—"As the defendant has not shown that there was any other debt due from him to the plaintiff, his letter must be presumed to apply to the note in suit." And the court in the recent case of *Cotulla* v. *Urbahan*, 135 S. W. 1159, approved the same doctrine, saying that "if there is only one transaction, a reference to the debt is sufficient as to its identity."

The defendant also challenges the sufficiency of the acknowledgment. It is sometimes stated, somewhat loosely, that an unqualified acknowledgment of a debt as an existing debt is sufficient. But the rule is more aptly stated in *Krebs* v. *Olmstead*, 137 Mass. 504, where the court said that the plaintiff may take a case out of the statute "by showing an acknowledgment in writing by the defendant that the debt was due, made under such circumstances and in such terms as reasonably and by fair implication to lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract." And the court added,—"It is not enough to prove an admission of the debt, if it is accompanied by circumstances which repel such inferences, or leave it in doubt whether the debtor intended to make a new promise." See also *Wald* v. *Arnold*, 168 Mass. 134. The same principle was stated by this court in *Johnston* v. *Hussey*, 89 Maine, 488, in these words:—"The acknowledgment must also at least savor of a promise to pay," and,—"It must show a recognition of a legal obligation and an intention, or at least a willingness, to be bound by it." When such an acknowledgment is shown, the law will imply a promise to pay. *Johnston* v. *Hussey*, supra; *Bailey* v. *Crane*, supra.

We think the defendant's letter in this case falls within the principle thus stated. It would be drawing altogether too fine a point to say that it was not a distinct recognition of the note as an existing debt. And the defendant expressed a willingness to pay it. He proposed to give a new note for the old one, and expressly promised to pay the new note before a time certain. That would be payment. Accordingly we hold that the statute of limitations is not a bar to this action.

Judgment for the plaintiff.

In Equity.

GEORGE F. WHITING, NANCY T. SLEEPER, Admx., AND DAVID N. MORTLAND, Admr.

vs.

LUCY C. FARNSWORTH, Admx.

Knox. Opinion October 9, 1911.

Descent and Distribution. Surviving Husband. Executors and Administrators. Administration. Statute, 1905, chapter 124, sections 86, 87. Revised Statutes, chapter 8, section 69; chapter 67, section 21.

Shortly before her death, without issue and intestate, a wife delivered to her husband certain bags containing money, jewelry and other property of her own, also containing property that belonged to him. After her death the husband delivered the bags and all of the contents to one of the plaintiffs. Assuming, as is claimed, that he intended thereby to make a gift of the property, it is *held*: —

1. That the husband had neither legal nor equitable title to the property which had belonged to the wife, but only a statutory right to have one-half of the net avails of it, after administration, distributed to him.
2. That the attempted gift transferred neither legal nor equitable title, and was inoperative and void, and that, being void, equity cannot interpose to make it good, or enforce it.
3. In relation to estates where collateral heirs are entitled to distribution, the statutes, R. S., chapter 8, section 69, and Laws of 1905, chapter 124, sections 86, 87, relating to collateral inheritance taxation contemplate that they must and will be duly administered.

In equity. On report. Bill dismissed.

Bill in equity brought by "George F. Whiting of Malden in the Commonwealth of Massachusetts, Nancy T. Sleeper of Rockland, Knox County, Maine, ancillary administratrix on the estate of Isabella A. Martin, deceased, late of Minneapolis in the State of Minnesota and David N. Mortland of said Rockland, administrator on the estate of Helen A. Farnsworth late of said Rockland deceased, against Lucy C. Farnsworth of said Rockland, administratrix with

the will annexed on the estate of James R. Farnsworth, late of said Rockland, and now sole heir of said James R. Farnsworth, and Mary C. Farnsworth and Josephine L. Rollins," and relating to the estates of the said Helen A. Farnsworth and James R. Farnsworth. An answer was filed by the said Lucy C. Farnsworth, administratrix, and the plaintiffs filed a replication. 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 *Farnsworth* v. *Whiting*, 104 Maine, 488, *Farnsworth* v. *Whiting*, 106 Maine, 430, and *Farnsworth* v. *Whiting*, 106 Maine, 543.

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

Heath & Andrews, J. H. Montgomery, and L. F. Starrett, for defendant.

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

SAVAGE, J. James R. Farnsworth and Helen A. Farnsworth were husband and wife. Mrs. Farnsworth died May 5, 1905, without issue, intestate. Shortly before her death, she delivered to her husband certain bags, containing money, jewelry, bonds and corporate stock of her own, of the value of about $16,000, with which were intermingled bonds and other personal property which belonged to Mr. Farnsworth. On the day after her death, Mr. Farnsworth delivered the bags and all the contents to the plaintiff Whiting, and it is claimed that he thereby intended to make a gift of the same, to be divided equally between Whiting and a Mrs. Martin. Whiting and Mrs. Martin were the brother and sister, and only heirs of Mrs. Farnsworth. Mr. Farnsworth died two or three days later.

The plaintiffs are the donee, Whiting, and the administrator of the estate of Mrs. Martin, with whom is joined the administrator of the estate of Mrs. Farnsworth. The defendant is the administratrix of the estate of Mr. Farnsworth.

Mr. Whiting and Mrs. Martin retained the property until after Mr. Farnsworth died, and when the administrator of Mrs. Farnsworth's estate was appointed, it was entrusted to his custody and keeping, and so far as appears he still retains it. Being "uninformed and unaware of the gift and delivery of said personal property, or of the validity thereof, or that Mr. Farnsworth had given away his heirship and interest in the property aforesaid," as is alleged in the bill and admitted by the answer, the administrator caused the property to be inventoried and appraised as a part of Mrs. Farnsworth's estate, and settled an account. Partial distribution was ordered, one-half to the plaintiffs, Whiting and Martin, and one-half to the heirs of Mr. Farnsworth.

The bill alleges that the decree of distribution was erroneous, in that distribution should have been ordered to the administratrix of Mr. Farnsworth's estate, instead of to his heirs, and also that "it should have taken into account the property so given as aforesaid, and distinguished the particular property from which distribution was made, and have designated the real owners thereof." It is further alleged and admitted that the administrator filed a petition in the probate court reciting the foregoing facts and praying that the former order of distribution be revoked, and that a new order of distribution be made "in accordance with the facts and law, so as to protect the rights and interest of the real owners of said property and all parties interested therein." Upon this petition, after notice and hearing, the former decree was annulled, but no further order was made.

The prayer of the bill is (1) that the court will determine the title to the personal property and decree that it belonged to Mr. Whiting and Mrs. Martin by reason of a gift, and that Mr. Farnsworth had no interest therein after the gift; and (2) that the court will order the said probate court to order and decree the payment and distribution of said personal property as set forth in the petition to the probate court.

We have set forth the history of the proceedings at greater length than would otherwise be necessary for the purpose of avoiding any misconstruction in regard to the remedy which the plaintiff seeks.

Since the property is in the possession of the plaintiffs, or some of them, and since this court has no jurisdiction in a proceeding like this, over the probate court, and cannot here determine whether the probate decree asked for is the appropriate one to straighten out the alleged erroneous account, it may well be doubted whether the plaintiffs have any remedy in equity upon the allegations of the bill.

But since the case comes up on report, and no point has been made of want of sufficient allegations or appropriate prayer, we will examine the merit of the plaintiffs' contention, which, as we understand it, is this. Conceding that Mr. Farnsworth did not have a legal title to the personal property which had belonged to his wife, and could not transfer a legal title by gift, yet the plaintiffs claim, to put it as strongly as we can, that if Mr. Farnsworth in form made a gift of his wife's property to them, that is, delivered it to them with the intention of giving it, he vested in them an equitable interest in the property itself, an interest which equity will take cognizance of and protect. And the argument is this:—that Mr. Farnsworth had an interest in the things given, because out of them, after administration, would come his distributive share in his wife's estate, that he could give away that interest, and that by giving the things themselves, while he transferred no legal title or interest, he did create an equitable title and interest in the donees. Hence equity should afford a remedy.

For the purposes of our examination we assume, as the plaintiffs claim, that Mr. Farnsworth delivered to the supposed donees the property that had belonged to Mrs. Farnsworth with the intention to make a gift of it, just as we held in *Farnsworth* v. *Whiting*, 106 Maine, 430, that he gave away his own property contained in the same bags.

We are not now concerned with Mr. Farnsworth's power to assign his distributive share, by way of gift or otherwise; nor with the fact that, in the course of administration, these specific things, or some of them, might have been distributed to him, R. S., ch. 67, sect. 21; nor, for reasons stated later, with the fact that those who were entitled to distribution might have distributed it among

themselves by mutual agreement, without administration, as is sometimes done, so that the specific things might have come to him, with a title good, at least, by waiver or estoppel, against the others. Nor is it relevant that if he were the sole distributee, the court would not take the things from him for the purpose of administration, unless there was a necessity for administration.

The naked question is,—Did Mr. Farnsworth have any interest, legal or equitable, in the property itself, which he could transfer by gift of the property? As we have already said, it is conceded in argument that he did not have any legal title, and could not transfer a legal title. And such is the law. Upon the death of an intestate the title to his real estate passes directly to his heirs, subject to being taken for the payment of debts. The title to his personal property vests in his administrator, when appointed, and the vesting relates back to the time of his death. His widow and heirs have, as distributees, merely a vested right to the distribution of so much of the personal estate as remains after administration. *Dalton* v. *Dalton*, 51 Maine, 170; *Grant* v. *Bodwell*, 78 Maine, 460.

Mr. Farnsworth, therefore, did not have the legal title to the things which he attempted to give away, and having no legal title, he could transfer none. All that he had was a statutory right to have one-half of the net avails of it, after administration, distributed to him. That right he might have assigned, but did not. Moreover, to constitute a gift, delivery is necessary, and delivery by one who has a right to deliver. To be sure, Mr. Farnsworth had the possession of the property, but his only legal possession was no more than that of a mere depositary, to hold until an administrator should be appointed. He had no other right of possession. He had no other right of dominion or control. And he could transfer by delivery no greater right than he himself had. A gift involves the transfer of the absolute right of possession and dominion to the donee. In attempting to give away his wife's estate, Mr. Farnsworth attempted to do what he had no power to do. He had no power to make such a transfer of possession as is essential to a gift. His was not merely the imperfect execution of a

personal power or right, it was an act in excess of power, and without power. Therefore it was inoperative and void. It transferred neither legal nor equitable title. Not having a legal, nor an equitable title, Mr. Farnsworth could not by an attempted gift create an equitable title in the donees. There was nothing in it which equity could aid. Being void in law, equity cannot interpose to make it good or enforce it. *Baltimore &c. Brick Co.* v. *Mali*, 65 Md. 93. See note to *Re Crawford et als.*, 5 L. R. A. 72.

It is necessary to notice one other point. It is admitted that Mr. Farnsworth left no debts. Hence it is contended that there was no necessity for administration, and that when all the distributees have agreed upon a distribution without administration, the court will not disturb their arrangement for the mere purpose of a formal administration. And there is much authority for this position. And if a division in such case among distributees is to be upheld, there seems to be no good reason why an agreement that one or more should have all the personal property, accompanied by delivery, should not be equally effective.

However, there are two answers to the plaintiffs' contention. One is that it states no ground for equitable cognizance, and therefore does not help to sustain this bill. The other answer is that whatever the rule may be as to the necessity of administration under other conditions, in this State, in cases of estates such as Mrs. Farnsworth's estate is, where collateral heirs are entitled to distribution, the statutes relating to collateral inheritance taxation contemplate that they must and will be duly administered. R. S., ch. 8, sect. 69; Laws of 1905, ch. 124, sects. 86, 87. In case of such estates, administration is a necessity.

We are unable to discover any ground upon which the plaintiffs are entitled to equitable relief. Therefore the certificate will be,

Bill dismissed with costs.

JOHN B. TATRO, Admr.,

vs.

MAINE CENTRAL RAILROAD COMPANY AND TRUSTEE.

Penobscot. Opinion October 9, 1911.

Cases on Report. Review. Master and Servant. Negligence. Contributory Negligence. Burden of Proof. Evidence.

On report of a cause by agreement where the presiding Justice orders a nonsuit, the Supreme Judicial Court will inquire, not whether there was sufficient evidence for the jury, as in the case of exceptions, but whether, on all the evidence, giving it the weight that a jury ought to give it, the plaintiff is entitled to recover.

In an action for death of a railway employee, *held* that the burden was on the plaintiff to show that the decedent's own negligence did not contribute to the accident.

In an action for death of a railway employee, evidence *held* insufficient to show negligence of the company in delaying medical treatment, etc., after the accident, even if it be assumed that the company was legally bound to furnish such treatment.

In an action for death of a railway employee, upon the like assumption, *held* that the burden was on the plaintiff to show negligence in delaying medical treatment, etc., after the accident.

On report. Judgment for defendant.

Action on the case to recover damages for personal injuries sustained by the plaintiff's intestate, Alfred Tatro, while in the employ of the defendant railroad, and caused by the alleged negligence of the defendant. The record shows that Alfred Tatro was 17 years and 10 months old at the time of the injury.

Plea, the general issue. At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit and the plaintiff excepted. Thereupon it was agreed that the case should be reported to the Law Court for decision upon so much of the evidence as was competent and legally admissible.

The case is stated in the opinion.

John E. Nelson, for plaintiff.

Forrest Goodwin, and White & Carter, for the defendant railroad.

Hugh R. Chaplin, for trustee.

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

SAVAGE, J. This is an action on the case for personal injuries. At the conclusion of the plaintiff's evidence the presiding Justice ordered a nonsuit, to which order exceptions were taken and allowed. Thereupon by agreement of the parties the case was reported to the Law Court for decision upon the evidence. We are therefore to inquire, not whether there was sufficient evidence to require the case to be submitted to a jury, as we should have to do if the case were heard upon the exceptions, but whether, upon all the evidence, giving it the weight and effect that a jury ought to give it, the plaintiff is entitled to a verdict.

The plaintiff's intestate, Alfred Tatro, was in the employment of the defendant, and at the time he received his injuries was working in the defendant's freight yard at the Northern Maine Junction. He was assisting in shifting cars. A locomotive was attached to a train of six or seven cars. It was desired to take out the first one back of the locomotive. It was undertaken to do this by "kicking" back all the cars in the rear of the first car onto one track, and then switching the first car onto another track. By this process, after the locomotive had set the train in motion backwards, and while it was in motion, it was the duty of Tatro to uncouple the first from the second car by lifting or operating a lever rod on the second car. If everything worked as it should, this would pull the pin in the draw bar between the cars, the cars would thereby become uncoupled, and the cars behind the first one, (or in front of it as they were going), would proceed along the track by their acquired momentum. Thus they would be "kicked back."

This accident occurred in the night. It was very dark. Tatro was on the ground and had a lantern. He gave the signal to the

engineer to back the train. That was the last seen of him until after he was hurt. It is probable that he undertook to uncouple the cars, and in some way slipped or fell under them. No part of the accident was seen by anybody, and no one knows what Tatro was doing when he got hurt. But when the locomotive got back to where he was, it was found that he had been run over, and his left thigh crushed, but not entirely cut off. Examination showed that the coupling pin which Tatro is supposed to have been trying to lift by means of the lever stuck fast so that the lever could not lift it. It was found in that condition after the accident.

In the first count in his writ, the plaintiff alleges that the coupling was defective, that the defendant negligently allowed it to be so, and that Tatro was injured by reason of the defect, so negligently allowed to exist. In the second count, it is alleged that Tatro was young and inexperienced, and that it was the duty of the defendant, not only to furnish him with reasonably safe appliances with which to work, but also to warn and instruct him with regard to the perils of the work, which it negligently failed to do. In argument, the plaintiff does not rely strongly upon either of these counts. It is not necessary to consider now whether the defendant was negligent as charged in these counts. For in any event, so far as they are concerned, the plaintiff must fail upon another ground. The rule is well settled in this State, that when a plaintiff seeks to recover for injuries caused by the defendant's negligence, the burden is on him to show affirmatively that no want of due care on his own part contributed to the injuries. *McLane* v. *Perkins*, 92 Maine, 39; *Day* v. *Boston & Maine R. R.*, 96 Maine, 207. If there is no proof either way, the plaintiff cannot recover. It is incumbent on the plaintiff in this case to show that Tatro's own negligence did not contribute to his injury. That he has not done, and unfortunate as it may be, cannot do. No one saw the accident, and there is nothing in the case which indicates in any way, in what manner, or by what cause, Tatro got under the car wheels. And that being so, it is useless to speculate as to how it might have happened. Therefore the suit is not maintainable under either of the first two counts.

But in a third count, the plaintiff alleges that Tatro at the time of the accident was far from medical aid, and that by reason of the accident he was in imminent danger of bleeding to death; "that the exigency made immediate action imperiously necessary; that it thereby became the obvious and imperative duty of the defendant to procure medical aid for him at the earliest possible moment; that the defendant assumed said duty and undertook its fulfilment; but having undertaken it, that it failed to use due care and diligence in the discharge of the duty which it owed, and which humanity dictated; but so negligently and wantonly performed said duty that Tatro lost his life thereby, and suffered great anguish of body and mind."

Under these allegations, and upon the proof, the plaintiff contends, first, that "the strict necessity and urgent exigency of this case placed upon the defendant the duty of caring for Tatro after his injury with a proper regard for his safety and the laws of humanity," and, secondly, that "whether or not the law imposed upon the defendant the duty of so caring for him, the duty was assumed by the defendant, and having been assumed and its performance actually entered upon, the defendant was obliged to discharge the duty "with reasonable care;" that it performed the duty negligently to the injury of Tatro, and hence is liable in this action.

We do not find it necessary to consider or determine the correctness of the plaintiff's propositions of law. For, assuming, but not deciding, that the law is as claimed by him, we think the action cannot be sustained upon the facts.

The facts bearing upon this branch of the case, as we gather them from the evidence, are these. The accident occurred at about 11:25 o'clock at night, and at a place in the yard nearly half a mile from the defendant's station at Northern Maine Junction. The engineer of the shifting locomotive at once sent his fireman and a brakeman on the locomotive to the station. They reached the station and notified the yard master at about 11:28 o'clock that Tatro had had his leg cut off. The yard master notified the train dispatcher at Waterville, who had charge of the running of trains upon that division, and asked for orders to take Tatro from Northern Maine

Junction to Bangor, a distance of about five miles. Instead of ordering the yard master to take him in, the train dispatcher ordered him to send Tatro in to Bangor on a freight train which was just then arriving at Northern Maine Junction from the west, and which had the right of way as far as the Bangor yard. This freight train took Tatro in the caboose, and left the Northern Maine Junction yard for Bangor at 11:45 o'clock, or about twenty minutes after the accident. A brakeman was sent with Tatro. The train was running extra from Northern Maine Junction, and consequently had to flag through the Bangor yard. This meant, of course, that it had to go slowly through the yard. How long it took to make the run to the Bangor yard, and how long to run through the yard to the station, is not clearly shown. The brakeman estimates that it took ten minutes to run to the yard, and that they were delayed at the semaphore about twenty minutes, before proceeding through the yard. At the same time he testified that they reached the Bangor station about twelve o'clock. We think it was probably as late as 12:05 or 12:10. We think so because Dr. Robinson testifies that he was telephoned to from the hospital, as we understand his testimony, "at midnight or a little after," and asked to go to the hospital to attend upon Tatro. Also, the driver of the hospital ambulance testifies that he was telephoned to, presumably from the hospital, to go to the station for Tatro; that he got the call "right around a little after twelve o'clock;" that he took ten to fifteen minutes to harness and get started, and three minutes to drive from the stable to the station, and that he arrived at the station at 12:25. Necessarily the hospital authorities had been communicated with before they telephoned to the doctor and the ambulance driver. And taking the whole situation into account, we think it is fair to assume that the hospital was notified after Tatro reached the Bangor station. Meanwhile Tatro had been placed in the baggage room. Although the engineer at the Northern Maine Junction yard had bound a bell cord around his leg as tightly as he could to prevent hemorrhage, he was losing blood and growing weaker. Dr. Holt had been sent for, but by whom it does not appear. He arrived at the station about twenty or twenty-five minutes after

Tatro did, but not until after the ambulance arrived. For some reason, not explained in the testimony, Tatro was not put into the ambulance until twenty or twenty-five minutes later. But finally, after he had lain in the baggage room from between three-quarters of an hour to an hour, he was taken to the hospital. There his leg was amputated. He died at 4:45 that morning from "shock and hemorrhage."

This is an unsatisfactory account of what happened after Tatro reached Bangor,—unsatisfactory, because as to most of the points of time we have to rely upon the mere estimates of witnesses, and estimates not entirely harmonious. But the foregoing statement, made after a close scrutiny of such evidence as we have, represents our conclusions.

It appears then that about twenty or twenty-five minutes after Tatro reached the Bangor station, a reputable surgeon and an ambulance procured by someone were in attendance, and there seems to be no ground for charging negligence upon the defendant after that. Nor do we think that the defendant is chargeable with negligence after the train reached the station, if within twenty or twenty-five minutes, at the midnight hour, a surgeon and an ambulance had been procured. That would seem to indicate reasonable diligence, especially if, as appears to be probably true, the hospital authorities were set to work immediately after the arrival of the train. The hospital had surgeons and it had an ambulance. And if upon call, the hospital authorities undertook to care for Tatro, and their acts indicate that they did, we think the defendant was justified in relying upon such an undertaking, and would not be liable for any such delays in reaching Tatro as are shown in this case. And in point of fact, we are impressed with the belief that if there was any unreasonable delay in Bangor, the delay was that of the ambulance driver, for which the defendant is not responsible.

So much relates to negligence after the train reached the Bangor station. But the plaintiff contends that reasonable care and diligence required the defendant to send Tatro immediately to Bangor where he could receive surgical and hospital treatment, and particularly so to arrange the use of its tracks that there should be

no delay in running through the Bangor yard. It is also contended that the defendant should have telegraphed from Northern Maine Junction to Bangor and had a surgeon and an ambulance in attendance when Tatro arrived there. It is doubtless true that if the train which bore Tatro could have run through the Bangor yard without delay it would have reached the Bangor station at about twelve o'clock; and if a surgeon and ambulance had then been in attendance he might have been saved about a half hour of suffering. Since there can be no recovery for loss of life, that is the extent of the defendant's liability in any event.

It is shown that the extra freight which took Tatro could reach Bangor in less time than it would take to make up a special and send it in, so no fault can be attributed to the defendant for sending him in on the freight. It is not shown what other efforts, if any, the defendant made to get him into Bangor station quickly, nor whether in the limited time it was possible to get a clear track through the Bangor yard. The burden of showing a negligent lack of effort, and the consequent injury to Tatro, is upon the plaintiff. That burden is not sustained. From the mere fact that the train was delayed probably from ten to twenty minutes in passing through the yard, we do not think it can properly be inferred that the delay was due to the negligence of the defendant. Even a slight familiarity with a large railroad freight yard at night, with making up trains, shifting trains, dispatching trains, shows that such an inference would be mere guess work, a choice among possibilities.

Lastly, did due care and diligence require the defendant to telegraph ahead to Bangor for a surgeon and ambulance? We feel constrained to answer the question in the negative. Bangor was only about five miles distant. A train started to carry Tatro there within twenty minutes after he was hurt. The hospital ambulance was, it seems, within three minutes drive from the station. The case does not show that the presence of a surgeon at the station was necessary, though it may have been useful. So far as appears, Tatro might have been taken to the hospital as soon as the ambulance arrived. With such expectations of obtaining speedy surgical help as the defendant's servants might reasonably have in such

a city as Bangor, under the conditions which existed there, we do not think that failure to telegraph should be regarded as want of reasonable care. Nor, in saying this, do we overlook the urgency of the situation. The defendant, indeed, in argument contends that it is not shown by the evidence that its servants did not telegraph, and therefore that the plaintiff must fail on this ground from lack of proof. But we have assumed that they did not telegraph.

We do not discover any valid ground upon which the plaintiff can recover.

Judgment for the defendant.

PETER A. HOULEHAN *vs.* INHABITANTS OF KENNEBEC COUNTY.

Kennebec. Opinion November, 1911.

Fines. Payment. Mistake. Right to Recover.

Money paid under mistake of law with full knowledge of the facts, is not recoverable unless the payment was induced by fraud or imposition or undue advantage or duress.

A fine illegally imposed, but voluntarily paid under mistake of law, is not recoverable.

The plaintiff was convicted of offenses and sentences of fines and imprisonment were imposed in two of the cases. Subsequently after final adjournment of the term, and in vacation, and without the knowledge of the county attorney, the Justice of the court "amended the sentences" and in one of the cases imposed a sentence of $1000 fine or thirty days in jail and ordered the other cases to be placed "on file." The plaintiff paid the $1000 to the defendant county. Subsequently the plaintiff brought an action to recover back the $1000.

Held: 1. That the whole transaction whereby the Justice undertook to amend the sentences was improper, illegal and in defiance of law. 2. That the plaintiff having voluntarily paid the $1000 pursuant to an unlawful arrangement could not recover the same back.

On report. Judgment for defendants.

Action of assumpsit for money had and received, brought in the Supreme Judicial Court, Kennebec County. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Williamson, Burleigh & McLean, for defendants.

Joseph Williamson, County Attorney, filed a brief for the State.

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

BIRD, J. This action for money had and received is before us upon report on agreed statement of facts. From the statement it appears that, at the January Term, 1910, of the Superior Court of Kennebec County, verdicts of guilty were rendered upon sundry indictments against plaintiff and subsequently, at the same term sentence was imposed upon each of the indictments; that upon two of the indictments the sentences involved a pecuniary fine and imprisonment; that exceptions were taken in all the cases and bond given for their prosecution; that on the twenty-seventh day of April, 1910, after the final adjournment of the April Term, 1910, of said court and in vacation, in the presence of plaintiff, his counsel, his bondsmen on exceptions and the clerk of courts and without knowledge of the county attorney, the Justice of said court "amended the said sentences" and in one of the cases imposed a sentence of $1000 fine or 30 days in jail and ordered the entry "Exceptions withdrawn. On file" to be made in the other cases; that the "amended sentence" was made on condition that it should be immediately performed and, in addition that a bond with sureties should be given by plaintiff, then defendant, to violate none of the provisions of the law under which the indictments had been found; that defendant, now plaintiff, requested a nol pros of all the cases upon the payment of the fine of $1000 and the giving of the bond; that the Justice of the court refused, stating that if the conditions

of the bond were performed nothing further would be heard from the cases, but that the filing of the other cases after payment of the fine of $1000 would be an additional assurance that the conditions of the bond would not be broken; that the defendant "thus assured that the cases were disposed of and would never be called up unless he violated his peace bond, and having the alternative to pay or go to jail" on the indictment in which the "amended" fine of $1000 had been imposed, paid the clerk of courts the fine of $1000 and on the same day the clerk of courts paid it to the treasurer of defendant county who made due entry of the amount upon his books as received in payment of the fine; that on the twenty-seventh day of June, 1910, all the cases were certified to the Law Court and there entered as in order for hearing upon the original exceptions where they are now pending; that in August, 1910, demand was made on defendant county, through its county commissioners, for the return of the $1000 so paid which the commissioners on the sixteenth day of September, 1910, declined to make. The writ is dated September, 16, 1910.

The payment made by plaintiff was not only not made under mistake of fact but with full knowledge of the facts. And the authorities are abundant that both at law and in equity money paid under mistake of law, with full knowledge of the facts, is not recoverable, unless the payment was induced by the fraud or imposition or the undue advantage of him who received it, or was made under duress. *Norton* v. *Marden*, 15 Maine, 45; *Norris* v. *Blethen*, 19 Maine, 348, 351; *Parker* v. *Lancaster*, 84 Maine, 512, 517; *Marcotte* v. *Allen*, 91 Maine, 74; *Coburn* v. *Neal*, 94 Maine, 541; *Elston* v. *Chicago*, 40 Ill. 514, 518, 89 Am. Dec. 361, 365.

There is no suggestion even, in the agreed statement, that the payment was induced by fraud, imposition or undue advantage. Nor was there duress. There was no imprisonment or threatened imprisonment. Unquestionably none of the parties present when the sentence was "amended" contemplated anything in execution of the "amended" sentence but payment of the fine. The agreed statement shows that the present plaintiff must have so regarded it when

he requested the Justice to nol pros all the indictments upon the payment of the fine of $1000 and the giving of the bond. We cannot infer force or threat in fact from the facts of the agreed statement; *Trafton* v. *Hill*, 80 Maine, 503, still less that any force or threat induced the payment: *Dunham* v. *Griswold*, 100 N. Y. 224.

It is true that the agreed statement alleges that when the sentence and docket had been "amended" the plaintiff had the alternative to pay the fine of $1000 or go to jail. But, as we have seen, the payment of the fine only was contemplated. No mittimus was issued nor was its issue suggested. The conference was held for the purpose of relieving the plaintiff from imprisonment under the lawful sentences which would be in effect if his exceptions were heard and overruled. The whole transaction was improper, illegal and in defiance of law and in it the plaintiff was a prominent and the most interested actor. He must be left where his illegal act placed him. To hold otherwise would be in violation of every consideration of public policy.

The proposition that a fine illegally imposed but voluntarily paid under mistake of law cannot be recovered back is supported by ample authority. *Harrington* v. *New York*, 81 N. Y. Supp. 667; *Comm.* v. *Gipner*, 118 Pa. St. 379; *Bailey* v. *Paulena*, 69 Iowa, 463; *McKee* v. *Anderson*, Rice S. C. 24; see also *Houtz* v. *Uinta County*, 11 Wyo. 152.

If the plaintiff considers it a case of hardship, in the event that judgment be finally entered for the State upon the indictments, redress cannot be afforded the plaintiff by the judicial courts.

Judgment for defendants.

JAMES W. POTTLE et al.

vs.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY.

Washington. Opinion November 13, 1911.

Insurance. Fire Policies. Fraudulent Valuation of Property Lost and Saved. Evidence.

In an action on a fire insurance policy to recover damages for loss of stock of merchandise, where the verdict was for the plaintiffs,

Held: 1. That if a plaintiff falsely and knowingly inserts in his proof of loss, any articles as burned, which were not burned, or knowingly puts such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

2. That a fraudulent undervaluation of goods saved is as fatal as fraudulent overvaluation of goods lost.

3. That in the case at bar practically all the goods claimed to have been lost were in the second story of the building and the quantity and value of these goods, as specified in the proof of loss are inherently improbable considering the size of the room and the other circumstances of the case.

4. That substantially all the goods in the lower story of the store proper were saved, and the witnesses introduced by the plaintiffs themselves estimated the value of these goods as $1500, while in the proof of loss the total of goods saved is $224.10.

5. That the proof of loss clearly violates the principles of law above stated and the verdict for the plaintiffs is manifestly wrong.

On motion by defendant. Sustained.

Assumpsit on a fire insurance policy Maine standard form, issued by the defendant. Plea, the general issue with a brief statement alleging, among other things, as follows:

"That the alleged fire originated by the voluntary act, design, and procurement of the plaintiffs, or one of them, whereby they attempted to defraud defendant, and that the policy declared on was thereby rendered void.

"That plaintiffs attempted to defraud the defendant by knowingly and intentionally including in their proof of loss, personal property that was not in their store when the fire occurred, and which was

not injured, destroyed, or lost by reason of said fire; and by knowingly, and intentionally including in said proof of loss personal property that they did not know was in said store at the time of the fire, and destroyed, injured or lost, and which they had no reasonable ground for believing was therein and so destroyed, injured or lost; and that said policy was thereby rendered void.

"That plaintiffs attempted to defraud the defendant by knowingly, wilfully and intentionally placing in their proof of loss a false and excessive valuation upon the several articles alleged to have been injured, destroyed or lost by reason of said fire; and by placing therein valuations on said articles that they did not know to be just and true, and had no reasonable grounds for believing to be just and true; and that said policy was thereby rendered void.

"That the insured property was exposed to loss or damage by fire to the knowledge of the plaintiffs, and they wilfully, intentionally, and fraudulently neglected to make all reasonable exertions to save and protect the same, as required by the terms of said policy, thereby attempting to defraud the defendant and rendering the policy void."

Verdict for plaintiffs for $1293.75. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

Hanson & St. Clair, and R. J. McGarrigle, for plaintiffs.

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

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

CORNISH, J. It is a firmly established legal doctrine that if a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss, any articles as burned which were not burned, or knowingly puts such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover. His own fraudulent acts prohibit it. *Dolloff* v. *Ins. Co.*, 82 Maine, 266; *Rovinsky* v. *Ins. Co.*, 100 Maine, 112.

A painstaking examination and consideration of the record in this case, lead inevitably to the conclusion that although these legal principles were clearly laid down in the charge of the presiding Justice, they were ignored by the jury and their verdict for the plaintiffs is manifestly wrong for that reason.

The plaintiffs were proprietors of a country store at North Perry in the county of Washington, a rural community in which this was the only store and in which a saw mill giving employment to about thirty-five men was the only industry. About six o'clock on the morning of October 18th, 1909, smoke was discovered issuing from the roof of the building which the proprietors had left a few minutes before, and a few neighbors with the entire force from the mill rushed to the rescue, and while some were engaged in putting out the fire which seemed to be in the partition near the chimney, the rest employed themselves in removing the goods and fixtures from the lower story of the building. After working for an hour or more they thought the fire had been quenched and all the men left. But it broke out again shortly after and before it could be arrested the building with the remaining contents burned. The total insurance on the goods was $2500, one-half of which was in the defendant company.

The plaintiffs claimed in their proof of loss that the total sound value of all the goods was $3496.87, and of the goods saved $224.10, leaving a net loss of $3272.77. This claim they reiterate at the trial leaving no opportunity for error or misjudgment, and the only plaintiff who testified further claimed that he had thought of other goods which were omitted from his schedule, amounting to $800 or $1000 more, the largest part of which was down stairs and destroyed. This would make a total claim of nearly $4500, of which only $224.10 was saved, or as he put it in another form only one thirty-second part was taken out, although he admits that the entire stock amounted in May, 1899, to only $2500, and the invoices of goods bought for six months prior to October, 1909, aggregated less than $2400.

It is conceded that the size of the store was 24 by 36 feet, with two stories, the lower, the store proper having a height of about

nine feet, and the upper, about seven. The lower story was fitted in the usual manner with shelving on three sides, a counter on two sides and drawers beneath the shelving and counters. This room was well stocked, one of the plaintiffs' witnesses, an experienced traveling salesman who was familiar with the condition, estimating the value of the goods in this room as $1500. A flight of stairs at the top of which was a trap door, connected the upper and lower stories and this upper room the plaintiffs occupied as their sleeping apartment. During the previous summer they had also used it to some extent as a shop, a carpenter's bench having been installed.

1. In the first place it is impossible to reach any other conclusion than that substantially all the goods in the store proper were removed and saved. There was ample time in which to accomplish it, an ample force for the work and no smoke to interfere. Even the fixtures, such as stove, desk, Post Office boxes, telephone and safe were rescued as well as the heavier goods, such as a barrel of oil and a hogshead of molasses. The testimony of the mill men who did the work and did not depart until it was completed, leaves no room for doubt as to the thoroughness with which they acted.

If the value of these goods was, as claimed by the plaintiffs' witness, $1500, the value placed upon them by the plaintiffs as $224.10 is so low as in itself to substantiate the claim of fraudulent undervaluation which is as fatal in goods saved as fraudulent overvaluation is in goods lost.

2. In the second place, the quantity and value of the goods claimed by the plaintiffs to have been located on the second floor are so great as to render the claim inherently improbable. There would hardly seem to be a demand for such quantities of specific articles in that small community, as for instance, two thousand, seven hundred and fifty yards of cloth, twenty-four cases of breakfast foods, eight barrels of crackers and biscuit, four hundred and fifty pounds of nuts, thirty-five cases of canned berries, three hundred pairs of overalls, $1136 worth of boots, shoes and rubbers, $100 of children's hosiery, fifteen boxes or fifteen hundred cakes of soap, fifty pounds of nutmeg, which is usually sold by the ounce, fifteen hundred cans of Norwegian sardines, etc., etc.

Moreover all these and much more, which it is needless to recapitulate, aggregating as the plaintiffs say, between $2000 and $3000, in value, were stored in this upper room which was also used as a chamber. Were the bulk measured, it would readily be seen that the space would be utterly inadequate for the purpose.

It is therefore

Held, that the proof of loss is so clearly false and fraudulent that the plaintiffs' right of recovery was thereby forfeited.

Motion sustained.
Verdict set aside.

J. E. MCCORMICK *vs.* H. H. SAWYER.

Kennebec County. Opinion November 13, 1911.

Bills and Notes. Indorsement After Maturity. Defenses. General Issue. Partial Failure of Consideration. Brief Statement.

A promissory note purchased before maturity but not indorsed by the payee until after maturity, is open to any legal defenses that might have been made against the payee if suit thereon had been brought by him.

In an action on a promissory note given for the price of an agricultural implement, the defendant maker of the note pleaded the general issue and undertook to show thereunder that there was a breach of warranty in the sale of the agricultural implement to himself and hence there was a partial failure of consideration, it not being claimed that the agricultural implement was of no value. No previous notice of this defense had been given to the plaintiff. *Held:* That the defense of a partial failure of consideration could not be made under the general issue alone but should have been set up in a brief statement.

On exceptions by defendant. Overruled.

Action of assumpsit brought in the Superior Court, Kennebec County, on the defendant's promissory note made payable to the International Harvester Company of America, and indorsed by that company to the plaintiff after maturity. The plaintiff was the agent of the International Harvester Company and as such agent

sold to the defendant a certain manure spreader for which the note in suit was given. Plea, the general issue. At the conclusion of the evidence, the presiding Justice ordered a verdict for the plaintiff and the defendant excepted.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

H. H. Sawyer, pro se.

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

WHITEHOUSE, C. J. This is an action on the defendant's promissory note made payable to the International Harvester Company of America, and indorsed by that company to the plaintiff after maturity. In defense under the general issue pleaded, the defendant offered to prove a breach of warranty on the part of the company respecting the construction and operation of the agricultural implement for which the note was given, and claimed a recoupment of the damages thereby sustained.

It was conceded by the plaintiff that although the note in controversy was purchased by him before maturity, the fact that it was not indorsed until after maturity, rendered it open to any legal defenses which the plaintiff might have had under proper pleadings if the action had been brought by the original payee, *Haskell* v. *Mitchell*, 53 Maine, 468; but it is contended that under our rule of practice such a defense cannot be allowed under the general issue, but must be set up either by a special plea or by a brief statement, and that in any event, before it can be shown under the general issue, the plaintiff is entitled to notice before the trial, of the nature of the defense.

At the trial the presiding Judge ruled that the defense of breach of warranty could not be set up under the general issue without previous notice that such a defense would be made, and in the absence of any request on the part of the defendant for permission to amend his pleadings by filing a brief statement of such defense, the presiding Judge ordered a verdict for the plaintiff, and the case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct.

It is undoubtedly true that a total failure of consideration may be shown under the general issue, for the reason that "as the action is founded on the contract and the injury is the non-performance of it, evidence which disaffirms the continuing obligation of the contract at the time when the action was commenced, goes to the gist of the action. . . . The plea of non-assumpsit was considered as not only putting in issue every allegation, as well as the promise as the inducement, consideration, and all averments in fact, but also as enabling the defendant to give in evidence every description of defense which showed that the promise was void or voidable or that it had been performed." Chitty on Pl. 16 Am. Ed. 489-493; *Clark* v. *Holway*, 101 Maine, 391.

But while an entire failure of consideration may be given in evidence under the general issue, without notice, "it is otherwise as to a partial failure of consideration, since it does not go to the foundation of the action and show that the plaintiff is not entitled to recover anything, but is merely in mitigation of damages. . . . As recoupment signifies nothing more than a reduction of damages, the right can in general only be exercised under a special notice and not under a plea which purports to be a bar to the action." Waterman on Set-Off and Recoupment, sections 669, 670; *The People* v. *Niagara*, 12 Wend. 246; *Mayor* v. *Trowbridge*, 5 Hill, 71. *Runyan* v. *Nichols*, 11 Johns. 547, was an action by an attorney against his client to recover his fees, and the defendant had been permitted to set up under the general issue, the plaintiff's negligence in conducting his business as his attorney. But the judgment was reversed on the ground that "the defendant neither pleaded nor gave notice of this defense, and it must have been a complete surprise upon the plaintiff." So in *Gleason* v. *Clark*, 9 Cowen, 57, it is said that "under the plea of the general issue, the defendant may show that the plaintiff never had any cause of action. If this species of defense goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages, notice should be given." See also *Hills* v. *Bannister*, 8 Cowen, 31.

In *Eldridge* v. *Mather*, 2 N. Y. 157, the result of the New York decisions upon this question is thus stated in the opinion of the court: "We are of opinion that in this state the rule is fully settled and should be adhered to that where the defendant is sued upon a contract and desires to set up in defense a partial want or failure of consideration in mitigation of damages, he must give notice thereof. This principle was expressly adopted as early as 1814 by the supreme court of this state, in the case of *Runyan* v. *Nichols*, 11 Johns. 547, supra. . . . . After so long an adherence to a rule which is just in itself, and so well calculated to effectuate the object of all pleadings, viz. to apprise the opposite party of the true ground in dispute, it is too late to inquire into the origin of the rule."

This just and convenient rule of practice, which has been observed in New York for more than a century, was adopted in Massachusetts as early as 1839 in the case of *Harrington* v. *Stratton*, 22 Pick. 510. In *Hodgkins* v. *Moulton*, 100 Mass. 309, it is said in the opinion: "Partial failure of consideration can be pleaded only when ascertained and liquidated, unless offered in evidence in reduction of damages, under rules which permit such a defense in certain cases, when it is properly pleaded, to avoid circuity of action. . . . . But clearly such defense must be specially stated in the defendant's answer." See also *Jackman* v. *Doland*, 116 Mass. 550, and *Hunting* v. *Downer*, 151 Mass. 275.

In 9 Cyc. L. & P. page 738, it is said: "At common law partial failure of consideration could not be set up as a defense unless the transaction was fraudulent in its inception. The defendant was obliged to resort to a cross action to recover his damages unless he could show an entire failure of consideration. But now generally, either by statute or judicial determination, the defense of partial want or failure of consideration may be interposed in an action on a contract when the facts constituting the defense are specially pleaded or set out by way of recoupment, or as a bar to so much of the demand as may be thus answered."

In this State it is believed that the rule requiring notice of such a defense to be given to the plaintiff by brief statement or other-

wise, has been uniformly recognized and enforced unless expressly or impliedly waived by the plaintiff. There is no legislation or judicial authority to the contrary. In the case of *Pratt* v. *Johnson*, 100 Maine, 443, the defendant claimed at the trial that the warranty in question in that case was a part of the consideration of the notes in suit, the whole constituting one transaction, and that he should be allowed to set up the breach of the warranty in defense of the action. On the other hand the plaintiffs contended that the alleged warranty was an independent agreement, the breach of which, if any, could not be set up in defense of that action. This was the only question considered in the opinion of the court. The plaintiffs did not object to the defense offered on the ground that it was not set up by brief statement, and no allusion was made to that question either in the arguments of counsel or the opinion of the court. The decision of the questions presented in that case cannot be deemed a judicial determination which was designed to abrogate a time honored and beneficent rule of practice.

In the case at bar it was not claimed or suggested that the agricultural implement for which the note in suit was given, was of no value. It may have been of considerable value notwithstanding the defects involved in the alleged breach of warranty. This defense of a partial failure of consideration should have been set up in a brief statement.

Exceptions overruled.

STATE OF MAINE *vs.* HENRY C. PARSHLEY.

Sagadahoc. Opinion November 14, 1911.

Common Carriers. Express Companies. Termination of Liability. Commerce. Search and Seizure. U. S. Statute, Wilson Act, August 8, 1890.

An express company's liability as a carrier continues until delivery of the shipment to the consignee, personally or at his residence or place of business.

The defendant was advised by an express company that it held an interstate shipment of intoxicating liquors addressed to him and asked if it was for him and what he wanted done with it. The defendant replied that he did not know whether it was his or not, but paid the express charges on the liquors, signed a receipt therefor, and told the company to keep the liquors until he found out about the same. Seven hours later the liquors were seized upon search and seizure process while in the office of the express company. *Held:* That at the time of the seizure there had been no constructive delivery of the liquors to the defendant, and that they were still in interstate commerce, and hence were not subject to search and seizure on State process.

On report. Nol. pros. as by agreement.

Search and seizure process and reported to the Law Court.

The report is as follows:

"This was a process for the seizure of intoxicating liquors, alleged to be stored for the purpose of illegal sale in the office of the American Express Company in the City of Bath. It was issued by the Bath Municipal Court, and is dated August 5, 1910.

"The following facts appear in evidence:

"A barrel containing intoxicating liquors was shipped from Boston, Massachusetts, to Bath, Maine, the barrel, according to the marks thereon being consigned to H. C. Parshley. The driver for the express company called at the respondent's shop about ten o'clock A. M., notified him of the arrival of this barrel, asked if it was for him, and what he wanted done with it; respondent said he did not know whether it was for him or not, but that he would pay the

express charges, which he did, and signed the express receipt book; and told the driver to keep the liquors until he (Parshley) found out about it.

"The liquors remained in the store room of the express company until about five o'clock in the afternoon of the same day, when they were seized under this warrant. Between the time the notice was given by the driver and time of the seizure no notice had been received by the express company from Parshley or anyone representing him, as to the disposition of the liquors. But the driver testifies that if any direction had been given by Parshley, he understood that it would have been his duty to carry and deliver the barrel to the respondent, as directed.

"Upon the foregoing statement of facts the case is, by agreement of parties, reported to the Law Court for its determination. Only a single question is reserved. All others necessary for the State to prove are admitted by the respondent. If the court is of opinion that the barrel of liquors seized had been sufficiently delivered by the express company to the respondent so that it was no longer under the protection of the inter-state commerce provision of the United States Constitution and of the federal statutes relating to the same, judgment is to be rendered for the State as follows: 'Judgment of the Bath Municipal Court affirmed;' otherwise a nol. pros. is to be entered."

Arthur H. Stetson, County Attorney, for the State.

Frank L. Staples, for defendant.

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

SPEAR and CORNISH concurring in the result only.

BIRD, J. There being no claim of an actual delivery, the sole question for determination is whether the liquors were constructively delivered before seizure under process.

The act of Congress of August 8, 1890, 26 Stats. 313, known as the Wilson Act, provides that all intoxicating liquors "transported into any state or territory, or remaining therein for use,

consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The meaning of the word "arrival" as employed in this act was authoritatively settled in *Heyman* v. *Southern Railway Company*, 203 U. S. 270. The conclusions reached in that case have been summarized by this court as follows:

1. The elementary and long settled doctrine is reiterated that, prior to the Wilson Act, in case of interstate shipments, "delivery and sale in the original packages was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned."

2. That the Wilson Act manifested no attempt on the part of Congress to delegate to the states the right to forbid the transportation of merchandise from one state to another, "since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

3. That the State statute must permit the delivery of the liquors to the party to whom they were consigned within the State, but that, after such delivery, the State has power to prevent the sale of the liquors, even in the original package.

4. That the question whether the liability of the carrier, as such, has ceased, under the State laws, and has become that of a warehouseman, is immaterial. *State* v. *Intoxicating Liquors*, 102 Maine, 385, 395.

In the case under consideration, as already seen, there is no pretense of an actual delivery but it is urged by the State that there was a constructive delivery and that such is sufficient to meet the requirement of the "Wilson Act." In *Heyman* v. *Southern Railway Co.*, ubi supra, there were no facts justifying the passing upon

the question of constructive delivery but the court in its opinion says "of course we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered." Id. page 276.

This language of the Supreme Court of the United States has already been considered by this court in *State* v. *Intoxicating Liquors*, 102 Maine, 385, 396, in which it is held that the point, if tenable, is unimportant from lack of facts to render it applicable to the cases under consideration; and in *State* v. *Intoxicating Liquors*, 104 Maine, 463, and again in *State* v. *Intoxicating Liquors*, 106 Maine, 138.

In the case in 104 Maine, 463, it is said "In this paragraph the court seems to have undertaken to state but not to decide the three essential elements of constructive delivery to be notice to the consignee of the arrival of the goods; a reasonable time on his part after notice to receive them, and a mutual design or arrangement with the carrier to hold them for the consignee." And referring to the words "designedly left in the hands of the carrier for an unreasonable time" the court says "This phrase was undoubtedly intended to allude to a passive or silent understanding between the shippers of liquors, the carriers and consignees with reference to those transactions which operate to enable an evasion of the law and assist consignees in obtaining a safe delivery of their contraband goods." . . . . "The rule is well established that a constructive delivery can be effected only by an agreement between the carrier or middleman and the buyer or person claiming under him whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his

original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent:" . . . "The relation of carrier to the shipper, the consignee and the goods is originally fixed by law, and by a contract between the parties which is, that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract once existing, can be changed only by operation of law or by an agreement between the parties. When the goods arrive at their journey's end it is the duty of the carrier to store them. This duty is imposed by law. When stored they are still in the possession and custody of the carrier and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery or by a new contract with the consignee in place of the contract of carriage."

In 106 Maine, 138, this court says "In *Heyman* v. *Southern Railway Company*, 203 U. S. 270, 276, the court was careful to say that it did not decide that the federal protection would not be lost where the consignee, after notice, designedly left the liquors in the hands of the carrier for an unreasonable time. The locality of the liquors is not made the test. All that the federal courts seem to require is that the liquors shall once have been turned over to and accepted by the consignee. This may occur without any removal of the liquors themselves from the freight sheds of the carrier." This case and that in the 104 Maine, 463, were contracts for the carriage of goods as freight and not by express. In the latter case, it was held there was no constructive delivery, in the former that there was, but in that case not only had all the goods been receipted for but part of them had been delivered from the freight shed of the carrier to the agent of the consignee.

Was there constructive delivery of the liquors in the case at bar? As has been noted the contract between the shipper and carrier provided for carriage by express. Such contract includes the delivery of the goods to the consignee personally or at his residence or place

of business and until such delivery the liability of the carrier continues; *State* v. *Intoxicating Liquors*, 101 Maine, 430; 102 Maine, 211; *A. T. & S. F. Ry. Co.* v. *I. C. Com.*, 188 Fed. 229, 237. The record in the case at bar does not show that the liquors were ever tendered to the plaintiff personally or at his place of business. Notice was given him at 10 o'clock of the forenoon of a certain day that the liquors had arrived, and inquiry made if they were for him and what he wanted done with them. He replied that he was uncertain if his or not and said that he would pay the express charges, and directed the driver of the carrier to keep the liquors until he ascertained. He paid the charges and signed the express receipt book.

We do not think that the facts present a case within the exception from the rule as to delivery suggested in *Heyman* v. *Southern Railway Company*, ubi supra. There is no evidence that the liquors were designedly left in the hands of the carrier. At most there is but a suspicion or surmise arising from the character of the goods but there is no evidence contradicting the statement of plaintiff that he was not informed as to their ownership and that he asked opportunity to learn. Neither do we think they were held by the carrier an unreasonable length of time. If, instead of liquors, the goods had been any other commodity would seven hours have been an unreasonable delay? And to hold that a delay reasonable as to other commodities is unreasonable with respect to intoxicating liquors would be to refuse to the latter before delivery the same protection which the commerce clause of the Constitution affords to other goods. See *Heyman* v. *Southern Railway Co.*, 203 U. S. 270, 276, 277; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 135, 136. Until delivery commerce in intoxicating liquors is left by the Wilson Act as free and untrammelled, and subject to the same regulations, as other commodities but to hold unreasonable delay in case of the former to be different from that of the latter would be discrimination and would permit the police laws of the State to affect the regulation of commerce. *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, 222; Ex parte Eaglesfield, 180 Fed. 558, 562. The regulation of commerce adopted by the Wilson Act is one common rule, whose

uniformity is not affected by variations in state laws in dealing with such property. *In re Rahrer*, 140 U. S. 545, 559, 561; *Heyman* v. *Southern Railway Co.*, 203 U. S. 270, 274. Yet if unreasonable delay is to be interpreted in view of the police laws of the States no uniform rule is established and delay reasonable in a license state will be unreasonable in a state where prohibition prevails. The receipt is not conclusive but may be modified in its terms or wholly contradicted by evidence. Defendant, nevertheless, had a right under the contract of carriage to delivery either to him personally or where he should direct and we find no evidence of waiver of this right. Indeed, it does not appear that the liquors bore any address except the name of defendant and the words "Bath, Maine" and, until directed where to make it, the express company could make no delivery. Finally not only is a designed leaving in the hands of the carrier for unreasonable time not proven but is nowhere affirmatively alleged.

Applying the test of our own decisions, we do not find constructive delivery proven by the facts presented in the reported case. There is no satisfactory evidence of a change of the contract of carriage by agreement of the parties nor was such a change affected by operation of law; *State* v. *Intoxicating Liquors*, 104 Maine, 463, 468; nor is there evidence that either contemporaneously with or subsequent to the giving of the receipt there was delivery of a part of the goods, as in *State* v. *Intoxicating Liquors*, 106 Maine, 138, 140.

A nol. pros. may be entered.

In Equity.

WILLIAM H. MOULTON *vs.* WOODMAN E. CHAPMAN et als.

Cumberland. Opinion December 11, 1911.

Wills. Construction. Remainders. Revised Statutes, chapter 76, section 16.

A testamentary remainder will not be construed to be contingent, if, consistently with testator's intention, it can be deemed vested.

A will and codicil directed payment of income to the testatrix's brother during his life, and that, at his death, the principal be paid to a specified person, etc. *Held*, that the remainder was vested, and not contingent, entitling the remainderman's administrator to payment.

While in construing a will every clause and word should be considered, yet a clause which is unnecessary for its declared purpose and is repugnant to the other provisions of the will and unexplainable except upon the assumption that it results from an error of the scrivener, will be disregarded.

In equity. On report. Decree according to opinion.

Bill in equity brought by the plaintiff, William H. Moulton, of Portland, in said County of Cumberland, against Woodman E. Chapman, of Limerick, individually and as administrator of the estate of Sarah Elizabeth Chapman, late of said Limerick, deceased, and Lucy M. S. Crockett, of Buxton, both in the County of York, Joseph M. Mayall, of Vassalborough, in the County of Kennebec, John Chapman Mayall, of Boston and George W. Chapman, of Hyde Park, both in the Commonwealth of Massachusetts, and Maria Adams Rogers of Portland, in the County of Cumberland, for the construction and interpretation of the will and codicil of Eliza Chapman Rogers, late of Portland, deceased. Answers were filed by the several defendants. The case was then reported to the Law Court for determination.

The case is stated in the opinion.

Augustus F. Moulton, for plaintiff.

Henry W. Swasey, for Woodman E. Chapman.

Symonds, Snow, Cook & Hutchinson, for Maria A. Rogers.

Walter B. Grant, for Joseph M. Mayall, John C. Mayall and George W. Chapman.

Ardon W. Coombs, for Lucy M. S. Crockett.

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

BIRD, J. This is a bill in equity brought for the construction and interpretation of the will and codicil of Eliza Chapman Rogers. The bill is brought by complainant as trustee under the second item of the will as modified by the second item of the codicil. The will was made the twenty-fifth day of March, 1880, and the codicil on the seventh day of June, 1900.

By the first item of the will the testatrix devised to Maria Adams Rogers, granddaughter of her late husband, a house and lot in Portland, Maine, which some two months earlier had been conveyed to her by her husband's son and also certain personal property received by her from the estate of her late husband.

The second item of the will is as follows:

"Second—I give and bequeath to William H. Moulton of said Portland, whom I hereby appoint my testamentary trustee to carry out the trusts in this will, the sum of five thousand dollars to be held by him in trust for the following purposes, to wit, to keep the same safely invested and to pay the annual income therefrom to my brother William Woodman Chapman, in quarterly payments for his support during his life, and at the decease of my said brother I hereby direct that the sum of one thousand dollars of said five thousand dollars be paid to my niece Sarah Elizabeth Chapman of Limerick, Maine, and that the remaining four thousand dollars be divided equally among my five nephews, George Smith, John Mayall, Joseph Mayall, George W. Chapman and Woodman Chapman, and that on the payment of the same said trust shall thereby terminate."

By the third item of the will another trust is created the income of which is to be paid to her sister, Lucy Maria Smith, during life and, at her decease, the trust fund is directed to be divided equally between Lucy Maria Smith, daughter of Ether S. Smith, and said Sarah Elizabeth Chapman. The remaining items of the will are unimportant.

By the first item of the codicil the testatrix devises to her brother, William Woodman Chapman, for life a farm, and the personal property thereon, in Hollis, with remainder over to her niece, Sarah Elizabeth Chapman, mentioned in the will.

The second item of the codicil is as follows:

"Second: I increase the trust fund of five thousand dollars ($5000) given by the second section of my said will to William H. Moulton, for the benefit of my brother William W. Chapman to the sum of ten thousand dollars ($10,000) to hold and apply the income thereof as set forth in said second section with regard to said sum of five thousand dollars. And on the decease of my said brother I direct that the whole of said trust fund of $10,000, be paid, transferred and conveyed to my said niece Sarah Elizabeth Chapman,—free and discharged of all trusts.

"My nephews and nieces mentioned in said second section having deceased I revoke the bequests therein made for them."

The third item is unimportant, and by the fourth item the residue of her estate is given to Maria Adams Rogers.

The testatrix died on the seventh day of June, 1900. Sarah Elizabeth Chapman died on the twenty-eighth day of May, 1903, at the age of fifty-eight and William Woodman Chapman on the twenty-third day of September, 1910, each unmarried and intestate.

The heirs-at-law of the testatrix at the time of her decease were her brother, Aaron B. Chapman, now deceased, leaving as his heirs-at-law Woodman E. Chapman and Sarah Elizabeth Chapman; a nephew George C. Smith, and Lucy M. S. Crockett, respectively son and granddaughter of Lucy Maria Smith, a deceased sister; Joseph M. Mayall and John C. Mayall, children of Sarah Mayall,

a deceased sister; George W. Chapman, son of George Chapman, a deceased brother; and William Woodman Chapman now deceased, as already stated.

The nephew of the testatrix, Woodman E. Chapman, administrator and heir-at-law of Sarah Elizabeth Chapman, claims that the remainder constituted under the second item of the codicil vested in said Sarah upon decease of the testatrix; the four other nephews contend that the second paragraph of the second item of the codicil shows a revocation of item two of the will in consequence of a mistake of fact entertained by testatrix and that not only should they share in the trust fund of $5000 provided by the second item of the will but also, in the same proportions, in the increase in said fund made by the second item of the codicil: while the residuary legatee denying that the remainder was vested and contesting the claim of the nephews, urges that the trust fund of the second item of the codicil should be paid to her.

In considering the claim of the nephew, Woodman E. Chapman, the second paragraph of the second item of the codicil will be disregarded for the present. It is a well recognized rule of construction of this court that no remainder will be construed to be contingent, which may, consistently with the intention of the testator, be deemed vested: *Robinson* v. *Palmer*, 90 Maine, 246, 248; *Storrs* v. *Burgess*, 101 Maine, 26, 33. A most careful scrutiny of both will and codicil fails to reveal an intention on the part of testatrix that the remainder should not vest. *Torrey* v. *Peabody*, 97 Maine, 104, 105. We cannot regard the fact that habenda in fee simple are made use of in the first item of the will and in the first and fourth items of the codicil and that no habendum appears in the second item of the codicil as conclusive, as urged, or indicative of an intention on the part of testatrix that the remainder should not vest. In the first two instances real estate is specifically devised and might be included or pass under the last or residuary clause, while in the second item of the codicil personal property only is bequeathed. Nor were such habenda necessary when used: R. S., c. 76, §16: *Hopkins* v. *Keazer*, 89 Maine, 347, 355; *Fuller* v. *Fuller*, 84 Maine, 475, 479; *Richardson* v. *Richardson*, 80

Maine, 585, 594; *Nash* v. *Simpson*, 78 Maine, 142, 146; *Mitchell* v. *Morse*, 77 Maine, 423, 425; *Jones* v. *Leeman*, 69 Maine, 489, 491.

In behalf of the residuary legatee, it is forcibly urged that the general rule that where there are no words importing a gift other than a direction to divide or pay at a future time, the legacy is contingent and does not vest until that time arrives is applicable to will before us. An examination of the cases cited in support of this contention makes it evident that the rule is applied where the remainder over is to a class the members of which are determinable only at a future time. But, it is said by one of the courts most frequently applying the rule, that it will hesitate to apply it where the gift is to legatees by name. *Roasa* v. *Harrington*, 65 N. Y. Supp. 601, 605; see *Clark* v. *Cammann*, 160 N. Y. 315; see also *Clark* v. *Shawen*, 190 Ill. 47. We conceive no occasion for its application in the present case.

The claim of the nephews arises under the second paragraph of the second item of the codicil. In construing a will it is true that every clause and word are to be taken into consideration and no clause or material matter of description rejected, but in view of the provisions of the will and codicil and the admitted facts, it seems hopeless to give a consistent or intelligent interpretation to this clause. It speaks of "nieces" mentioned in the second item of the will, yet but one niece was mentioned. It alleges that the "nieces" mentioned have deceased, but the preceding sentence bequeaths the remainder to the only niece mentioned and she was then living. The paragraph itself was wholly unnecessary since revocation of the second item of the will was unquestionably affected by the first paragraph of the codicil. It is unnecessary, inconsistent with and repugnant to other provisions of the will and codicil and unexplainable except upon the supposition that it is the result of a misconception by the scrivener of something said by testatrix. We are forced to conclude that an attempt to reconcile this clause with the other clear and unambiguous expressions of the will and codicil will be futile; *Ilsley* v. *Ilsley*, 80 Maine, 23, 25; *Cotton* v. *Smithwick*, 66 Maine, 360, 367; III Jarm. on Wills (5th Am. Ed.) 706,

(Rules of construction XII, XIII). We find nothing in this second paragraph of the second item of the codicil affecting the conclusion already reached as to the vesting of the remainder in Sarah Elizabeth Chapman nor can we find in it grounds to support the claim of the nephews to share in the remainder.

Nor do we find ground for the contention of Lucy M. S. Crockett that the remainder of the fund should be paid to the heirs-at-law of the testatrix.

Our conclusion upon the whole will and codicil is that the remainder of the fund belonging to the trust created by the second item of the codicil should be paid over by the trustee to Woodman E. Chapman, as administrator of the estate of the deceased remainderman, Sarah Elizabeth Chapman.

Costs of complainant including reasonable counsel fees to be retained from the trust fund by the trustee; reasonable costs, as between counsel and client, to be paid by the trustee from said fund to the respondents filing answers, all answering jointly to be treated as one respondent and all questions as to costs, arising hereunder, to be determined by the sitting Justice. All sums so retained and paid by the trustee are to be allowed in his account.

Decree accordingly.

CLARENCE H. DRESSER *vs.* JACOB KRONBERG.

Cumberland. Opinion November 20, 1911.

Execution Sale. Bona Fide Purchaser. Money Had and Received. Assumpsit.

A bona fide purchaser of chattels, for value, at a sheriff's sale on execution can recover from the judgment creditor in an action for money had and received when the chattels sold were, at the time of the sale, not the property of the judgment debtor but of a third person.

Assumpsit for money had and received is comprehensive in its reach and scope, and though the form of procedure is in law it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored by the court.

There need be no privity of contract between the parties, in order to support an action for money had and received, except that which results from one man's having another's money which he has not a right conscientiously to retain. The law then creates both the privity and the contract.

On exceptions by defendant. Overruled.

Action for money had and received brought in the Superior Court, Cumberland County. Plea, the general issue. At the conclusion of the evidence the presiding Justice (the late Judge Turner) ordered a verdict for the plaintiff and the defendant excepted.

The case is stated in the opinion.

Wilford G. Chapman, for plaintiff.

Gerry L. Brooks, for defendant.

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

CORNISH, J. The defendant Kronberg recovered judgment against one Waterhouse, took out execution and caused two horses which had been previously attached on mesne process to be sold upon execution at sheriff's sale as the property of Waterhouse, to the

plaintiff for the sum of fifty-eight dollars, and the proceeds of the sale were paid by the officer to the defendant in this action as the judgment creditor in the execution.

Subsequently the horses were replevined by the Saco Grain and Milling Company as the true owner thereof and judgment in the replevin suit was duly rendered in favor of said company. Thereupon the plaintiff Dresser brought this action of assumpsit for money had and received against the defendant, the judgment creditor in the original action. The presiding Judge directed a verdict in favor of the plaintiff and the case is before this court on defendant's exceptions to this ruling.

A single question of law is involved, namely, whether a bona fide purchaser for value of chattels at a sheriff's sale can recover from the judgment creditor in an action for money had and received when the chattels sold were at the time of sale the property not of the judgment debtor but of a third party.

It should be observed at the outset that the action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of the procedure is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored of the courts. "It is a familiar principle," says the court in *Pease* v. *Bamford*, 96 Maine, 23, "that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained." This is but the affirmation of the early statement of Lord Mansfield in *Moses* v. *McFerlan*, 2 Burr. 1012, that, when ex aequo et bono, the plaintiff is better entitled to the thing than the defendant is to withhold it from him, he may recover in this form of action.

The instances in which the courts have applied this doctrine are so numerous and varied as to render citation of authorities unnecessary. The question is, should it be applied in the case at bar? It is conceded that the attempted sale of chattels not belonging to the judgment debtor was void and conveyed no title to the plaintiff, the would be purchaser. *Farrant* v. *Thompson*, 5 Barn & Ald, 826;

Buffum v. *Deane*, 8 Cush. 35; *Champney* v. *Smith*, 15 Gray, 512; *Coombs* v. *Gorden*, 59 Maine, 111. The execution was not in itself a nullity but it gave no authority to proceed against the property which was sold. It authorized the sale of the property of the judgment debtor, but not of a stranger.

It is further conceded that the plaintiff purchased the property in good faith, assuming as we think he had a right to assume, that it belonged to the judgment debtor and that he was securing a good title thereto. This proved to be a mistake in fact for the title absolutely failed. No consideration whatever passed to the plaintiff for the money which he paid through the hands of the sheriff into the pocket of the defendant. The price paid does not belong to the defendant because the property sold did not belong to the judgment debtor and a creditor cannot satisfy his execution against A by seizing the property of B. On the other hand, the money does belong to the plaintiff who parted with it without consideration. Why should not the repayment by the party who is not entitled to it to the party to whom it belongs, be compelled by means of this legal process designed to meet just such cases? No one loses thereby. The true owner has recovered his property, the judgment debtor cannot have his debt paid with the property of another, and the judgment creditor, the defendant in this suit, after repayment, can obtain a new execution upon the judgment for the full amount by a writ of scire facias; *Wilson* v. *Green*, 19 Pick. 433; *Pillsbury* v. *Smyth*, 25 Maine, 427; *Rice* v. *Cook*, 75 Maine, 45. A result which restores to each his own is equitable and therefore desirable.

Suppose the judgment creditor bids in the property at the sale and subsequently it is taken from him as the property of another. Clearly a new execution for the full amount would be granted. *Piscataquis County* v. *Kingsbury*, 73 Maine, 326. The situation is no different if the purchase has been made by another and the creditor has repaid the purchase price either voluntarily or involuntarily. The original purchase was under a mistake of fact and the remedy here asked puts the parties in statu quo.

We are aware that the courts in some other jurisdictions notably in Indiana and Illinois, have denied recovery from the judgment

creditor, but we are unable to assent to the force of the reasoning by which that conclusion is reached. *Dunn* v. *Frazier*, 8 Blackf. (Ind.) 432; *Lewark* v. *Carter*, 117 Indiana, 206, see note same, 3 L. R. A. 440; *England* v. *Clark*, 5 Ill. 487. The decisions in Indiana are placed upon the ground that the doctrine of caveat emptor applies with full force in all judicial sales and that the purchaser buys at his peril. This statement when rightly interpreted is true but it simply means that there is no guaranty or warranty of title because the purchaser takes and can only take whatever title the debtor has. Therefore in the absence of fraud the law will not ordinarily relieve a purchaser from a defective title and a partial failure of consideration, as for instance an outstanding incumbrance or a lien for taxes. *Ritter* v. *Henshaw*, 7 Iowa, 97; *Parker* v. *Rodman*, 84 Ind. 256. But the doctrine is not carried to the extent that in case of absolute failure of title the purchaser is without remedy. Even the states which deny a right of action against the creditor, grant it against the judgment debtor. *McGhee* v. *Ellis*, 4 Litt (Ky.) 244; *Price* v. *Boyd*, 1 Dana (Ky.) 434; *Geoghegan* v. *Ditto*, 59 Ky. 433; *Julian* v. *Beal*, 26 Ind. 220; *Westfield* v. *Williams*, 59 Ind. 221; *Coan* v. *Grimes*, 63 Ind. 21.

The principle of equitable recovery against one party is stated in *Julian* v. *Beale*, supra, as follows: "When the judgment defendant has no title whatever in the lands sold at sheriff's sale, there is no consideration for the promise of the purchaser to pay the purchase money and when a bid is made under a mistake of fact in this respect, the bidder is not bound to complete his purchase; but if he should pay the purchase money he may recover it back from the judgment defendant whose debt was thereby paid." We fail to see why the same payment under the same mistake of fact does not apply with equal force to the judgment creditor. The debtor has been entirely passive in the whole proceeding while the creditor has set in motion the legal machinery whereby the sale of a stranger's property has been illegally made and now seeks inequitably to retain the benefit therefrom. The fallacy of the doctrine lies perhaps in holding that the judgment against the debtor has been paid and that therefore the purchaser has expended money for his benefit,

while to compel the creditor to refund would deprive him both of the money and the judgment. It is true that nominal payment has been made but not real payment. The judgment has not been satisfied but may be revived and an alias execution issued on scire facias for the full amount when all the facts are disclosed.

The leading case in Illinois, *England* v. *Clark*, 5 Ill. 487, in denying the purchaser recovery against the judgment creditor though practically conceding it might exist against the debtor, laid emphasis upon the want of privity of contract between the purchaser and the creditor and no implied contract on the part of the latter.

The answer to this proposition is that there need be no privity of contract between the parties in order to support an action for money had and received except that which results from one man's having another's money which he has not a right conscientiously to retain. The law then creates both the privity and the contract, *Hall* v. *Marston*, 17 Mass. 575; *Keene* v. *Sage*, 75 Maine, 138.

While the precise question involved here has not before been squarely presented to the court in this State for determination, it has arisen incidentally on two occasions and the language of the court in those cases is in harmony with the conclusion here reached.

Pillsbury v. *Smyth*, 25 Maine, 427, revived a judgment and ordered the issuing of an alias execution, when in the sheriff's sale of real estate no title passed. In the course of the opinion the court say: "If a purchaser, not the debtor, but a stranger, of property sold in the ordinary mode upon execution, obtained nothing under the sale, for want of title in the debtor, payment in such case would, like other payments made in mistake, be without consideration, and could be recovered back; it would be gross injustice for a creditor and officer to expose for sale, goods which they had obtained by a trespass, and after sale and receipt of the purchase money throw upon the purchaser, the loss occasioned by recovery by the owner of his rights, in taking the property or compelling the buyer to pay its value."

In *County of Piscataquis* v. *Kingsbury*, 75 Maine, 326, an execution against the defendant town was returned by the officer as satisfied by the sale of real estate of non-residents. This was

declared void and the county, having repaid the money to the purchaser, brought an action of debt against the town to get the judgment renewed. The action was sustained and the court say: "It is contended, by the defendants, that no action lies; that, as to the purchaser, the rule of caveat emptor applies; that the purchaser has no right of action against the creditor for the price paid; and that the creditor cannot revive a right of action by a voluntary repayment to the purchaser.

"We cannot concede this position to the defendants. We think it was a case of money paid by common mistake and without consideration, and recoverable back. It may be assumed, perhaps, that the parties did not know that the land sold did not belong to residents, inasmuch as the land was advertised for sale as belonging to owners unknown. . . . A mistake of title may be a mistake of fact." See also *Magwire* v. *Marks*, 28 Mo. 193; *Richardson* v. *McDougall*, 18 Wend. 80; *Bartholemew* v. *Warner*, 32 Conn. 98.

It is therefore the opinion of the court that this action is maintainable under the facts of this case and that the ruling of the presiding Judge in directing a verdict for the plaintiff was without error.

Exceptions overruled.

LILLIAN J. WASHBURN *vs.* UNITED STATES CASUALTY COMPANY.

Somerset. Opinion November 20, 1911.

Insurance. Contract. Renewal. Premiums. Credit. Presumptions. Application. Warranties. Estoppel. Revised Statutes, chapter 49, section 93.

A general insurance agent, pursuant to a long course of dealing with a decedent and under instructions "never to let a policy expire unless told to," received a renewal receipt from an accident insurance company and attached it to the decedent's policy, then in the agent's safe, charging the renewal premium to the decedent, crediting the amount to the company, and attaching copy of the receipt to the policy register. The decedent intended to have the policy renewed, and understood that it had been renewed. *Held*, that the policy was legally renewed.

Credit is presumed to have been extended to the insured for a premium, if the policy was delivered without requiring payment.

Under Revised Statutes, chapter 49, section 93, providing that insurance agents shall be regarded as in the place of their principals, an accident insurance company is bound by its general agent's act in writing and signing an application at an applicant's request, containing representations as to the applicant's occupation and habits.

On report. Judgment for plaintiff.

Assumpsit on an accident insurance policy for $5000 issued to Henry Washburn, the husband of the plaintiff, and payable to the plaintiff as beneficiary in event of the death of the said Henry Washburn "resulting from bodily injury effected by external, violent and accidental means." This cause has previously been before the Law Court on exceptions. See *Washburn* v. *United States Casualty Company*, 106 Maine, 411. At the conclusion of the evidence in the second trial, the case was reported to the Law Court for determination.

The case is stated in the opinion.

George W. Gower, and Turner Buswell, for plaintiff.

Merrill & Merrill, for defendant.

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

WHITEHOUSE, C. J. This is a suit upon an accident insurance policy for $5000 issued to Henry Washburn, payable to the plaintiff as beneficiary in the event of the death of the insured "resulting from bodily injury effected by external, violent and accidental means." It is alleged that the insured came to his death on the 21st day of February, 1908, as the result of such a bodily injury sustained on the 19th of the same month and in this action the plaintiff seeks to recover the amount of the indemnity for the loss of life as stipulated in the policy. The case has previously been before the Law Court on exceptions to the ruling of the presiding Justice ordering a nonsuit. *Washburn* v. *Casualty Company*, 106 Maine, 411. The exceptions were sustained and the case now comes to the Law Court a second time on a report of the evidence presented at the former trial, and certain additional testimony introduced at the second hearing. Upon so much of this evidence as is legally admissible, the Law Court will now finally determine all questions of law and fact involved in the case.

It will be seen from an examination of the former opinion in this case in the 106th Maine, that the only question involved in the exceptions which was argued by counsel and considered by the court was whether the original policy which by its terms expired January 16, 1908, a month before the death of the insured, had been renewed according to the regulations and practice of the company, and the established course of business between its agent and the insured, so as to be legally in force at the time of the accident. It was then the defendant's principal contention that its liability terminated with the expiration of the original policy. But the opinion holds that the evidence then before the court was sufficient to warrant the conclusion that a valid contract of renewal had been made between the parties, and that the policy was in force at the time of the death of the insured.

A careful examination of the additional evidence now before the court, in connection with the former testimony, fails to disclose any

material fact tending in any degree to detract from or impair the force and effect of the original evidence before the court on exceptions. On the contrary there is new and important evidence introduced by the plaintiff which very materially strengthens the foundation upon which the former opinion was based, that the original policy had been legally renewed.

According to the former testimony, for ten or fifteen years prior to the date of the policy in suit, Mr. Griffin, the general agent of the company had been entrusted with the entire charge of Mr. Washburn's insurance business, and kept all of his policies in his safe in a pigeon hole devoted exclusively to that purpose. Mr. Griffin stated that he had "explicit instructions" from Mr. Washburn "never to let a policy expire unless he was told to," and that under that instruction all of his policies had been renewed. It was contended in behalf of the defendant, however, that this instruction "never to let a policy expire" must be restricted in its application to then existing contracts, and that it could not properly be extended to include new contracts of insurance like the one in question, that might afterward be made. It further appeared that about a month before January 16, 1908, the date named for the expiration of the original policy, according to the usual course of business, Mr. Griffin received from the company a renewal receipt to continue the policy in force another year. Before the expiration of the policy Mr. Griffin duly countersigned this renewal receipt and attached it to the policy then in Mr. Washburn's pigeon hole in the safe, and January 16, 1908, charged the renewal premium of $25 to Washburn and credited the amount to the company and also attached a copy of it to his policy register. It was in evidence that Mr. Washburn was never required by the agent to pay cash for a policy, but paid the premium only on presentation of a bill therefor after the policy had been deposited in the pigeon hole of the agent's safe. Indeed, when a policy is delivered without requiring payment, the presumption is that a credit was intended and the policy is valid. *Miller* v. *Life Ins. Company*, 12 Wall. 303. From the evidence then before the court, it satisfactorily appeared that Mr. Griffin understood that he was expected to renew this policy, and from the

whole tenor of his evidence and especially from his letter acknowledging the receipt of the plaintiff's proof of loss, it was manifest that Mr. Griffin understood that the policy had been renewed and was in full force at the time of the accident.

It was not so distinctly and conclusively shown, however, by direct evidence, that Mr. Washburn intended to have it renewed or understood that it had been renewed. But this evidence is now supplied and all question upon that point removed by the testimony given in her deposition at this second hearing, by Miss Lord, who had been policy clerk and bookkeeper in Mr. Griffin's office for thirteen years. In answer to interrogatories she testified as follows upon this branch of the case:

Q. Were you acquainted with Mr. Henry Washburn in his lifetime?

A. Yes sir.

Q. Shortly before his death did Mr. Washburn call at Mr. Griffin's office?

A. Yes sir.

Q. Will you fix the time as nearly as you can?

A. I can't say whether it was a week or two weeks before, but it was a very short time before his death.

Q. Now will you state what was said and done by Mr. Washburn at that time, and what you yourself did in connection with his business?

A. I can't remember the exact words he said. Mr. Washburn came in and asked if Mr. Griffin was here and when told he was not said he had no special word to leave, except that he was going away on a short trip and for Mr. Griffin to look after his insurance matters, as he always had. He asked some question about some insurance, I don't just remember what, and I went to the safe and got all his insurance papers—they were bound together—gave them to him, and he took them and ran them over in his hand. I don't know how much time he spent on them—I can't tell. He handed them back and started to go out and came back and just repeated his injunction for Mr. Griffin to keep up his insurance, and remarked that he would do so anyway. That was all the conversation he had.

I think Mr. Washburn's own words were for John not to let anything expire, if I remember his own words. That was what he always said.

Q. Whether or not this policy, No. X 12680, was handed by you to Mr. Washburn among the other policies?

A. It was.

Q. Whether or not at that time it had attached to it the renewal agreement A 29650, countersigned by Mr. Griffin?

A. It had.

Q. To make my question clear, whether or not the renewal agreement had been countersigned by Mr. Griffin before that time?

A. Yes sir.

Q. After Mr. Washburn had looked over his policies, as you have testified, what was done with them, including the policy and renewal about which we have been talking?

A. He returned them to me and I put them back in the safe."

It is thus made clear that there was a correlative obligation between the insurer and the insured and the contract was legally renewed.

But it is further contended in behalf of the company that the warranties in the plaintiff's application for the policy and in the schedule of statements, that he was a "hotel keeper" and that he was "free from any intemperate habits" were not true.

It is proved beyond controversy, however, that Mr. Griffin himself, the defendant's general agent, wrote the application for the policy and under his general authority and implied request, signed Mr. Washburn's name to it, and answered the interrogatories respecting his occupation and habits in the absence of Mr. Washburn, and without any knowledge on his part of the nature of the answers. These facts are conclusive against the company's contention upon this point.

It is provided by section 93 of chapter 49, R. S., that "such agents (of foreign insurance companies) and the agents of all domestic companies, shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known

to the agent shall be regarded as known by the company and waived by it as if noted in the policy." In *Marston* v. *Life Ins. Co.*, 89 Maine, 266, it was held in the case of a life insurance policy, that where the application is drawn by the authorized agent of the company and the answers to the questions therein are written by the agent in filling the application, without fraud or collusion on the part of the applicant, the company is estopped from controverting the truth of such statements in an action on the policy. See also *Hilton* v. *Phoenix Assurance Co.*, 92 Maine, 272; *Hewey* v. *Insurance Co.*, 100 Maine, 523.

As stated in the opinion in the case last cited, "It is incumbent upon the company to show that the misrepresentations were his (the applicant's) and not mistakes or misrepresentations of its own. . . . Otherwise it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained."

It is conceded, however, that the warranty in regard to the applicant's occupation was true at the date of the policy, and it satisfactorily appears that, although he ceased to be a hotel keeper before the renewal of the policy, his change of occupation in no respect increased the hazard. And whatever the truth may have been in regard to the use of intoxicating liquors by the insured, the evidence presented to the court is wholly insufficient to support the conclusion that he was a man of "intemperate habits" within the meaning of that term as used in policies of insurance and interpreted by the courts.

Judgment for the plaintiff for $5000 with interest from May 21, 1908.

In Equity.

THE FLETCHER, CROWELL COMPANY

vs.

OVIDE CHEVALIER et als.

Androscoggin. Opinion November 22, 1911.

Liens. Materials Furnished but not used. Materials Furnished, Used, and Afterwards Taken Out. Mass. Statute, 1902, chapter 197, section 1. Revised Statutes, chapter 93, section 29.

There is no lien under Revised Statutes, chapter 93, section 29, for materials furnished for a building but not used in the construction of the building.

Where two steel columns were made in accordance with the specifications for a building and were actually set up in the building by the contractors, and afterwards they were removed at the request of the building committee, *held*, that the columns were in fact incorporated into the building and became a part of the realty and that the lien created by Revised Statutes, chapter 93, section 29, was not defeated by the removal of the columns.

On report. Judgment for plaintiff as stated in the mandate.

Bill in equity to enforce a mechanic's lien for materials alleged to have been furnished in the construction of a certain building in Lewiston.

The case is stated in the opinion.

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

McGillicuddy & Morey, for owner of the building.

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

WHITEHOUSE, C. J. In this suit the plaintiff seeks to enforce a mechanic's lien for materials alleged to have been furnished to the defendants Chevalier and Ducharme in the construction of a build-

ing which they had contracted to erect for the defendant L'Union Musicale, the owner of the land, and for which they had agreed to provide all the materials and perform all the work.

This case with three others against the same defendants, was referred to Mr. Justice SAVAGE for determination. Upon his report a final disposition was made of the other three cases, the one at bar being the only case for the consideration of the court. By agreement of the parties this case was "reported to the Law Court to determine for what amount this plaintiff has a lien upon the land and building described in its bill upon the facts stated in the referee's report, and to direct judgment accordingly."

The referee's report discloses the following facts and conclusions respecting the case at bar.

"The Fletcher, Crowell Company contracted with Chevalier and Ducharme to deliver on cars at Lewiston all the iron or steel work described in the account annexed to their bill in equity. It was all shipped at different times by railroad to Lewiston. Some of it consisted of special castings, made specially for this building, and not fitted to any other. Some of it was taken by Chevalier and Ducharme to the site of the building and some of it still remains in the possession of the railroad company. A part of the steel was used in the construction of the building.

"After the building was partly constructed, owing to a heavy rain storm and washout, a portion of the building settled, and required a rebuilding to some extent. The owners and the contractors disagreed as to which party the loss or damage should fall upon. The contractors were willing to stand a portion, but not all of the expense of rebuilding the damaged portion. Thereupon, L'Union Musicale prevented the contractors from going on with their work, under the existing conditions, as to rebuilding."

"Afterwards the plans of the building were remodeled, and the building was built one story lower than was at first contemplated. Owing to the change some of the lumber furnished by Richardson, Dana & Co. and some of the special castings and other steel furnished by the Fletcher, Crowell Company were not needed and were not used. But the owner completed the building on its own account

and used some of the Richardson, Dana & Co. lumber and some of the Fletcher, Crowell Company steel in the construction. For this lumber and steel the owner does not object to paying or to having liens adjudged."

"The contractors, after they ceased working, notified the Fletcher, Crowell Company that they found themselves unable to continue the work, and directed that company to order the iron then in the possession of the railroad company to be reshipped. This was not done."

"A particular controversy exists as to two columns, ordered of, and shipped by The Fletcher, Crowell Company. They were made in accordance with the specifications and were actually set up in the building by the contractors. Later they were removed at the request of the building committee of L'Union Musicale, it being claimed that the columns had not been properly set."

"As to the claim of the Fletcher, Crowell Company, I find that this plaintiff under its contract with Chevalier and Ducharme furnished materials for the erection of the building to the amount of $2,025.90. Of this, materials to the amount of $1,720.60 were never used in the construction of the building, at any time, in any way. Two steel columns, for which $140 is charged, were set in the building, and afterwards removed, as already stated. Materials to the amount of $165.30 were used in the erection of the building, and remain in it."

"In the Fletcher, Crowell Co., I report the facts as above stated, for the judgment of the court, on the law involved."

"If the court is of opinion that The Fletcher, Crowell Company has a lien for all the materials furnished for the erection of the building, whether used or unused, I award that it shall have a personal judgment and judgment for a lien upon the land and building described in its bill, with costs, each in the sum of $2,025.90 with interest from September 21, 1910. If, however, the court is of opinion that the plaintiff has no liens for materials which did not enter into the construction of the building, and become a part of it, then I award that its lien judgment aforesaid shall be for the sum of

$305.30 or $165.30 only, with interest and costs as stated, according as the court determines that the plaintiff has, or has not, a lien for the two columns, set in the building and afterwards removed, as already stated."

Upon the facts thus reported two questions are presented for the determination of this court; first, whether the plaintiff is entitled to a lien for materials furnished to the amount of $1720.60, "which were never used in the construction of the building at any time in any way;" and second, whether the plaintiff is entitled to a lien for the item of $140 for the two iron columns that were set in the building and afterwards taken out by order of L'Union Musicale.

It is provided by section 29 of chapter 93 of the Revised Statutes that "whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building or appurtenances . . . . by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands . . . . to secure payment thereof with costs."

Whether it is necessary to prove that the materials furnished were actually incorporated in the building in order to create a lien upon it under the above statute and others having substantially the same tenor and purpose, is a question not entirely free from difficulty and one with respect to which courts of equal respectability have reached different conclusions.

Many of the earlier cases upon the subject are collected and considered in Am. & Eng. Annotated Cases, vol. 13, page 11, in a note to *Central Lumber Company* v. *Braddock Land & G. Co.*, 84 Ark. 560. In the principal case it was held that, under a statute authorizing a mechanic's lien for the value of material furnished "for any building" the materials furnished must be actually used in its construction before the lien can attach." In the note Maine is placed in the category of fifteen states that have adopted this rule, but an equal number of states are cited in support of the contrary view, that the lien exists as to all materials furnished in good faith whether they actually become part of the structure or not. In Vol. 19 of the "Annotated Cases," page 588, it is said in the note to

the principal case that "the recent cases indicate a tendency of the courts to hold that the lien does not exist unless the materials were actually used in the erection of the building.

In support of this statement the following cases are cited: *Potter Mfg. Co.* v. *Meyer*, 171 Ind. 513, 86 N. E. 837; *Niagara Oil Co.* v. *McBee*, 91 N. E. 250; *Gilbert Hunt Co.* v. *Parry*, 110 Pac. 541 (Wash. 1910); *U. S. Water Co.* v. *S. S. Realty Co.*, 133 S. W. 371. Although the earlier cases in Indiana generally upheld the doctrine that the materials need not be actually used in the building, the court in that state in the recent case of *Potter Mfg. Co.* v. *Meyer*, supra, distinctly appears to have adopted the opposite rule. In the opinion it is said: "It is well settled both in this state and elsewhere that a materialman claiming a lien must ordinarily show that his materials were furnished for and were actually used in the erection of the building against which the lien is asserted."

The reasons for this rule and the warrant for placing Maine in the category of states that have adopted it, are illustrated and stated in the following cases:

In *Lambard* v. *Pike*, 33 Maine, 141, in speaking of a stove and funnel, the court said: "If placed in the mill it would be but a fixture used for its comfortable occupation. To create a lien the materials must be used for erecting, altering or repairing the building; must be so applied as to constitute a part of the building." In *Ames* v. *Dyer*, 41 Maine, 397, in support of the conclusion that the moulds of a vessel cannot be regarded as a part of the materials with which it is constructed, the court cited *Phillips* v. *Wright*, 5 Sandf. 342, and quoted from the opinion as follows: "The whole theory of a lien for labor and materials rests upon the basis that such labor and materials have entered into and contributed to the production or equipment of the thing upon which the lien is impressed." . . . Can it be said that the materials are furnished for and towards building a ship when no part of them enters into or becomes a part of the ship?" In *Taggard* v. *Buckmore*, 42 Maine, 77, it was held that materials sold by one party to another upon representation that they would be wrought into a

vessel which was in process of construction by him, but which were not so used, would not create a lien on the vessel. In the opinion the court said: "The principle embraced in the statute is founded in natural justice, that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have security on the same though changed in form and inseparable from all property. But justice does not require that he should be allowed the security in the same property for the price of materials which became no part thereof." See also *Baker* v. *Fessenden*, in which it was held that the statute will not give a lien on a mill for labor performed in repairing machinery, "unless it was done on some portion of the realty," and *Hanson* v. *Publishing Co.*, 97 Maine, 102, in which the underlying principle of the statute as set forth in the foregoing cases, was reaffirmed by the statement in the opinion that "a lien is given upon the ground that the work has been a benefit to the realty, and has enhanced its value."

It is true that the facts in these cases differ so materially from those at bar that the decisions are not authoritative precedents in support of the defendant's contention in this case; but they unmistakably indicate the trend of the judicial thought upon the question in this State.

In *Chapin* v. *Persse*, 30 Conn. 472, the court said: "The theory of the lien is, that the party furnishing materials for the erection or the repair of buildings on credit retains his claim to them after they have gone into the building, and to enable him to enforce it his lien is spread over all the property with which the materials have become inseparably connected. Hence he is given a lien upon the whole building and the land on which it stands. But to give a lien for all the material sold for the purpose of going into the building, irrespective of the actual use of it for that purpose, might have the effect of creating a lien to the full value of the building, and the land on which it stands, in favor of parties whose property did not in fact any of it go into the building, and thus the persons who had in fact erected or repaired the building, or who had done work upon it, would be deprived of any advantage from the liens given them by the statute. Such surely ought not to be,

and as we believe was never intended to be, the result in any case. We think, therefore, that to entitle the furnisher of the materials to a lien, his property must not only be furnished for the erection or the repair of a building, but must actually go into the building and be used for that purpose."

In *Sweet* v. *James*, 2 R. I. 270, it was held that "whatever may be the condition of the materials furnished, whether very rough or perfectly adapted to their purpose. . . . and from whomsoever they may have been originally purchased, and although kept by the contractor as merchandise, his lien is not affected by these considerations, provided only they are incorporated in the work contracted for." So in *Hinckley & Egery Iron Co.* v. *James*, 51 Vt. 240, it was held that a mechanic's lien covers only such of the materials furnished as are attached to the realty so as to be a part of it at the time the memorandum required by statute is filed in the town clerk's office."

In Massachusetts it is expressly provided by statute that a person has a lien for "materials furnished and actually used" in the erection of the building." Rev. Laws, 1902, Vol. 2, chap. 197, section 1.

See also *Smalley* v. *Gearing*, 121 Mich. 190, 79 N. W. 1114; *North* v. *Globe Fence Co.*, 144 Mich. 557, 108 N. W. 285; *Dearborn* v. *Everhartt*, 74 Mo. 37; *McConnell* v. *Hewes*, 50 W. Va. 33, 40 S. E. 436; *Hill* v. *Bowers*, 45 Kan. 592, 26 Pac. 13; *Ryndak* v. *Seawell*, 13 Okla. 737; *Fitch* v. *Howett*, 32 Ore. 396, 52 Pac. 192; *Silvester* v. *Col. Quartz Mine Co.*, 80 Cal. 513, 22 Pac. 217; *McAnally* v. *Hawkins Lumber Co.*, 109 Ala. 397, 19 So. 417; *Wardlaw* v. *Troy Oil Mill*, 74 S. C. 368, 53 S. E. 658.

The principles of equitable estoppel are not applicable to the facts of this case.

It is accordingly the opinion of this court that the plaintiff is not entitled to a lien on the land and building for the materials furnished to the amount of $1720.60, which were not used in the construction of the building, but for a personal judgment only against the contractors.

With respect to the "particular controversy" in regard to the two steel columns, valued at $140, it appears from the findings of the referee that "they were made in accordance with the specifications and were actually set up in the building by the contractors," and that "later they were removed at the request of the building committee of the L'Union Musicale, it being claimed that the columns had not been properly set." There is no finding, however, that these columns were not in fact properly set in the building, or that they were not of suitable quality and dimensions and perfectly adapted to the purpose for which they were designed. They were in fact incorporated into the building and became a part of the realty. But it appears from the findings of the referee that after the building settled, "the plans were remodeled, and the building was constructed one story lower than was at first contemplated." For aught that appears these columns were "a benefit to the building and enhanced its value" as it was constructed under the original plans. But they were removed by the owner, and so far as appears without the consent of either the contractors or the plaintiff, and without any failure of duty in that respect on the part of the plaintiff. The lien to which the plaintiff was entitled when the columns became a part of the realty, was not thereby defeated.

The conclusion therefore is that the certificate must be,

Personal judgment for the plaintiff for $1720.60, with interest from September 21, 1910, against the defendants Chevalier and Ducharme only.

Judgment for the plaintiff against Chevalier and Ducharme for $305.30 with interest thereon from September 21, 1910, and a lien therefor on the land and building described in the writ.

JANE M. MCINTIRE *vs.* CHARLES G. LAUCKNER.

Sagadahoc. Opinion November 23, 1911.

Wills. Construction. Exceptions. Reservations. Deeds. Statutes. Easements. Right of Way by Necessity. Trespass Quare Clausum. Case. Statute, 1855, chapter 129. Revised Statutes, chapter 20, sections 5, 6.

A "reservation" in a will may be construed as an exception in order to effectuate the testator's intent.

A reservation may be said to vest in the grantor some new right or interest not before existing in him, while an exception in a grant retains in him title to what is excepted.

If a reservation does not contain words of inheritance, it will give only an estate for the life of the grantor.

The operation of an exception is to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title.

Where a testator reserved the burying ground on his farm "to be one quarter of an acre of land," . . . . . "the graveyard to be for the use of the family forever in common," *held* that the reservation should be construed as an exception, though no words of inheritance were contained in the reservation, and that the fee to the excepted lot descended to the testator's heirs.

Where a testator by his will made in 1844 and proved and allowed in 1849, excepted a burying ground on his farm "to be one quarter of an acre" but boundaries were never set up except as to a lot 32 feet square, *held* that the exception was inoperative to give title in anything more than the lot actually marked.

The statute of 1855, chapter 129,—now Revised Statutes, chapter 20, section 6—requiring a description of land appropriated for a family burying ground to be recorded in the registry of deeds, was not designed to be retroactive and hence does not apply to an exception of a burial lot from a devise made in 1849.

Under a devise of a tract of land excepting a burial lot for the use of testator's family forever surrounded by the land devised, *held* that the testator's heirs had a right of way by necessity from an adjacent town road to the lot.

Held, that an action for damages for obstructing a right of way leading from a town road to a burial lot was on the case, and not in trespass quare clausum, where it was not claimed that defendant entered the burial lot, though it was alleged that he broke and entered plaintiff's inclosure.

On report. Judgment for plaintiff.

Action on the case to recover damages for the obstruction of an alleged right of way leading from a town way to a burial lot alleged to be owned by the plaintiff but surrounded by the defendant's land. Plea, the general issue with a brief statement alleging that "said plaintiff is not and never has been the proprietor of a certain burial lot enclosed in whole or in part as set forth in the plaintiff's said writ," and that the "said plaintiff never had the right to pass and repass over nor a right of possession to any right of way as set forth in plaintiff's said writ." An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Edward C. Plummer, for plaintiff.

George W. Hunt, for defendant.

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

WHITEHOUSE, C. J. This is an action on the case in which the plaintiff seeks to recover damages for the obstruction of a right of way leading from a town road to a burial lot surrounded by the defendant's land. The defendant denies that the plaintiff is owner or part owner of the burial lot in question, and denies that she had any right of way to it over the defendant's land. The case is reported to the Law Court on a brief statement of facts, with a stipulation that in the event of decision in favor of the plaintiff the damages are to be assessed at ten dollars.

The plaintiff's contention is based on a reservation in a devise contained in the will of her grandfather, William Sprague, who had title to the land now owned by the defendant, on which the burial lot is situated. This will was made by the testator in 1844 and approved and allowed in 1849. The reservation is as follows: "I reserve the burying ground on my farm to be one quarter of an acre of land where my wife and children are buried, and order grave-stones for myself to be provided by my executors and paid for out of my estate, the graveyard to be for the use of the family forever in common."

It appears from the agreed statement of facts in the case that the boundaries of the burial lot in which the testator's wife and children are buried are permanently marked by stone fence posts, from which, however, the rails originally affixed thereto have disappeared in the lapse of time and process of decay, and that the size of the burial lot thus located by the stone posts is thirty-two feet square. It further appears from the agreed statement, "that the distance from the town road at the bars alongside the road and giving access to the burial lot, is three hundred and sixty-eight feet to the entrance of the enclosed part of the lot; that no part of the enclosed burial lot has been ploughed up by defendant, and none of the bodies there been disturbed by him; that a monument and a small gravestone mark the graves of William Sprague's wife and the grave of William Sprague respectively and have been continuously in position there for some sixty years, and that the plaintiff's son is buried there; that the ground has been ploughed up by defendant so as to completely encircle the graveyard and leave no passable right of way thereto from the bars at the town road; that no statutory record of the graveyard has ever been made; that defendant owns the ground surrounding the graveyard and did own it at the time of the alleged trespass, subject to the right of passage over it by plaintiff from the public road to the graveyard if such a right of way shall be found by the Court to have existed; that there is not now and never has been a made roadway from the bars to the graveyard but the regular approach to the yard from the town road always has been in practically a straight line from the bars to the yard; that this right of way was obstructed as claimed, by the defendant, at the time plaintiff had occasion to use it; that no monuments or other boundary marks indicating the limits of the fourth of an acre which the testator attempted to reserve have ever been set up beyond the stone fence posts around the burial lot thirty-two feet square as above stated; that the defendant purchased the property surrounding the burial lot in 1888 from Rachel Jewell, grand-daughter of William Sprague, by deed of warranty, in which there are no reservations of the burial lot, and that the ground surrounding the enclosed lot, is, and has been, an open field."

1. The purpose obviously sought to be accomplished by the "reservation" in the devise of William Sprague above stated, can be effected by construing the reservation as an exception, as the court is often required to do in order that the intention of the parties may not be defeated. A reservation may be said to vest in the grantor some new right or interest not before existing in him, and if it does not contain words of inheritance it will give only an estate for the life of the grantor. The operation of an exception on the other hand is to retain in the grantor some portion of his former estate and whatever is thus excepted or taken out of the grant remains in him as of his former title. *Engel* v. *Ayer*, 85 Maine, 448, and cases cited.

It is not in controversy that William Sprague had title in fee simple to all the land in question, and the burial lot excepted from the devise in his will descended to his heirs in fee without words of inheritance. *Wood* v. *Boyd*, 145 Mass. 179; *Stockbridge Co.* v. *Hudson Co.*, 107 Mass. 290; *Winthrop* v. *Fairbanks*, 41 Maine, 307. Thus the plaintiff became one of the owners of the burial lot 32 feet square, the bounds of which were conspicuously marked by stone fence posts.

2. But there is no evidence that the "one quarter of an acre" which William Sprague attempted to "reserve" from his devise, has ever been appropriated to the purposes of a burying ground either during the lifetime of William Sprague or by his heirs since his death. It has never been definitely located upon the surface of the earth. Its boundaries have never been marked by monuments of any kind indicating its location with reference to the burying ground 32 feet square which was enclosed by a fence of stone posts and rails. There is an entire absence of any description from which it can be determined whether the "one quarter of an acre" was to be two rods wide and twenty rods long, with the enclosed lot 32 feet square constituting a part of it, or was to be in the form of a square with the enclosed lot in the center of it. The language of the will reserving "the burying ground on my farm to be one quarter of an acre of land" warrants the inference that the burying ground 32 feet square had not been enclosed by the stone posts and rails at the

date of the will, and it may also be inferred from all the evidence that the testator or his heirs, at some time prior to the defendant's purchase in 1888, having reached the conclusion that four square rods would be sufficient for that burial lot, decided not to incur the needless expense of fencing forty square rods, and thereupon erected the enclosure of stone posts and rails around the lot of about four square rods. In any event this is the only lot that was ever definitely located, and must be deemed the full amount of land that it was the intention of the testator or his heirs to appropriate for that burying ground. The reservation or exception in the devise of William Sprague is inoperative and ineffectual to give the plaintiff title in anything more.

3. The statute of 1855, chapter 129, (R. S., ch. 20, sec. 6), requiring a description of land appropriated for a family burying ground to be recorded in the registry of deeds was not designed to be retroactive, and is not applicable to the reservation in this case made in 1849. Nor does sec. 5 of c. 20, affect the question here presented.

4. The testator and his heirs had a right of way by necessity from the town road to the enclosed burying ground in question. Such a right "results from a grant or reservation implied from the existing circumstances in which the grantee, —or in case of reservation,—the grantor is thereby placed. When a landowner conveys a portion of his lot, the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor." *Whitehouse* v. *Cummings*, 83 Maine, 91.

In the case at bar the lot reserved by the testator in the devise in question was entirely surrounded by his own land, and was inaccessible except through that land. It is conceded in the statement of facts that a right of way by necessity had received practical recognition among the parties for more than sixty years, and that during all this time the course of travel to the burial lot has been in a straight line from the bars at the town road. It is also conceded that by the acts of the defendant complained of in the plaintiff's

writ, this way was obstructed and rendered impassable, and that the burial lot was inaccessible by any other way than over the defendant's land.

The defendant very properly contends that trepass quare clausum will not lie in favor of one whose right of way over the land of another has been obstructed by the owner of the land. The declaration in the plaintiff's writ, however, is not in trespass quare clausum, but in a plea of the case, and the gist of his action is the obstruction of the plaintiff's right of way to the family burial lot. It is true that in accordance with his contention that 40 square rods had been excepted for the burial lot, the plaintiff incidentally avers in his declaration that the defendant in plowing up and obstructing the right of way, "broke and entered the plaintiff's enclosure," but it is not claimed that the defendant entered the enclosure of four square rods, and the gravamen of the complaint is that the defendant rendered the right of way impassable.

It is the opinion of the court that judgment must be entered for the plaintiff, and in accordance with the stipulation of the parties, the certificate must be,

Judgment for the plaintiff for ten dollars.

W. E. MAGOON *vs.* B. L. FLANDERS.

Somerset. Opinion November 23, 1911.

Vendor and Purchaser. Contract to Convey. Evidence.

Where the plaintiff brought an action to recover damages for an alleged failure on the part of the defendant to convey to him certain real estate according to the terms of a written contract, and a verdict was ordered for the plaintiff, *held* that the evidence was sufficient to support a finding that the plaintiff waived his right to purchase the property and that he sustained no damage for which the defendant was legally or equitably responsible.

On exceptions by defendant. Sustained.

Action on the case to recover damages for an alleged failure to convey real estate according to the terms of a written contract. The plaintiff was allowed to amend his writ by adding a count for money had and received. Plea, the general issue in assumpsit, with a brief statement alleging that the "plaintiff waived any right to purchase the property described in his writ, if he ever had any such right, and by his conduct is estopped to claim any damages from said defendant." At the conclusion of the testimony the presiding Justice ordered a verdict for the plaintiff for $100.07 and the defendant excepted. It was stipulated in the bill of exceptions that if the exceptions were sustained that judgment should be for the defendant.

The case is stated in the opinion.

Gould & Lawrence, for plaintiff.

Butler & Butler, for defendant.

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

WHITEHOUSE, C. J. This is an action on the case to recover damages for an alleged failure on the part of the defendant to convey to the plaintiff certain real estate according to the terms of the following contract signed by the parties, viz:

"In consideration of eight hundred and fifty dollars paid by W. E. Magoon on the following terms, eight dollars per month for one year and three hundred dollars at the end of the year and the balance yearly B. L. Flanders agrees to give said Magoon a good and sufficient title to the land and buildings thereon situated north of the Catholic cemetery on North St. in Skowhegan.

Skowhegan, May 4, 1909."

The plaintiff was also allowed to add a second count for money had and received under which he claimed to recover ninety-six dollars and interest, being the amount of twelve payments under the contract at eight dollars per month.

The defendant contended that the plaintiff waived whatever right he had under the contract to purchase the property, and by his conduct was estopped to claim any damages from the defendant.

At the close of the testimony the presiding Judge ordered a verdict for the plaintiff for $96 and interest with the stipulation that if the exceptions taken by the defendant were sustained by the Law Court, judgment should be entered for the defendant.

It is the opinion of the court that the exceptions must be sustained.

There was sufficient evidence if believed to support a finding by the jury that the plaintiff's failure to receive a deed of the premises was due to his own breach of the contract and not to any fault on the part of the defendant. It is conceded that the plaintiff failed to pay the $300 at the end of the first year, and no explanation or excuse was offered for the failure, except that he did not have the money to pay it; but it does not appear that he asked for any further time or indulgence. On the contrary the evidence would authorize the jury to find that in April, 1910, he accepted the proposition made by the defendant for him to occupy the place another year at the same "rental" of $8.00 per month if the defendant did not sell the property. The plaintiff admitted that he had not earned enough during the winter to pay his expenses and when at the beginning of the second year, the defendant found a purchaser for the property, the plaintiff does not appear to have made any objection to the sale, and for three weeks made no claim

for damages except the value of a hen yard built by him, for which he accepted satisfaction from the defendant, without any suggestion that he would have liked more time to pay the $300 and without any complaint that he had not been fairly treated by the defendant.

The written contract is silent in regard to the plaintiff's occupation of the premises during the first year. But the plaintiff was allowed to take possession upon the payment in advance of $8.00 a month, a fair rental for the place. There was no suggestion that the plaintiff was to have the use of the premises for a year, rent free, if he failed to pay the $300 at the end of the year without fault of the defendant. On the contrary it appears from the defendant's testimony that near the close of the year, in April, 1910, the plaintiff asked for a reduction of "rent," and under the practical interpretation given to the contract by the parties, the jury would have been justified in reaching the conclusion that the monthly payments made by the plaintiff the first year were to be retained by the defendant as a fair rental during that time, if the plaintiff gave up possession by reason of his failure to pay the $300, without fault of the defendant.

The practical result was that the plaintiff occupied the house for a year at a reasonable rental, and by leaving at the beginning of the second year, he sustained no damage for which the defendant was legally or equitably responsible.

According to the stipulation of the parties, the certificate must be,

Exceptions sustained.

Judgment for the defendant.

LEVI H. GARY

vs.

JOHN H. GRAHAM, ARTHUR E. WIGHT AND FRED FORBES.

Aroostook. Opinion November 24, 1911.

Attachment. Dissolution. Bankruptcy. U. S. Bankruptcy Act, July 1, 1898, section 67.

An attachment of personal property on a writ as the property of the defendant, is dissolved when the attaching officer accepts from the defendant a receipt therefor containing a promise in the alternative to pay a given sum on demand, or redeliver the property, and releases the custody of the property to the defendant and leaves it without removal.

Where an attachment of personal property was dissolved by the attaching officer taking the defendant's alternative receipt therefor, and the defendant was afterwards duly adjudged a bankrupt, *held*, that the attachment was not restored by an order of the referee in bankruptcy that the "rights under said attachment be preserved for the benefit of the estate" by virtue of section 67 of the national bankrupt law.

Where an attachment of personal property of the defendant was made on a writ, and the attachment was dissolved by the attaching officer taking the defendant's alternative receipt therefor, and the defendant was afterwards duly adjudged a bankrupt and discharged in bankruptcy, *held*, that there was no liability on the receipt.

The liability of a receiptor is limited to and determined by that of the attaching officer, and when such officer is not liable either to the plaintiff or the defendant in the suit on which the attachment was made, neither is the receiptor.

On report. Judgment for defendants.

Assumpsit upon a receipt given to the plaintiff, a deputy sheriff for certain potatoes attached by him on a writ against the defendant Graham. An agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

Charles G. Briggs, and Herbert W. Trafton, for plaintiff.

Willis B. Hall, William P. Allen, Martin & Cook, and Hersey & Barnes, for defendants.

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

WHITEHOUSE, C. J. This is an action of assumpsit upon a receipt given to the plaintiff, a deputy sheriff, for 250 barrels of potatoes attached by him on a writ as the property of the defendant Graham. By virtue of this receipt the defendants promise that after judgment in favor of the plaintiff in the original action, they would on demand re-deliver the potatoes to the plaintiff or pay him the sum of $500. Thereupon the plaintiff relinquished the custody of the potatoes to the defendant Graham. The writ, dated March 12, 1908, was made returnable at the next April term of the Supreme Judicial Court for the county of Aroostook, and was duly entered in court at that term and continued. On the 16th day of the following June, the defendant Graham filed his petition in bankruptcy, was adjudicated a bankrupt and afterwards received his discharge in bankruptcy. On the 20th day of November, 1909, on petition of the trustee in bankruptcy of the defendant Graham, it was ordered by the referee in bankruptcy appointed by the United States District Court, that the rights under the attachment of the potatoes should be preserved for the benefit of the estate, and that the trustee should make application to the Supreme Court of Aroostook county for permission to intervene in his capacity as trustee to become party plaintiff in the suit. Thereupon the trustee having received permission to appear as party plaintiff in the original suit, entered a discontinuance as to the defendant Graham and was allowed to take a judgment in rem against the potatoes attached and execution was issued thereon May 14, 1910. On the 18th of the same month the plaintiff as deputy sheriff demanded of the defendants who signed the receipt in question that they re-deliver to him the property named in the receipt or pay the amount of the judgment. The defendants refused to comply with either alternative of this demand. The case is reported for the determination of the Law Court upon this statement of facts.

It is the opinion of the court that the action is not maintainable upon the facts stated in the report.

It has been repeatedly held in this State that where an officer who attaches personal property on a writ as the property of the defendant, accepts from the debtor a receipt therefor containing a promise in the alternative to pay a given sum on demand, or re-deliver the property, and thereupon the officer releases the custody of the property to the debtor and leaves it without removal, the receiptor has the right to elect which of the alternative conditions he will perform, and consequently the attachment is thereby dissolved. *Gower* v. *Stevens*, 19 Maine, 92; *Weston* v. *Dorr*, 25 Maine, 176; *Waterhouse* v. *Bird*, 37 Maine, 326; *Stanley* v. *Drinkwater*, 43 Maine, 468; *Waterman* v. *Treat*, 49 Maine, 310; *Mitchell* v. *Gooch*, 60 Maine, 113.

It appears, however, that on June 16, 1908, within four months from the date of the attachment, the defendant Graham was adjudged a bankrupt, subsequently receiving his discharge in bankruptcy, and that upon the representation of the trustee in bankruptcy that the potatoes in question of the value of $500 had been attached by the plaintiff, a deputy sheriff, as the property of the defendant Graham, and that the "attachment has never been discharged or released," it was ordered by the referee in bankruptcy that the "rights under said attachment be preserved for the benefit of the estate" by virtue of section 67 of the National bankrupt law. But it has been seen that upon the settled law of this State the attachment of the potatoes was dissolved by the officer's acceptance of the receipt as a substitute for the lien on the potatoes and his abandonment of possession to the debtor. The representation in the trustee's petition to the court of bankruptcy that "said attachment has never been discharged or released," was evidently the result of a misapprehension either in regard to the law or the facts. There were no existing "rights" to be preserved. The attachment had been dissolved without the aid of the adjudication in bankruptcy. The U. S. statute in question was designed to preserve rights under attachments and liens that actually existed, and not to create rights under attachments that had ceased to exist at the time of the filing of the petition in bankruptcy. The obvious purpose of it was to preserve to the creditors property which they would otherwise lose by an adjudi-

cation in bankruptcy, and to prevent the intervention of other liens to their prejudice. The order issued under that statute did not have the effect to restore the attachment of the potatoes which had been lost before bankruptcy.

Furthermore by the terms of the receipt signed by the defendants, they could only be made liable by reason of a valid judgment against the defendant Graham in the original suit. There was no judgment against Graham, because the claim against him was discharged by his bankruptcy, and there was no property under attachment upon which a judgment in rem could be legally entered. As observed by this court in *Mitchell* v. *Gooch*, 60 Maine, 113, supra, "Upon the dissolution of the attachment, as it is admitted that the goods attached went into the possession of the debtor, the officer does not require their possession for the purpose of returning them to him, for he has them. Nor does he need them to return to his assignee in bankruptcy, for he must look to the bankrupt who has the goods, and not to the officer who has them not.

"The liability of the receiptor is limited to and determined by that of the officer. As the officer is not liable to either plaintiff or defendant in the suit on which the attachment was made, neither is the receiptor."

The certificate must accordingly be,

Judgment for the defendants.

In Equity.

JAMES H. FITZSIMMONS et als.

vs.

ISABELLE C. HARMON, Executrix, et als.

Cumberland. Opinion November 27, 1911.

Wills. Construction. Trusts. Resulting Trusts. Revised Statutes, chapter 76, section 1.

A letter or other document containing explicit directions for the disposition of property cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely described and referred to in the will as an existing document as to be readily identified as the particular paper intended by the testator.

Among the essentials of a valid trust are that the precise nature of the trust which the donor intended to create should appear, and that the particular persons who are to take as cestuis que trust, and the proportions in which they are to take, should be pointed out. If they are not, then the trust cannot be executed, and it must fail.

Where the character of a trust is impressed upon the gift, and it fails, because ineffectually declared, and the cestuis que trust are not clearly designated, the trustee is not entitled to the gift for his own benefit.

A testator made a will reading as follows:

"I Elizabeth Doherty, being in my right mind at this date (October 13th, 1909,) wishing to dispose of property now in my name, give, devise and bequeath my property of whatever kind to Isabelle C. Harmon to divide as seems to her best as I have told her my wishes in the matter, mentioning all relatives including my nephews.

"I name Isabelle C. Harmon as my executor."

Held: 1. That while the language of the will clearly manifests an intention to create a trust, yet the terms of the bequest do not declare a trust sufficiently definite to be executed.

2. That there is a resulting trust in favor of the heirs at law, and that the estate should be divided among them after the payment of debts and expenses of administration.

In equity. On report. Decree according to opinion.

Bill in equity brought by "James H. Fitzsimmons, Patrick E. Fitzsimmons and Thomas Fitzsimmons, all of Portland, in said County of Cumberland," and "against Isabelle C. Harmon, Executrix of the Last Will and Testament of Elizabeth Doherty, late of said Portland, deceased, Joseph Fitzsimmons, John Fitzsimmons, Peter Fitzsimmons, Theresa Fitzsimmons and Kate Fitzsimmons, all of said Portland, and all other heirs at law of Elizabeth Doherty, whose names are to your plaintiffs unknown," asking the court to construe and interpret the provisions of the last will and testament of the aforesaid Elizabeth Doherty. The defendant Harmon filed an answer admitting the allegations in the bill and joined in the prayer for a construction of the will. Heard on bill, answer and evidence and at the conclusion of the testimony the case was reported to the Law Court for determination.

The pith of the case is stated in the opinion.

Connellan & Connellan, Joseph B. Reed, and John B. Kehoe, for plaintiffs.

Reynolds & Sanborn, and Charles H. Johnston, for Isabelle C. Harmon.

Michael T. O'Brien, for Theresa Fitzsimmons.

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

WHITEHOUSE, C. J. Elizabeth Doherty of Portland died on the eighteenth day of October, 1909, leaving a will which reads as follows:

"I, Elizabeth Doherty, being in my right mind at this date (October 13th 1909) wishing to dispose of property now in my name, give, devise and bequeathe my property of whatever kind to Isabelle C. Harmon to divide as seems to her best as I have told her my wishes in the matter, mentioning all relatives including my nephews.

I name Isabelle C. Harmon as my executor."

In this bill in equity, brought by some of the heirs of the testatrix, the plaintiffs ask the court to construe and interpret the provisions

of this will, and particularly to determine, first, whether the legatee and executrix therein named, takes any beneficial interest under it, second, if the legatee named takes no beneficial interest, whether the will declares a trust sufficiently definite to be executed, and third, if no such trust is declared, to whom shall the residue of the estate, after the payment of all debts and expenses of administration be distributed.

In her answer, Mrs. Isabelle C. Harmon, named as defendant in the bill, joins in the prayer of the plaintiffs for a judicial construction of the will.

The plaintiffs contend, first, that under the terms of the will, Mrs. Harmon, the legatee, and executrix therein named, takes no beneficial interest; second, that while the terms of the will clearly manifest an intention on the part of the testatrix to create a trust, the trust thereby indicated is not made sufficiently definite to be executed, and third, that there is a resulting trust in favor of the heirs at law of the testatrix, and that the estate should be divided among them.

The privilege of making a disposition of property by will is created, and the exercise of it definitely regulated by the statutes of this State. The leading provision is found in section one of chapter 76, R. S., and is as follows:

"A person of sound mind and of the age of twenty one years may dispose of his real and personal estate by will, in writing, signed by him or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will."

The statute thus clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed. A bequest of personal property as well as a devise of real estate in order to be effectual is required to be made by an instrument in writing signed by the testator and subscribed by three attesting witnesses. Even a letter or other document containing explicit directions for the disposition of property

cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely described and referred to in the will as an existing document as to be readily identified as the particular paper intended by the testator. *Bryan's Appeal*, 77 Conn. 240, and cases cited.

In the case at bar it has been seen that the only wishes expressed for the guidance of the legatee in the distribution of the property had been given orally and they were not incorporated in the will. The language of the testatrix is: "I give, devise and bequeath my property of whatever kind to Isabelle C. Harmon to divide as seems to her best, as I have told her my wishes in the matter."

1. The phraseology employed in making this bequest to Mrs. Harmon utterly fails to disclose any purpose on the part of the testatrix to make an absolute gift of the property to Mrs. Harmon for her personal benefit. It is not given to her to consume, but to "divide." It expressly requires her to "divide" all the property thus bequeathed to her. The fact of the division is not left to her discretion, but imposed upon her as a duty. It gives her discretionary authority only respecting the manner of the division, having regard to the wishes orally expressed by the testatrix.

2. On the other hand it is equally clear that the terms of the bequest do manifest an intention on the part of the testatrix to create a trust.

But the trust declared by the terms of the will is too indefinite and uncertain to be executed. "Among the essentials of a valid trust are, that the precise nature of the trust which the donor intended to create should appear, and that the particular persons who are to take as cestuis que trust, and the proportions in which they are to take, should be pointed out. If they are not, then the trust cannot be executed, and it must fail. Where the character of a trust is impressed upon the gift, and it fails, because ineffectually declared, and the cestuis que trust are not clearly designated, the trustee is not entitled to the gift for his own benefit. It was said by Lord Eldon, in *Morice* v. *Bishop*, of Durham, 10 Ves. 521, 537, that, "though the trust is not declared, or is ineffectually

declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law." *Briggs* v. *Penny*, 3 Macn. & Gord. 546; *Warner* v. *Bates*, 98 Mass. 274; *Hess* v. *Singler*, 114 Mass. 56, 1 Perry on Trusts, 83, (5th ed.) 46; *Sheedy* v. *Roach*, 124 Mass. 472.

In *Nichols* v. *Allen*, 130 Mass. 212, the court said: "Two general rules are well settled; 1st. When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin." *Briggs* v. *Penny*, 3 De G. & Sm. 525, and 3 Macn. & Gord. 546. *Thayer* v. *Wellington*, 9 Allen, 283.

But *Oliffe* v. *Wells*, 130 Mass. 221, is a case strikingly analogous to the one at bar. In that case the bequest submitted to the court for construction was as follows: "To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out the wishes which I have expressed to him or may express to him." In the opinion the court says: "The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols* v. *Allen*, ante, 211. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton* v. *Seaman's Friend Society*, ante, 91. . . . . The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. *Sears* v. *Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless

signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See Lewin on Trusts, (3d ed.) 75." See also *Minot* v. *Attorney General*, 189 Mass. 176.

In the case at bar Mrs. Isabelle C. Harmon, the legatee and executrix who wrote the will herself at the request of Mrs. Doherty, who signed it, was permitted to state in her testimony that she did not intend to use a dollar of the estate for her own benefit, and that in writing the will she "intended to so word it that she would not keep a dollar of it." It is not in question that in attempting to administer the trust she has adhered to that intention with scrupulous fidelity. But while the language of the will clearly manifests an intention to create a trust, it is the opinion of the court, that for reasons above stated, under the salutary and time honored rules governing the creation and execution of trusts, the terms of this bequest do not declare a trust sufficiently definite to be executed; that there is a resulting trust in favor of the heirs at law, and that the estate should be divided among them after the payment of debts and expenses of administration.

Bill sustained with one bill of costs for plaintiffs and one bill of costs for the defendants. Reasonable counsel fees shall also be allowed by the sitting Justice to attorneys on both sides, to be paid from the estate and allowed to the executrix in her account.

Decree accordingly.

WESLEY P. ROWE *vs.* HILL LUMBER MANUFACTURING COMPANY.

Oxford. Opinion November 27, 1911.

Master and Servant. Saw Mill Employee. Injury. Negligence. Evidence.

Where the plaintiff recovered a verdict for damages for personal injuries sustained by him while operating a swinging circular saw in the defendant's saw mill, *held* that the evidence was not sufficient to show negligence on the part of the defendant and that the verdict should be set aside.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant corporation. Plea, the general issue. Verdict for plaintiff for $600. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

James S. Wright, for plaintiff.

Fred V. Matthews, for defendant.

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

WHITEHOUSE, C. J. The plaintiff recovered a verdict of $600 for an injury to his right foot received while operating a swinging circular saw in the defendant's saw mill in which he was employed. The case comes to the Law Court on a motion to have the verdict set aside as against the evidence.

The plaintiff claimed to recover on the ground that the framework in which the cutting-off saw in question was hung and the means of operating it were defective, insufficient and unsuitable, in two respects, first, because the saw was so hung and adjusted that it had a lateral, wobbling motion to the extent of an inch or more, and second, because the swinging framework in which the saw was hung, was not provided with a rope or chain of a fixed length to

prevent the saw from coming forward further than was necessary to cut off the log. No other failure of duty on the part of the defendant company is alleged in the writ.

But the plaintiff says at the time of the accident, April 29, 1909, he took hold of the lever and pulled the saw forward for the purpose of sawing off a log, and that the saw, "instead of cutting the log as it should and going back to its place, suddenly jumped and bounded forward beyond what it ought and was supposed to have done and struck the right foot of said plaintiff, &c."

The plaintiff was a man 28 years of age, who as a carpenter was familiar with the use of tools and machinery. At the time of the accident he had been at work in the defendant's mill about six months, principally as a carpenter. In March preceding the accident, he had operated this saw for a few hours in cutting up slabs. On the day in question, the plaintiff and a fellow workman named McLucas, an experienced sawyer, were directed by the foreman to cut up some logs into shingle bolts. "He told McLucas he wanted us to go out and cut up some shingle timber." It is not claimed by the plaintiff that the foreman expressly requested him to operate the saw, and the foreman testified that "McLucas had always run it," and in asking him to go out with the plaintiff and "cut up some shingle timber," he presumed that McLucas would operate the saw. The plaintiff's assistance was needed in handling the logs and bolts. But without the request of any one, after a log had been placed on the platform, the plaintiff proceeded to verify the measure of a shingle bolt with his rule and thereupon voluntarily seized the lever and undertook to operate the saw. He expressed no doubt about his competency to run it and asked for no instructions or suggestions in regard to it, and no complaint is made in the writ because instructions were not given him. He appears to have confidently relied upon his own knowledge of saws in general and his prior experience with this one in particular. The mechanism of the framework of the swinging saw and the means and method of operating it, appear to have been simple and easily understood. Whatever dangers were involved in the operation of it must have been obvious to one of his age and experience. The absence of any

chain or rope to prevent the saw from coming forward beyond the point required to sever the log, which is alleged in the writ and claimed in argument to be a defect in the appliance, must also have been manifest to the plaintiff. In his testimony in both direct and cross examination, he gives an intelligent description of the swinging "ladder" in which this saw is hung, of the permanent framework to which the ladder is attached at the top, of the location of the pulleys and shafts, and of all the essential features of the machine. His testimony also discloses a clear understanding of the method of operating it. In answer to inquiries he states that the diameter of the saw was about 36 inches, and that the collar around the shaft was about four inches, leaving a free blade of the saw for cutting off about 15 or 16 inches, and explains that in sawing off a log 4 inches in diameter, the size of the one they were cutting off at the time of the accident, the saw would necessarily cut beneath its axis, and revolving downwards towards the log, would have a natural tendency to draw the log towards it, but that this log was held in place in a trough between the two wheels of the "hedgehog" in which it was laid.

In giving an account of the accident, he says that after this 4 inch log was placed in position in the trough of the "hedgehog," he cut off the scarf-end, squared the end of it, and "Mr. McLucas would push it right along to measure off a shingle bolt, and I took my rule out and measured the bolt, 16 inches, took my hand and placed it right on the end of that bolt, reached up with this hand and pulled the saw. That saw came and cut the bolt half off, nearly half off as I recollect. Then it bounded forward like a flash and cut my pants and tore them down here and pulled my foot in and cut it right across there. Then the saw thrashed around and struck this piece of iron and stopped the saw in the side of this carriage." He subsequently explained that the saw "went through the stick—either cut or broke it off." With reference to his own position at the time of the accident, he states that his right foot when it was cut, was on one of the logs that had been piled behind him and a foot from the log that came along the track, on a level with the track; and that his other foot was on the left of the saw and his hand on the end of the log.

It conclusively appears, however, from an inspection of the model in evidence which represents the relative proportions of the original saw and framework, that if the right foot had been in the position stated by the plaintiff, the saw would have swung entirely clear of it, and it would have been mechanically impossible for the saw to injure it when it was in that position.

But the plaintiff's fellow workman, McLucas, the most experienced millman and expert sawyer in the defendant's mill, testifying as a witness for the plaintiff, states that he was perfectly familiar with the saw in question and its action under various circumstances, and that "it was in good shape and solid." He explains the manner in which it was deflected from a straight course and run onto the iron of the platform at the time of the accident, by saying that there was a cleat or block nailed onto the platform in front to measure by, and the log to be cut off was pushed up against this block. It was his judgment that he himself pushed the log up against this cleat a "little mite hard" so that when the saw had cut into the log some distance it became bound in the scarf, and when it cut and broke off the shingle bolt, it forced it endwise down into the slot on the left hand side, and wedged the saw up against the iron on the platform at the right of it. He says if the stick doesn't lie properly in its place, the saw will sometimes come forward rapidly when it cuts the stick, but he never used a rope to "tie it back" because he "rather not have it on." In his judgment the slight lateral motion of the saw would not tend to bind it in the log because "it would cut a wider scarf."

After a patient study of all the evidence and a critical inspection of the model exhibited, it is the opinion of the court that there is nothing in the case to justify the conclusion that the machinery in question was either defective, out of repair or unsuitable for the work to be done by it, either in the particulars specified in the plaintiff's declaration or in any other respect. It had only been in use about two years at the time of the accident, and during all that time no complaint had ever been made by any of the workmen who operated it, that it was not reasonably safe and suitable for its purpose. The slight lateral motion of the saw and of its swinging

frame, is shown by uncontradicted testimony to be such only as is usually observable and to be expected in mechanism of that kind even after a short period of service; and it appears from the testimony introduced by the plaintiff as well as that introduced by the defendant, that the employment of a rope or chain to prevent the saw from coming forward too far, is not necessary to its safe operation, but is incompatible with the most effective and convenient use of it.

If the act of McLucas in pushing the log up against the "cleat" a "little too hard," can be deemed a negligent one, it was the negligence of a fellow servant. The existence of the "cleat" itself is not alleged in the writ or claimed in argument to be a defect. There is not sufficient evidence to support a finding that there was any failure of duty on the part of the defendant towards the plaintiff. The principles of law applicable to the different phases of the case have been so fully considered and carefully distinguished in the recent decisions of this court that any discussion of them in connection with this motion for new trial must be deemed superfluous. See *Young* v. *Randall*, 104 Maine, 135; *Cunningham* v. *Bath Iron Works*, 92 Maine, 501; *Jones* v. *Mfg. & Invest. Co.*, 92 Maine, 565; *Conley* v. *Am. Express Co.*, 87 Maine, 352.

Motion sustained.
Verdict set aside.

ESTER P. HILL

vs.

FREDERICK A. DAY AND CLEMENTINE R. FOSS.

York. Opinion November 28, 1911.

Landlord and Tenant. Subtenant. Duty of Landlord. Safety of Premises. Liability of Landlord. Agency.

A landlord is under no greater duty to a subtenant, respecting the safety of the premises, than he is to the tenant to whom he let the premises.

In the letting of a dwelling house there is no implied warranty that it is reasonably fit for use, and no obligation on the part of the landlord to make repairs on the leased premises, unless he has made an express valid agreement to do so; but the tenant, on the principle of caveat emptor, and in the absence of any fraud on the part of the landlord, takes the property in the actual condition in which he finds it.

The lessor of a dwelling house is not liable to a subtenant for injury caused by plaster falling, in the absence of an agreement by the landlord to keep the premises in repair.

Evidence in an action by a subtenant against a landlord for injury caused by plaster falling *held* insufficient to show that the landlord knew of the defective condition.

A subtenant, suing the lessor of premises for injury caused by plaster falling, cannot show liability under gratuitous undertaking by the landlord to repair and negligent performance of the work, in the absence of a showing that the subtenant was a party to the undertaking or knew of it before the accident.

Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent.

On exceptions by the plaintiff. Overruled.

Action on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff and caused by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a certain dwelling house owned by the defendant Day. Plea, the general issue. At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit. To this ruling and certain other rulings excluding certain testimony the plaintiff excepted.

The case is stated in the opinion.

Mathews & Stevens, for plaintiff.

John P. Deering, for defendant Day.

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

KING, J. This case comes up on exceptions to an order of nonsuit, and other exceptions by plaintiff to the exclusion of testimony. The action is to recover damages for personal injuries alleged to have been sustained by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a dwelling house owned by the defendant Day.

Exceptions to the order of nonsuit.

The declaration alleges that the house was occupied by Clementine R. Foss (one of the defendants) under a contract with Day, and used by her as a dwelling house and for the letting of rooms. No evidence, however, was introduced as to any contract of tenancy between Mr. Day and Mrs. Foss. The plaintiff testified that she hired of Mrs. Foss a front room with the privilege of using the kitchen for passing through to the back yard, and for some cooking and light housekeeping, and began her occupancy on Nov. 10, 1908. On the 20th of November the plaintiff, having passed from the back yard through the kitchen with some clothes, came back into the kitchen and shut a door—presumably the door leading from the kitchen to the yard—whereupon a portion of the ceiling plastering fell upon her causing the injuries complained of.

If it be assumed that the relation of landlord and tenant existed between Mr. Day and Mrs. Foss with respect to the house in question, as alleged in the declaration, the fact that the plaintiff was using the kitchen by permission of Mrs. Foss would create no greater liability on the part of Day to the plaintiff than that which he was under to Mrs. Foss by virtue of the relation of landlord and tenant between them.

The law is well settled in this State that in the letting of a dwelling house there is no implied warranty that it is reasonably fit for

use, and no obligation on the part of the landlord to make repairs on the leased premises unless he has made an express valid agreement to do so; but the tenant, on the principle of caveat emptor, and in the absence of any fraud on the part of the landlord, takes the property in the actual condition in which he finds it. *Bennett* v. *Sullivan*, 100 Maine, 118; *McKenzie* v. *Cheetham*, 83 Maine, 548; *Libby* v. *Tolford*, 48 Maine, 316; *Whitmore* v. *Pulp Co.*, 91 Maine, 297.

In the absence of any evidence in this case as to the terms of the tenancy of Mrs. Foss it must be held that the defendant Day was under no obligation to keep the premises in question in repair, and that Mrs. Foss, and the plaintiff occupying by her permission, there being no fraud on the part of Day, took the house in the condition in which it was for better or worse. *Gregor* v. *Cady*, 82 Maine, page 136. Accordingly the defendant Day was not liable to the plaintiff for her injuries if they resulted from neglect to keep the house in repair.

But the plaintiff claims that the defendant Day is liable to her on the ground that the insecure condition of the plastering and consequent danger that it might fall was a secret defect—a trap—in the premises, known to Mr. Day, and the existence of which he did not communicate to his tenant Mrs. Foss, and of which she had no knowledge. This claim is not supported by the facts and circumstances in evidence.

We need not here decide the question whether, if at the time Day let the house to Mrs. Foss there was an existing danger that the plastering might fall and he had knowledge of it, it was his legal duty to inform her of it, because there is no evidence that any such danger existed when the tenancy of Mrs. Foss began, or, if it did then exist, that Day had any knowledge of it which he did not communicate to her, or that she did not otherwise have knowledge of it.

As has been noted, there is no evidence in the case relating to Mrs. Foss' tenancy, it does not appear how long she had been in occupation of the premises. It does appear, however, by the testimony of Judith K. Young that when she began occupying some

rooms in the house on Nov. 1, 1906—two years before the plaintiff's injuries — Mrs. Foss was then in occupation of the house. Day's duty and freedom from duty to Mrs. Foss, and consequently to the plaintiff, in respect to communicating information of any defects or dangerous conditions in the leased premises, must be determined as of the time he let the property to Mrs. Foss. If it does not appear that he had knowledge of the defect at that time then no such duty is shown. If he then owed no such duty to his tenant, no subsequent knowledge on his part of a defective condition of the premises would create that duty. The only evidence tending to show that Day had knowledge of the condition of the plastering before the plaintiff's injuries is in the testimony of Judith K. Young to the effect that while she occupied rooms in this house from November 1st, 1906, to April, 1907, she called Day's attention to a place in the kitchen ceiling, near where the plastering fell upon the plaintiff, where there was a leak and from which some plastering had then fallen. But that was after the beginning of Mrs. Foss' tenancy for the witness testified that Mrs. Foss occupied the tenement at the time she went there and that she "hired with her."

Further the plaintiff alleged in her declaration "that the defendant Day had undertaken to remedy said dangerous condition and had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy." In support of this allegation the plaintiff testified that about a week or ten days *after* her accident Mr. Day was at the house and Mrs. Foss called his attention to the leak in the kitchen, which presumably caused the plastering to fall, and that he said he had been up there to work on the roof with men, and Mrs. Foss replied "You haven't stopped the leak yet." The plaintiff further testified that no work was done on the roof from the time of her injuries to the time of this conversation.

Assuming that this testimony would justify an inference that Day had, prior to the time of the plaintiff's injuries, undertaken to repair the leak in the roof and, in the language of the declaration, "had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy," that inference alone would not authorize the application of the principle which the plaintiff here invokes.

That principle is thus expressed in *Gregor* v. *Cady*, 82 Maine, page 137: "And although the lessor's attention, after possession taken by the lessee, was called by the latter to the rickety condition of a portion of the premises and he thereupon agreed to repair it, still he was under no obligation to fulfill his promise. But when upon the request of the lessee the lessor gratuitously undertook to make the repairs and negligently and unskillfully performed the work, whereby the lessee was subsequently injured, the lessor became liable by reason of his misfeasance, provided he undertook to repair the particular part of the premises to which his attention was called and where the injury occurred."

"If a party makes a gratuitous engagement and actually enters upon the execution of the business and does it amiss through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance." 2 Kent's Com. 570. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." Note in *Coggs* v. *Bernard*, Smith Lead. Case. (6th Am. Ed.) 335. It will be seen that this principle is not applicable to the case at bar. If Day undertook to repair the roof before the accident to the plaintiff, there is no evidence that the plaintiff was a party to his gratuitous undertaking, or had any knowledge of it before her accident. To give the plaintiff a right of action against Day for misfeasance on his part, if he did actually enter upon the gratuitous service of repairing the roof, it must be proved at least that she had knowledge of his undertaking, otherwise no confidence could have been induced in her by his acts, and of course without such knowledge on her part it could not be held that she relied upon the assumption that he had exercised reasonable care and skill in the performance of that work. No such proof is made. It is therefore the opinion of the court that the evidence in behalf of the plaintiff was not sufficient to entitle her to a verdict against the defendant Day, and that the nonsuit was properly ordered.

We assume that the plaintiff does not now urge the other exceptions taken, as no argument in their support is presented in the brief of plaintiff's counsel.

But we find no reversible error in the rulings excepted to. The testimony excluded was clearly incompetent and immaterial. "Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent." *Eaton* v. *Provident Association*, 89 Maine, 58.

The entry in this case must therefore be,

Exceptions overruled.

JAMES M. NORTON AND ELMORE R. WALKER, Petitioners,

vs.

WILLIS C. EMERY, WALTER G. HILTON AND ORLANDO WALKER, Assessors.

Somerset. Opinion November 30, 1911.

Writ of Prohibition. Nature of Remedy. Right to Relief. Adequate Remedy. Taxation. Revised Statutes, chapter 79, section 5, section 6, Paragraph XI.

The writ of prohibition is an extraordinary judicial writ, directed to an inferior tribunal to prevent use or usurpation of judicial functions.

As Revised Statutes, chapter 79, section 6, paragraph XI, gives the Supreme Judicial Court equity jurisdiction on petition of not less than ten taxable inhabitants of a town to restrain an attempted exemption of property from taxation, *held* that a writ of prohibition under section 5, of the same chapter should not be issued to prohibit the assessors of a town from abating taxes pursuant to a vote of the town where the town had voted to instruct the assessors to abate the taxes on certain property for ten years.

On report. Petition dismissed.

Petition for a writ of prohibition to restrain the assessors or selectmen of the town of Anson, and their successors, from abating

certain taxes on a mill, etc., of the North Anson Lumber Company for a term of ten years. The defendants filed a motion to dismiss the petition, and the case was reported to the Law Court for determination.

The case is stated in the opinion.

Charles O. Small, for plaintiffs.

Augustine Simmons, for defendants.

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

HALEY, J. This is a petition for a writ of prohibition to restrain the assessors or the selectmen of the town of Anson, and their successors in office, from executing the vote of the inhabitants of the town of Anson, passed at a special town meeting of the town, held on the twenty-first day of March, A. D. 1905, under an article in the warrant for said meeting, instructing the selectmen of the town to abate the taxes of the North Anson Lumber Company for a term of ten years on the new mill then being erected in said town by said company, and such other mills and buildings, except dwelling houses, as the said company might erect in the future in connection with their manufacturing business. Under this vote, state and county taxes on said property were not to be abated.

The company completed the erection of a mill and certain other buildings in said Anson and placed saw mill machinery in said mill. The selectmen of said town, who were also assessors of taxes, and, as the plaintiffs claim, acted as such, abated the taxes assessed on the mill and certain other property of the said company for some years prior to 1909 in pursuance of said vote, without any written application being made to them therefor by said company or in its behalf.

At the annual town meeting of the inhabitants of said town, held on the first day of March, 1909, Willis C. Emery, Walter G. Hilton and Orlando Walker were duly and legally elected selectmen and assessors of taxes of said town for the year ensuing, and entered upon the duties of the respective offices.

On the twenty-ninth day of January, 1910, James M. Norton and Elmore R. Walker, two inhabitants and tax payers of the town of Anson, were informed by one or more of the said assessors of taxes of said town that the said assessors were about to abate the whole or some part of the taxes assessed against the property of the North Anson Lumber Company, located in said town, for 1909, and believing that the whole or some part of said tax was about to be abated in pursuance of the vote of said town passed on the twenty-first day of March, A. D. 1905, and for no other reason, petitioned this court for a writ of prohibition to enjoin and prohibit the said Willis C. Emery, Walter G. Hilton and Orlando Walker, as assessors of said town, from abating the whole or any part of said taxes, except for good and legal cause and upon written application therefor, according to law.

Upon this petition notice was ordered, returnable to a term of the Supreme Judicial Court to he held at Skowhegan in said County of Somerset on the third Tuesday of March, 1910, and due service was made upon the respondents.

At a subsequent term of said court, by leave of court, said petition was amended by inserting in the prayer of said petition after the word "Assessors" the words "and their successors in office."

At the March term, 1910, of said court the respondents appeared and filed a motion to dismiss said petition for the following reasons:

1. A writ of prohibition is not the proper or legal process for the cause stated in the petition.

2. The writ of prohibition will not issue when there is another adequate remedy.

3. Among the other adequate remedies in this case would be bill in equity for an injunction, as provided in section 6 of par. XI of chapter 79 of the Revised Statutes, and perhaps mandamus to the tax collector not to collect the tax.

4. Assessors of Taxes are not a court, nor even an inferior court, and do not possess such judicial powers as to render a writ of prohibition legally applicable to them for the cause stated in the petition.

5. The alleged intended act does not involve an assumption or usurpation of judicial powers or functions.

6. Said intended act would be only a ministerial or administrative act, to execute the vote of the town.

7. The cause of complaint, as stated in the petition is substantially an attempt to exempt property from taxation, and therefore the petition should be signed by not less than ten taxable inhabitants of said town of Anson, as provided in sec. 6 of par. XI of chap. 79, of the Revised Statutes.

8. The petition in this case is signed by only two of the taxable inhabitants thereof.

9. The petition does not allege any process before the board of assessors upon which they may act, or that the North Anson Lumber Company has made any written application to the assessors of taxes of said Anson for the time being, as required by law, for the abatement of any of its taxes assessed for the year 1909 on any of its property situated in said town.

10. The petition does not allege that said assessors have taken any action, or done anything or attempted to do anything by vote or otherwise, or even discussed the matter in a meeting of their board, formal or informal, concerning the abatement of the whole or a part of said taxes.

This case in now before the Law Court on the following report as to whether a writ of prohibition shall issue as prayed for, or the petition dismissed on motion of the defendants.

Counsel for defendants admit all the allegations in the plaintiffs' petition, except the allegation in the ninth paragraph of the petition, that they intended to abate the whole or a part of said tax unlawfully. But as to that allegation the defendants admit that they, as selectmen, did intend to abate a part of said tax, but not unlawfully.

Counsel for petitioners admit that they could have easily obtained the signatures of at least ten taxable inhabitants of said Anson to an application or petition, as provided in section 6, paragraph XI, of chapter 79 of the Revised Statutes, and that said assessors were the selectmen.

The writ of prohibition has been defined as "an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal properly and technically denominated as such, or to an inferior ministerial tribunal possessing incidental judicial powers and known as a quasi judicial tribunal, or even in extreme cases to a purely ministerial body to cease abusing or usurping judicial functions."

The writ is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming such functions. It is the nature of the act which determines the propriety of the writ. The power of the Supreme Judicial Court of this State to issue the writ is expressly conferred by the Revised Statutes, chapter 79, section 5, although the court had the power, by virtue of its general common law jurisdiction, it being a common law writ said to be as old as the common law.

The statute does not define the cases in which the power is to be exercised, but it is a power like that connected with other prerogative writs, to be used with caution and only upon proper and necessary occasions.

The decision of this case does not require a lengthy discussion of the writ of prohibition, the procedure or its purposes. All the authorities agree that the power to issue it should be used with caution, and only upon proper and necessary occasions, and that if there is another adequate or ordinary remedy, it is the duty of the court to deny the writ, but such other remedy must be prompt, efficient and equally adequate. "The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity." *People* v. *Westbrook*, 89 N. Y. 152. "Whilst, therefore, it thus appears that the power of the court is ample to issue writs of prohibition, upon proper and necessary occasions, yet like other prerogative writs with which it is associated, it is to be used with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in all the tribunals, when there is no other regular and ordinary remedy." *Washburn* v. *Phillips et al.*, 2 Met. 298. "The writ of prohibition,

like mandamus, quo warranto, or certiorari, ought not to issue when there are other remedies perfectly adequate. We have a discretion to grant or deny the writ, and it would, I apprehend, in general, be a very good reason for denying it, that the party has a complete remedy in some other and more ordinary form." *Ex-parte Brandlaucht*, 2 Hill, 367. "While the court is vested with ample power to issue writs of prohibition in proper cases, it is only when there is no other adequate remedy." *Jaquith* v. *Fuller*, 167 Mass. 123. "It may properly be added that the decision of the Supreme Court (State) indicates that in its opinion relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself. This was a ground broad enough to maintain the judgment irrespective of the decision of any Federal question." *Yesler* v. *Board of Harbor Commrs.*, 146 U. S. 646. "Prohibition being an extraordinary remedy, is only granted, as has been previously stated, in cases of necessity. Therefore the existence of another adequate, ordinary remedy, or of a more proper extraordinary remedy, will make it the duty of the court to deny the writ." Spellman Extraordinary Remedies, sec. 1727. The writ of prohibition agrees with both injunction and mandamus in this: that where there is an adequate remedy at law, it is not available. *State* v. *Braun*, 31 Wis. 606.

The act which the plaintiffs seek to prohibit is an indirect attempt to execute the vote of March 21, 1905, exempting property from taxation, and chapter 79, sec. 6, paragraph XI, R. S., provides that this court shall have equity jurisdiction on petition of not less than ten taxable inhabitants thereof to restrain the exemption of property from taxation. As said by the court in *Emery* v. *Sanford*, 92 Maine, 525, "Among the adequate remedies, however, which are available to property owners and tax payers to secure equal and legal taxation, is that prescribed in paragraph 9, section 77, R. S., in which, on application of not less than ten inhabitants of a town, full equity jurisdiction is conferred upon this court to hear and determine all complaints relating to any unauthorized votes of such town to raise money by taxation, or to exempt property therefrom." *Knights* v. *Thomas*, 93 Maine, 494.

There being a remedy provided by statute to prevent the vote from being executed, it cannot be said that there is not an ordinary proceeding at law or in equity to restrain the defendants.

The statute, having conferred upon this court jurisdiction upon petition of ten inhabitants of the town, has given a prompt, efficient and an equally adequate remedy with the writ of prohibition, which remedy the plaintiffs, if they have a just grievance, should avail themselves of.

Writ denied. Petition dismissed.

A. P. MITCHELL AND VERNON MITCHELL

vs.

INHABITANTS OF LINNEUS.

Aroostook. Opinion November 30, 1911.

Towns. Arbitration and Award. Selectmen. Authority to Arbitrate.

While the selectmen of a town cannot delegate their authority to determine the question of damages caused by taking land for a road, they may arbitrate a claim for such damages after they have assessed them.

Where the selectmen of a town laid out a way and assessed the damages therefor, and the land owner appealed from the assessment of damages, and afterwards the matter was submitted to arbitration but only one of the selectmen signed the agreement to arbitrate, *held* that the evidence sufficiently showed that the selectman who signed the agreement to arbitrate was authorized so to do and that the town was bound by the decision of the arbitrators.

On report. Judgment for plaintiffs.

Action of debt upon an award of referees. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court with the stipulation that "upon so much of the evidence as is admissible the Law Court is to enter such judgment as the legal rights of the parties require."

The case is stated in the opinion.

Madigan & Madigan, and Leonard A. Pierce, for plaintiffs.

Hersey & Barnes, for defendants.

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

HALEY, J. This is an action of debt upon an award of referees. The case is before the court upon report.

In 1910, the selectmen of the town of Linneus laid out a way in that town, in part over land of A. P. Mitchell, and land of Vernon Mitchell a son of A. P. Mitchell. They made their return to the town and the way, at a town meeting legally called, was duly accepted. They awarded to A. P. Mitchell $100 for damages sustained by him, but made no award for damages sustained by Vernon Mitchell. A. P. Mitchell being dissatisfied with the amount of the damages awarded him, seasonably took an appeal from the award to the Supreme Judicial Court, and the appeal is now pending awaiting the decision in this case.

In August, 1910, there were negotiations between the selectmen of the defendant town, James H. Ruth, Colby Estabrook and Byron R. Stewart, and A. P. Mitchell in reference to settling the claim, or claims, for damages by arbitration, and papers were prepared to submit the question of damages to referees. The papers, or some of them, were signed by two of the selectmen and by A. P. Mitchell, and were afterwards destroyed.

It is claimed by the plaintiffs that the claims of both A. P. Mitchell and Vernon Mitchell were to be submitted, and that the submission was signed by two of the three selectmen of defendant town. It is claimed by the defendant town that it was the intention to submit only the claim of Vernon Mitchell for damages; that after the papers were signed by the selectmen, A. P. Mitchell signed for Vernon, and that they then discovered that Vernon was more than twenty-one years of age, and the selectmen refused to admit the authority of A. P. Mitchell to sign for him, and, as they could not obtain his signature, the attempt to arbitrate was abandoned. The

following day Mr. Ruth, one of the selectmen and the town agent of the defendant town, met A. P. Mitchell and made an agreement to refer both claims to referees named in the agreement to refer the claims, with the further agreement between them, and the referees, that the award should not be made public until Vernon's return, which was to be in about ten days, and that if he would then agree to be bound by the award and would sign the submission to the referees, they should file their award.

The referees then viewed the way as laid out, upon which the town was then working, in company with A. P. Mitchell and selectman Ruth. Upon Vernon's return he was informed of the proceedings, and signed the agreement to submit the claims to arbitration, which is set forth below.

The referees then made public their award, in which they allowed the plaintiffs the sum of $375.

The agreement to arbitrate was as follows:

"Linneus, Me., August 25, 1910.

We, the undersigned, James H. Ruth, in behalf of the town of Linneus, and A. P. Mitchell and Vernon Mitchell, owners of land across which road to avoid Coyle Hill, so called, has been located, do subscribe to the following agreement: —

We are willing to abide by the decision of Matthew Wilson of Houlton and John W. Davidson of Hammond Plantation, as to what damages shall be paid by the town of Linneus to said A. P. Mitchell and Vernon Mitchell for the right of way for said road located by said town of Linneus.

J. H. Ruth for the Town of Linneus.

his mark

A. P. Mitchell X

M. Wilson

Vernon Mitchell."

This action is brought upon the award, and the defense is:

First. That the selectmen had no authority to arbitrate the claim for damages.

Second. That Mr. Ruth, who signed the submission for arbitration, was not authorized to do so, and that his action has never been ratified by the town, or by either of the other two selectmen.

It is undoubtedly true, as claimed by the defendant town, that it is the duty of the selectmen to lay out ways in their town and to assess the damages caused thereby and report their doings to the town. While so engaged they are acting as a court, and they cannot delegate their authority or refer the question of damages for the land taken. Being the court created by law to pass upon the question in the first instance, they cannot avoid their responsibility by referring the question to others.

In this case the municipal officers did assess the damages sustained by A. P. Mitchell in the laying out of the way. They assessed no damages for Vernon Mitchell, over whose land the way as laid out also passed. This was, in fact, as though they had reported that no damages had been sustained by him, and the duty of the court was ended when it made its report and filed it as required by law, and Vernon Mitchell had his right of appeal on the question of damages, as he would have had if an award had been made and he was dissatisfied therewith. *Wilson* v. *Simmons*, 89 Maine, 242, and cases cited.

The duties of the selectmen, as a court, as far as the way in question was concerned, ended when their report was filed in the town clerk's office; but their duties as selectmen of the town, were not ended; as selectmen, they still had charge of its business which included the adjustment and payment of all just claims against the town.

At the time of the reference the appeal of A. P. Mitchell was pending in the Supreme Judicial Court, and it was their duty to protect the interest of the town in that appeal. If Vernon Mitchell had a claim for damages for the taking of his land, or thought he had such a claim, it was their duty to protect the interest of the town in the adjustment of that claim. That being their duty, they had the right to employ counsel to assist them and contest the claim in court. Having the right to settle and adjust, they had the power to do whatever was necessary to settle and adjust, which

included the right to submit to arbitration. As said by the court in *Hallister* v. *Pawlet*, 43 Vt. 425, "The right to settle and adjust includes the right to submit the subject matter in dispute to arbitration. An arbitration is one of the usual ways of settling a disputed claim; and the selectmen had the right to settle and adjust this claim in any of the usual and ordinary modes of settling and adjusting such claims."

The same rule was recognized in *Fogg* v. *Dummer*, 58 N. H. 505, which was an action on an award where the selectmen had submitted to arbitration, and in which the court say: "It was their duty, as agents, to investigate the plaintiff's claim, and, in the absence of special instructions by the town, they had the power to submit the merits of the claim to arbitration.

Hine v. *Stevens*, 33 Conn. 497, which overruled *Griswold* v. *North Stonington*, 5 Conn. 367, was an action upon an award, and the court held that the selectmen had authority to submit to arbitration, saying: "The avoiding of a lawsuit by a reference and thereby escaping the delay, the expense and the risk of a jury trial, is in most cases eminently judicious."

And in *City of Somerville* v. *Charles H. Dickerman*, 127 Mass. 272, the court held that the city had no right to submit the assessment of betterments to arbitration, but stated in regard to the power to submit to arbitration the question of damages sustained by the land owner: "In such a case, the controversy or question is between the town and land owner separately, as to the damage he has sustained by the taking of his land; it concerns no one else, it may well be and often is settled by agreement, but it would seem that it might be referred to arbitrators as a convenient mode of settlement without affecting the rights of others or violating any principle of public policy," citing three cases as authority.

Having the right to submit to arbitration, the only remaining question is, was Mr. Ruth, who signed this submission to arbitrate, authorized to do so, or was his action ever ratified by the other selectmen?

Mr. Ruth denies his authority; Mr. Estabrook and Mr. Stewart, the other selectmen, also deny it. The plaintiffs rely upon the

declarations and acts of the selectmen to overcome the testimony of the three selectmen. It is undisputed that Mr. Ruth, at the time the papers were signed, was asked if he had authority to sign for the town, and he replied that he had. The writing itself shows that he claimed that authority. The day before the papers were signed, other papers were signed to refer the same matters to arbitration, which was abandoned because no one had authority to sign Vernon Mitchell's name. Those papers were signed by a majority of the selectmen. It is argued that the first paper contemplated only the arbitration of Vernon's claim, but Mr. Ruth testified that it was understood, if the father had authority to sign for Vernon, both claims were to be submitted to arbitration, and Mr. Stewart testified that it was understood that they were going to submit the damages for laying out the whole road to arbitration, and he drew the papers for submission to arbitration, and the plaintiff A. P. Mitchell testified that both claims were to be submitted. The evidence fairly shows that the day before the submission acted upon was made, the defendant town, by a majority of its selectmen, agreed to submit to arbitration the claims of both plaintiffs, and that the question of A. P. Mitchell's authority to sign for Vernon was raised, and the matter was left incomplete until that difficulty was removed; that the next day the arrangements were made to have the referees go upon the premises and make their award, seal it, and when Vernon returned, if he would sign the submission, the referees were to make their award public. All this was done, and when the award was made public the selectmen of the defendant town were dissatisfied, and denied the authority of Mr. Ruth.

The selectmen sent two people to get A. P. Mitchell to arbitrate. Colby Estabrook, the day before the arbitration, was on the road and stated that he thought that a fair way to settle it, and the day of the arbitration, Mr. Stewart, who drew up the first papers, was out to the road where the men were working. The award was kept sealed, its contents unknown until Vernon returned, ten days later. In a small town, like that of the defendants, the fact of arbitration must have been known. No selectman protested, or denied that the claim had been submitted to arbitration. When the award

was made public, Mr. Ruth at once drove to the home of the selectman Stewart and instructed him not to sign any papers in the Mitchell matter, and informed him that the referees had allowed $375, and that they would not pay it. No question was asked by Mr. Stewart of how it came to be referred, when, or by whom, and no denial was made that it was done with authority.

Mr. Ruth fairly states the position of the selectmen when he answers the following questions:

"Q. If the award brought in by these men had been less than $100, you would have stayed by it, wouldn't you? I am speaking of you.

A. If it had been anywheres near reasonable at all I would have stayed by it.

Q. But, when you found that it was more than you thought it ought to be, then you refused to pay it, did you?

"A. I did."

In substance, the position of the selectmen is, they would hold the plaintiffs to the agreement, if satisfied with the award. If not satisfied with it, they would deny their authority and repudiate it.

The facts, circumstances and conduct of the interested parties, as they appear in the case, carry the conviction that the selectmen knew of the arbitration and consented, and that, if the award had been satisfactory to them, they would not have denied the authority of Mr. Ruth. The parties, having chosen the tribunal in which to litigate their differences, are bound by the decision of that court.

Judgment for plaintiffs for $375, and interest from the date of the writ.

ENOCH R. SMITH *vs.* JOHN V. SAWYER et als.

Washington. Opinion December 4, 1911.

Adverse Possession. Prescription. Use or Occupation. Trespass. Action. Title. Presumptions.

Where the plaintiff claimed title by adverse possession to a certain lot of 100 acres which was unenclosed and a part of a large tract of 400 or 500 acres, all of which was unimproved, except a small portion of meadow which produced hay, and had a small quantity of wood or lumber growing upon it, and produced blueberries in considerable quantities, and had never been personally and exclusively possessed by any one, *held* that the acts of the plaintiff in occasionally cutting a little hay or firewood or burning a portion for berries or gathering berries were insufficient to establish title by adverse possession.

Record title arising from a quitclaim deed from one who received a warranty deed in 1856 prima facie shows ownership of the land, permitting recovery against a mere trespasser or one who cannot show better title, though the original grantor had no title.

A deed from the Commonwealth of Massachusetts, executed in 1788, is not defective as a basis for record title for want of showing of authority of the legislative committee to execute it, where the deed recites authority under legislative resolves which are a matter of public record.

A presumption of correctness attaches to official proceedings, and, when those proceedings have stood unimpeached for over a century and have been recorded in the public archives of two states, they should not be set aside without positive proof of their invalidity.

On exceptions by plaintiff. Overruled.

Action of trespass quare clausum fregit in which the plaintiff alleged that the defendants broke and entered a certain lot of land and took and carried away therefrom certain wood which had been cut thereon by the plaintiff. Plea, the general issue with a brief statement claiming title to the land. At the conclusion of the evidence, the presiding Justice ordered a verdict for the defendants and the plaintiff excepted.

The case is stated in the opinion.

A. D. McFaul, John F. Lynch, and William R. Pattangall, for plaintiff.

O. H. Dunbar, and H. H. Gray, for defendants.

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

CORNISH, J. This is an action of trespass to recover damages from the defendants for entry upon a certain lot of unimproved land, and carrying away a quantity of cord wood that had been cut by the plaintiff.

At the conclusion of the evidence the presiding Justice ordered a verdict for the defendants "upon the agreement and stipulation on the part of the defendants that if this order is overruled by the Law Court, the Law Court are authorized to render judgment for the plaintiff in the sum of thirty-six dollars." The case is before this court on plaintiff's exceptions to this order.

The plaintiff bases his right of recovery upon both adverse possession and record title. A painstaking examination and study of the evidence fails to prove such an open, continuous, exclusive and adverse occupation on the part of the plaintiff and his predecessors for twenty years or more as ripened into title by prescription. This lot of one hundred acres was unenclosed and part of a larger tract of four or five hundred acres known as the Mitchell Block, all of which was unimproved except a small portion of meadow which produced hay. It had a small quantity of wood or lumber growing upon it and has also produced blueberries in considerable quantities. It has never been personally and exclusively possessed by any one, and the acts of the plaintiff in occasionally cutting a little hay or fire wood or burning a portion for berries, or gathering berries, are insufficient to meet the law's demand on adverse possession. *Chandler* v. *Wilson,* 77 Maine, 76; *Hudson* v. *Coe,* 79 Maine, 83.

The plaintiff's record title begins with a warranty deed of this and other land from Benjamin Mitchell to William P. J. Cumings,

Aaron Kelley and Darius D. Kelley dated April 26, 1856. Aaron Kelley and Darius D. Kelley, conveyed their two-thirds interest undivided to George E. Watts by warranty deed, dated February 2, 1882; and George E. Watts conveyed to the plaintiff his right, title and interest in the lot in question by quitclaim deed dated January 16, 1883.

It is not shown that Benjamin Mitchell the original grantor in this chain, ever had any title whatever to the premises. But a warranty deed to one from whom the plaintiff has a quitclaim is sufficient prima facie evidence of ownership to permit recovery against a mere trespasser or against one who cannot prove a better title. *Rand* v. *Skillin*, 63 Maine, 103. *Ripley* v. *Trask*, 106 Maine, 547. Under the evidence in this case the plaintiff's prima facie claim is made out.

But the defendant sets up in himself what he claims to be an older and a better record title than the plaintiff's. This begins with a warranty deed dated March 22, 1788, from the Commonwealth of Massachusetts through a committee of the General Court appointed under resolves dated October 24, 1783 and November 6, 1783, to John C. Jones and others, followed by a warranty deed from Rufus K. Porter, agent for Proprietors John C. Jones and others to William Mitchell, dated September 19, 1843, both deeds conveying the tract in question and much more follows by a deed from Corris Leighton purporting to be one of the children and heirs at law of William Mitchell to John V. Sawyer and Oscar W. Look, dated December 19, 1903. The description in this last deed reads as follows:

"A certain tract of land (if any such title should exist at this time) situated in the town of Jonesport, and formerly known as the 'Mitchell Block,' being a surplus or gore piece, lying westerly and at the rear of the 'settlers' and shore lots, and sometimes known as the 'heater piece.' "

If there are no defects in this chain the defendants Sawyer and Look have an undivided interest in the premises and that interest is older and better than the plaintiff's.

The plaintiff attacks this record title on two points. First, he says there is no evidence that the Legislative Committee executing the deed in behalf of the Commonwealth of Massachusetts had in fact any power or authority to make the conveyance. True, no extraneous evidence was offered to prove such authority, but the deed itself recites that the authority was given by two Legislative resolves, dated respectively October 24, 1783, and November 6, 1783. Those resolves are a matter of public record and at the time of their passage the land in question was within the jurisdiction of Massachusetts, as it was thirty-seven years before the separation and organization of the State of Maine. The deed executed by the committee covered a large part of the unappropriated lands in the then county of Lincoln, its consideration was about twenty-five thousand dollars, it was at once recorded in the county of Suffolk, and later upon the incorporation of the county of Washington, was recorded in the first volume of deeds recorded in that county. Moreover not a little weight is to be attached to the fact that the parties who executed the deed were public officers and the official act of itself has some force. A presumption of correctness attaches to official proceedings and when those proceedings have stood unimpeached for over a century and have been recorded in the public archives of two States, we do not think they should be set aside without positive proof of their invalidity. *Chandler* v. *Wilson*, 77 Maine, 76, 81.

Second. The plaintiff contends that there is no evidence that Corris Leighton was one of the children and heirs at law of William Mitchell, except the recital in the deed, but in answer to questions put by plaintiff's counsel on cross examination, the defendant Look testified that after discovering from the records that one Cumings from whom he had taken a deed had no title, he obtained a deed from the Mitchell heirs and that Corris Leighton was one of those heirs.

It therefore follows that the question of adverse possession being eliminated and only that of the better record title remaining, on this issue the defendant prevails and the ruling of the presiding Justice was without error.

Exceptions overruled.

INHABITANTS OF EDEN *vs.* INHABITANTS OF SOUTHWEST HARBOR.

Hancock. Opinion December 4, 1911.

Paupers. Statutes. Repeal by Implication. Persons Quarantined. Liability of Towns. Statute, 1821, chapter 127, section 1; 1883, chapter 123, section 27; 1909, chapter 25, section 2; chapter 55. Revised Statutes, chapter 18, section 51.

The phrase "town to which he belongs" within Revised Statutes, chapter 18, section 51, providing for the furnishing of nurses, etc., to a quarantined person at the charge of the town to which he belongs, means the town in which he has his pauper settlement.

To effect a repeal by implication, a later statute must be so clear and explicit as to show that it was intended to cover the whole subject-matter, and displace the prior statute, or the two must be plainly repugnant and inconsistent.

Revised Statutes, chapter 18, section 51, providing that nurses and their assistants and necessaries furnished a quarantined person shall be at his charge, or that of his parents or master if able, and otherwise, at that of the town to which he belongs, was not repealed by implication by Public Laws 1909, chapter 25, section 2, providing that expenses, including supplies of food, medicines, etc., furnished a quarantined person, or such part thereof as the board of health may determine, shall be deemed a legitimate expenditure for the protection of the public health, and shall be charged to the account of incidental expense of the town, but not to any pauper account, and that no person so quarantined and assisted shall be considered a pauper. The former statute is designed to divide the expenses, so that the part designed to protect the community where the infected person is found should be borne by that town, and the part incurred for his healing and comfort should be borne by the patient or by the town of his settlement, while under the latter statute both kinds of expenditures for indigent persons are grouped together, and it is left to the board of health to determine how much shall be borne by the town of the settlement, and how much by the town where the quarantined person is found.

Under the express terms of Public Laws 1909, chapter 55, a town furnishing antitoxin to an indigent person is entitled to reimbursement by the town of his settlement.

Under Public Laws 1909, chapter 25, section 2, providing that expenses of a quarantined person or such part thereof as the board of health may determine shall be charged to the account of incidental expenses of the

town, etc., the determination by the board of health of a town where nurses, necessaries, etc., were furnished persons having their pauper settlement in another town, that the expenses should be paid by the town of settlement, renders the latter town liable.

On an agreed statement of facts. Judgment for plaintiffs.

Action by the town of Eden against the town of Southwest Harbor to recover for supplies and services furnished certain persons infected with diphtheria, said persons having their settlement in the defendant town, though found in the plaintiff town when said supplies and services were furnished, brought under Revised Statutes, chapter 18, section 51. Writ dated March 8, 1911.

The declaration in the writ is as follows:

"In a plea of the case, for that the said defendant at said Eden, to wit Ellsworth, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of one hundred ninety-five dollars and four cents, according to the account annexed, then and there in consideration thereof, promised the plaintiffs to pay them the same sum on demand:

"Bar Harbor, Me., Dec. 12, 1910.

Town of Southwest Harbor,

To Town of Eden, Dr.

To supplies and services furnished George Marshall and family as follows:	
To medical services rendered by Dr. J. H. Patten,	$65.00
" " " " Dr. R. G. Higgins,	2.00
" services as undertaker and necessaries for funeral of child Eugene Marshall, rendered and furnished by F. E. Sherman,	61.43
" Groceries,	10.21
services hauling water, ice, and supplies rendered by Ralph Brewer,	13.20
fumigating,	10.00
To antitoxine,	$ 2.20
" team hire,	10.00
" services as nurse rendered by Mrs. Susie J. Sullivan,	21.00
	$195.04

"Also in a plea of the case, for that on the thirteenth day of August, 1910, one George Marshall and his family, consisting of the following named persons, to wit: George Marshall, Villa A. Marshall and Eugene Marshall, had their legal settlement in the defendant town, which said legal settlement in said defendant town has continued ever since; and on said 30th day of August at said Eden, said George Marshall and his family had recently been and then were inflicted with diphtheria, a disease and sickness dangerous to the public health; and thereupon the local board of health of the town of Eden in which town said Marshall and his said family were then living, provided for the safety of the inhabitants as they, the said board of health, thought best, by removing them to a separate house, viz, to the isolated hospital, so called, in the said town of Eden, said removal not being dangerous to their health; and by providing medicines, medical attendance and necessaries to the amount of one hundred ninety-five dollars and four cents ($195.04) as specified in the account annexed hereto; and neither the said George Marshall nor his said family nor the parent or master of either, was or is able to repay said charge; of all of which said defendant town then and there had notice, and said defendant town by virtue of the statute then and there became liable and promised the plaintiff to pay it said sum of one hundred ninety-five dollars and four cents on demand."

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

The agreed statement of facts is as follows:

"On Aug. 30, 1910, and ever since that date Geo. Marshall and his family, said family consisting of said Geo. Marshall, his wife Villa A. Marshall and his child Eugene Marshall, have had their legal settlement in the defendant town.

"On said date said Geo. Marshall and his family aforesaid were residing in the plaintiff town and were and had recently been infected with diphtheria, a disease and sickness dangerous to the public health. On said Aug. 30, 1910, and other days between said date and Sept. 13, 1910, the local board of health of the plaintiff town, being the town where said Marshall and his family

aforesaid then were, for the purpose of providing for the safety of the inhabitants, the said local board of health thinking it best to do so, removed said Marshall and his family aforesaid to a separate house to wit: To the isolated hospital, so called, in said plaintiff town, and on said Aug. 30 and other days up to and including Sept. 13, 1910, the plaintiff provided for said Marshall and his family aforesaid at said hospital, nurses and other assistants and necessaries as set forth in the account annexed to the writ; the removal to the isolated hospital, above referred to was done without great danger to the health of the persons removed. Neither said Geo. Marshall nor his family aforesaid, nor the parent or master of either was or is able to pay said charges.

"On the 12th day of December, 1910, the secretary of the local board of health of the plaintiff town by order of said board wrote and mailed to chairman of the board of selectmen of the defendant town a letter enclosing the bill in suit except the last item thereof, said letter being in the form following:

'Bar Harbor, Me., Dec. 12, 1910.

Chairman of Board of Selectmen,
Southwest Harbor, Me.

Dear Sir: We are sending you bill for the George Marshall family. His boy having been sick and died with diphtheria. This is the actual money paid out and no cost of the board of health services added to it.

Hoping that you will send us your check not later than the 20th, as our books close January 1st, and we want these accounts all in if possible.

Yours very truly,
(sgd) J. Alden Morse,
Sec'y Board of Health.'

"This letter was received by chairman of the selectmen of the defendant town Dec. 14, 1910, the items set forth in the account annexed, so far as the plaintiff town is entitled to recover, are suitable in character and charges therefor are reasonable and proper,

and if the plaintiff is entitled to recover it may recover the amounts specified in the writ: The writ and declaration shall be printed and form a part of the agreed statement.

"It is also agreed that the said defendant town duly filed its offer to be defaulted for the sum of two dollars and twenty cents for the antitoxin charged in the account annexed and that said offer was rejected."

Charles H. Wood, and Deasy & Lyman, for plaintiffs.

George R. Fuller, and Hale & Hamlin, for defendants.

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

CORNISH, J. August 30, 1910, the local board of health of Eden, the plaintiff town, quarantined one Marshall and his family as persons infected with a contagious disease, and provided for them "nurses and other assistants and necessaries." (R. S., ch. 18, sec. 51.) Mr. Marshall and his family, though then commorant in Eden, had their pauper settlement in the defendant town, South West Harbor, and were unable to pay for the services and supplies thus furnished them. Accordingly the town of Eden brought this action against the town of South West Harbor to recover for the expenses of such services and supplies under the statute, R. S. (1903) ch. 18, sec. 51, which provides that the "nurses and other assistants and necessaries" furnished a quarantined person shall be "at his charge, or that of his parent or master, if able; otherwise at that of the town to which he belongs." It is conceded that the phrase "the town to which he belongs" is meant the town in which he had his pauper settlement. *Kennebunk* v. *Alfred*, 19 Maine, 221; *Hampden* v. *Newburgh*, 67 Maine, 370. It is further conceded that the plaintiff can recover for the items and amounts sued for if the right of action given by that statute was not taken away by the later statute, Public Laws of 1909, ch. 25.

The later statute does not in terms take away the right of action given by the earlier and the repeal if accomplished, must be by implication. But to effect a repeal by implication the later statute

must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute or the two must be so plainly repugnant and inconsistent that they cannot stand together. *Goddard* v. *Boston*, 20 Pick. 407; *Smith* v. *Sullivan*, 71 Maine, 150; *Staples* v. *Peabody*, 83 Maine, 207.

The court will if possible give effect to both statutes and will not presume that the legislature intended a repeal. *Diver* v. *Keokuk Savings Bank*, 126 Iowa, 691, 102 N. W. 542.

"As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable." Sutherland on Damages, page 152.

A critical comparison of these two statutes under consideration dissipates any apparent repugnancy. The act of 1909 simply amends the last ten words of R. S., ch. 18, sec. 51. All the rest of the section remains unchanged. To make this clearer: The earlier statute R. S., ch. 18, sec. 51, is as follows:

"When any person is or has recently been infected with any disease or sickness dangerous to the public health, the local board of health of the town where he is, shall provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses and other assistances and necessaries, at his charge or that of his parent or master if able; otherwise, at that of the town to which he belongs."

The later statute, Pub. Laws 1909, ch. 25, sec. 2, is as follows:

"All expenses including all supplies of food and medicine, including antitoxin, incurred in carrying out the provisions of section one of this act, or incurred in furnishing families or persons affected with tuberculosis with burnable spitcups, or other supplies needed to prevent the spread of infection, *or such part thereof as the board may determine*, shall be deemed a legitimate expenditure for the protection of the public health and shall be charged to the account

of incidental expenses of the town, but not to any pauper account, nor shall any person so quarantined and assisted, be considered a pauper, or be subject to disfranchisement for that cause unless such persons are already paupers as defined by the Revised Statutes."

This later statute was, in effect, further amended at the same session of 1909, by the passage of chapter 55, which provides, among other things, that "the local board of health in any town furnishing an indigent residing in another town antitoxin, upon application shall be reimbursed by the town where the patient resides." The word "resides" in this statute is evidently used in the same sense as "belongs" in R. S., ch. 18, sec. 51, that is, the town where the indigent has his pauper settlement.

The right of action named in section 51 of chapter 18 of the Revised Statutes was provided for at the organization of the State, by section 1 of chapter 127 of the Public Laws of 1821, and it has come down through all the revisions of 1841, 1857, 1871, 1883, 1903, in essentially the same form, except that prior to 1887 the municipal officers were charged with the duty which since that time has devolved upon the local board of health; 1883, ch. 123, sec. 27. It has never been one of the pauper statutes, enacted for the relief of the poor. That matter lay wholly in the control of the overseers of the poor who were and are obliged to follow certain statutory requirements as to notices, etc., in order to recover from the town of the pauper's settlement. But in case of an infectious disease or one dangerous to the public health, at first the municipal officers and later the local board of health were given these powers and duties in order not merely to relieve the patient, but "to provide for the safety of the inhabitants." The assistance rendered and the expenses incurred are in no sense pauper supplies. They need not be applied for by the pauper himself nor by some one authorized by him, and no notice need be given to the town where the patient has his pauper settlement. The municipal officers and later the local board of health had full power to act when the emergency arose and it was outside the jurisdiction of the overseers of the poor.

But this court in *Kennebunk* v. *Alfred*, 19 Maine, 221, in construing the original statute, held that there should be a division of expenses, that part of the authorized expense was designed wholly for the protection of the community and should be borne by the community, while another part was for the healing and comfort of the patient and should be borne by the patient if financially able, otherwise by the town of his settlement.

Now the effect of chap. 25 of the Laws of 1909, is simply to change the last clause of section 51, touching those persons who might not be able to pay, the indigent persons, and to make the town where such persons fall sick, liable for all the expenses, including those designed to prevent the spread of the disease and those for the comfort of the patient, "or such part thereof as the board may determine." Without that clause the town furnishing the supplies would be liable for all the expense, but with it, the effect is to give the local board the power to charge a part or the whole to the town of settlement.

In other words, under the old statute as construed in the decision before referred to, expenditures for food for indigent persons were chargeable to the town of settlement, but expenditures for protection of the public health must be borne by the town supplying them. Under the new statute, all kinds of expenditures for indigent persons are grouped together, and it is left to the board of health to decide how much shall be borne by the town of settlement and how much by the town where found. This new act does not restrict the power of the board under R. S., c. 18, sec. 51, to remove the sick and place them in quarantine. They still have that power. Nor does it abridge their power to collect all the expenses from the person himself if able. They still have that power and as to those persons there never has been any division of expenditures. They were liable for the whole or nothing. But if the person is indigent then the new act prescribes a change, and instead of dividing the expenses along the line that separates personal relief from public protection, and collecting the former from the town of settlement and compelling the latter to fall upon the town rendering the services, it groups all kinds of expenses in one class and leaves to the board of

health the determination how much if anything shall be borne by one town and how much if anything by the other. In short it substitutes the judgment of the board of health for the arbitrary rule of law laid down in *Kennebunk* v. *Alfred*, supra.

This is subject to one exception, however, which was made later by chap. 55 of Public Laws of 1909, which provides that for antitoxin furnished an indigent person the town furnishing shall be reimbursed. Antitoxin then shall be charged to the town of settlement, but all other expenses shall be charged according to the determination of the board of health.

True, it may be argued that in practice, the board will invariably charge all expenses to the other town and thereby relieve their own town from all liability. This may be so, but the Legislature has seen fit to place the power in their hands, evidently relying upon their judgment, honesty and sense of fairness, and it is not for the court to assume that the confidence has been misplaced. If experience proves that fact, it is within the power of the Legislature to remedy the difficulty by statutory enactment.

The record in this case shows that the board of health of Eden considered the matter and demanded of the defendant town the amount actually paid out with no cost of services of the board.

It follows that the certificate of decision must be,

Judgment for plaintiffs.

HELEN A. MULLEN *vs.* EASTERN TRUST AND BANKING COMPANY.

Penobscot. Opinion December 4, 1911.

Mortgages. Bonds. Trustees. False Certification. Liability of Trustee. Deceit by Trustee. Measure of Damages.

In an action of deceit against a defendant trust company, trustee in a trust mortgage, for falsely certifying an overissue of bonds, two of which of the par value of $500 each were purchased by the plaintiff from the mortgagor,

Held: 1. That it is sufficient if the plaintiff prove that the defendant made false representations, with the intent that the plaintiff as one of the purchasing public should rely and act upon them, or in such a manner as would naturally induce her to act upon them, that the representations were material, that being matters susceptible of knowledge, they were made as of facts of its own knowledge, that the plaintiff was induced thereby to purchase an invalid and worthless bond and that she was deceived and injured. Wilful fraud need not be proved.

2. That the certificate in this case to the effect that "the undersigned, trustee, named in the within bond and in the mortgage therein referred to, hereby certifies that said mortgage has been delivered to it as trustee and this bond is one of a series of one hundred bonds secured thereby" was untrue in fact, as no mortgage had ever been delivered to the trustee to secure these bonds in question and there was no series of one hundred bonds secured by any mortgage whatever. The valid series secured by the trust mortgage consisted of only ninety bonds.

3. That it is the duty of the certifying trustee to ascertain the facts, as its certificate is no merely formal matter but goes to the very essence of each bond. It guarantees not the value or sufficiency of the property behind the bond, but the validity of the bond itself as a legal instrument and the fact that it is secured by the trust mortgage. It makes false certificates at its peril.

4. That, it appearing that the certificate was false in fact and that the plaintiff relied upon the certificate in purchasing the bond, she is entitled to recover in this action.

5. That the measure of damages is the difference between the value of the bonds in question at the time of purchase and their value if they had been as represented. Being one of ten unauthorized and overissued bonds they were invalid and worthless. The evidence shows that if they had

been as represented they would have been worth par in the market at that time. The plaintiff paid par for her bonds and other bonds were sold at or about the same time at the same price. The fact that the company became insolvent and passed into the hands of a receiver seven years after these bonds were issued, and that the holders of valid bonds who kept them till that time received only fifty-eight per cent in final settlement does not outweigh the estimate put upon the value of the bonds at the time and shortly after their issue.

On report. Judgment for plaintiff.

Action of deceit against the defendant corporation, the trustee in a certain trust mortgage given to it by the Ounegan Woolen Company, a corporation, for falsely certifying certain bonds, purporting to have been issued by said Woolen Company, as secured by said mortgage.

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

"1. That it never declared to the plaintiff nor to any one representing her, that it was the owner or holder of the two bonds referred to in plaintiff's writ and which plaintiff declares were purchased by her of said defendant, and that it did not request the plaintiff to purchase said bonds of it.

"2. That the plaintiff did not bargain with the defendant to buy of it nor did the plaintiff buy of the defendant the said two bonds, upon the terms or in the manner alleged, and the defendant denies that plaintiff paid it one thousand dollars, or any other sum, for said two bonds as plaintiff alleges she did."

At the conclusion of the evidence, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Joseph F. Gould, for plaintiff.

E. C. Ryder, for defendant.

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

CORNISH, J. Action of deceit against the defendant, the trustee in a certain trust mortgage, for falsely certifying certain bonds as secured thereby.

This raises the question, novel in this state, as to the legal liability of a banking corporation in certifying trust bonds.

It appears in the case at bar, that the stockholders of the Ounegan Woolen Company on August 3, 1899, voted to authorize the directors "to raise funds for the use of the Company by the issue of bonds to an amount not exceeding fifty thousand dollars, to be secured by mortgage upon the mill property of the Company, the rate, time and all unspecified details of the bonds and mortgage to be left with the directors."

On August 22, 1899, the directors in pursuance of this authority from the stockholders voted "to issue ninety bonds of the denomination of five hundred dollars each, all payable to the Eastern Trust and Banking Company, trustee, or bearer, in ten days from the date thereof, dated September 1, 1899, &c." The mortgage provided that a certificate of the following tenor signed by the trustee should be endorsed upon each bond.

"TRUSTEE'S CERTIFICATE."

"The undersigned, trustee named in the within bond and in the mortgage therein referred to, hereby certifies that said mortgage has been delivered to it as trustee, and this bond is one of the series of ninety bonds secured thereby.

Eastern Trust & Banking Company, Trustee.

By Secretary."

Each bond also provided as follows;

"This bond shall not become obligatory until it shall have been authenticated by certificate endorsed hereon of said Eastern Trust and Banking Company, Trustee, above named."

The mortgage was duly executed, the ninety bonds of five hundred dollars each, numbered from one to ninety, and aggregating $45,000 were duly executed by the officers of the Woolen Company, duly certified by the trustee and sold. No question is raised as to the validity of these bonds or of the trust mortgage securing them.

Later, ten other bonds, each of the par value of five hundred dollars, numbered from 91 to 100 inclusive, and in all respects like the original ninety, except that they purported to be of a series of one hundred bonds, were placed upon the market. They were duly signed by the officers of the Woolen Company and on the back of each was the following certificate signed by the defendant.

"TRUSTEE'S CERTIFICATE."

"The undersigned, trustee, named in the within bond and in the mortgage therein referred to, hereby certifies that said mortgage has been delivered to it as trustee and this bond is one of the series of one hundred bonds secured thereby.

Eastern Trust & Banking Company, Trustee.

By G. B. Canney, Secretary."

The plaintiff, through her husband, as her agent, in November, 1901, purchased two of these bonds, Nos. 93 and 94, from A. H. Brown who was the Treasurer of the Woolen Company and also Manager of the Old Town branch of the Eastern Trust and Banking Company.

Interest was paid upon these spurious bonds during five years, the last coupon being met on September 1, 1906. Soon after that time the Woolen Company became insolvent and its affairs were settled up by the defendant as receiver. It was then that the plaintiff was informed of the overissue and discovered that her bonds were void and she made demand upon the defendant for repayment the last of December, 1906.

The plaintiff introduced evidence to show that in the sale of the bonds, Mr. Brown was acting for the Trust Company and not for the Woolen Company, but we deem this contention immaterial. The basis of recovery is the false representation contained in the trustee's certificate and whether the purchase was made directly from the trustee or from the Woolen Company cannot affect the rights of the parties.

What duty did this trustee owe to the purchasing public in certifying these bonds and has there been a breach of that duty?

It is apparent that such certificate is no merely formal matter. It goes to the very essence of each bond and no bond is binding until it is thus authenticated. The certificate is the royal stamp that makes it not only current but valid. Its purpose is to guarantee, not the value or sufficiency of the property behind the bond, but the validity of the bond itself as a legal instrument and the fact that it is secured by the trust mortgage. It is made with the full understanding and expectation that it is to be acted upon and relied upon by all would be purchasers, and therefore it is the duty of the trustee to ascertain the truth of the facts to which it certifies. It makes false statements at its peril. All the necessary sources of information are accessible to it and it is compensated for its services. In this case the fee was one hundred dollars for certifying the ninety bonds. Under these circumstances the responsibility rests upon the trustee to authenticate no bond that should not be authenticated and to ascertain that all the statements in the certificate are true in fact.

It cannot be denied that the certificate on the two bonds in suit was untrue. No mortgage had ever been delivered to the trustee to secure these bonds and there was no series of one hundred bonds secured by any mortgage whatsoever. Their issue had never been authorized by the directors. All these facts could have been ascertained, and the invalidity of the bonds have been established by a slight examination of the Woolen Company's records on the part of the defendant. Instead, its approval and guaranty are endorsed upon the bonds and the purchasing public are thereby misled to their damage. What element of false representation, within the legal meaning of that term is lacking? We see none. Mr. Mullen, the plaintiff's agent, testified that before making the purchase, he examined the trustee's certificate upon the bonds and would not have purchased them except for that certificate. Wilful fraud need not be proved. It is sufficient if the plaintiff prove that the defendant made false representations, with the intent that the

plaintiff as one of the purchasing public should act upon them or in such a manner as would naturally induce her to act upon them, that the representations were material, that being of matters susceptible of knowledge, they were made as of a fact of its own knowledge, that the plaintiff was induced thereby to purchase an invalid and worthless bond, and that she was deceived and injured. This is the accepted rule in this State. *Braley* v. *Powers*, 92 Maine, 203; *Atlas Shoe Co.* v. *Bechard*, 102 Maine, 197; *Banking Co.* v. *Cunningham*, 103 Maine, 455. All these requirements, the plaintiff in the case at bar has met and her right of action is clearly established.

The learned counsel for the defendant contends that even if the trustee is prima facie liable, that liability is limited by the express stipulation in the trust mortgage that "the trustee may act by agents or attorneys and shall not be responsible for their acts or omissions, but shall be bound to use due care in their selection and retention." This provision was not intended to refer in any way to the act of the trustee in authenticating the bonds. It is found in the article which prescribes the duties and powers of the trustee if it takes possession of and manages the trust property in case of foreclosure proceedings or any breach of the conditions of the mortgage. It has no application to and therefore in no way limits or affects the responsibility of the trustee in certifying the bonds to secure which the mortgage was primarily given. This view is confirmed by the provision in the latter part of the same article that prior to its being called upon to take possession of the property, "its sole duty is confined to certifying the bonds as of the series mentioned herein." The breach of this last duty is the cause of complaint here. The cases cited by the learned counsel for the defendant are in harmony rather than in conflict with the conclusion here reached.

In *Bauernschmidt* v. *Maryland Trust Co.*, 89 Md. 507, 43 At. Rep. 790, the certificate was true in fact, because the bonds certified were a part of the legal series and were secured by the mortgage, but the plaintiff contended that the certificate went further and constituted in effect a warranty of the sufficiency of the mortgaged

premises, and guaranteed not only that the bonds were legally and formally but financially and actually secured by the mortgage. The court of course refused to so hold. The opinion concedes all the liability which the plaintiff in the case at bar invokes.

"It was not contended in this case, nor do we suppose it could be successfully contended, that the certificate here relied on can be construed as constituting a warranty of the sufficiency of the mortgaged premises as security for the bonds mentioned in the mortgage. . . . . The certificate identifies the bonds on which it is placed as one of the series of bonds mentioned and described in the mortgage, and that it was secured by mortgage. . . . . But it has never been understood here, or elsewhere, so far as we are informed, that a trustee, under a mortgage like the one before us, creating, as it does, a mere trust to certify the bonds, did more by the form of certificate adopted than to thereby identify them as the bonds of the company which the mortgage was executed to secure."

In *Tschetinian* v. *City Trust Co.*, 186 N. Y. 432, the certificate read "this bond is one of a series of bonds numbered and described in the mortgage referred to." This was true in fact but the plaintiff claimed that this certificate was comprehensive enough to guarantee that they were first mortgage bonds, the mortgagor having endorsed "First Mortgage Bond" on the back of each. The court held, however, that the certificate simply identified the bonds and assured the purchaser that they were entitled to the benefits afforded by the mortgage, but did not guarantee the nature or the extent of the security. The distinction is clearly made in the opinion in these words:

"The language employed when interpreted in its natural and ordinary meaning simply amounts to a statement identifying the bond whereon it is written as one of those mentioned in the mortgage and the effect of this is an assurance to the purchaser that his bond is amongst those entitled to the benefit and protection afforded by such mortgage. But the statement does not upon any reasonable construction in the absence, as in this case, of any allegation of fraud or deceit active or passive, make the trustee a guarantor of

the quality and extent of the security given by the mortgage or responsible for the accuracy of statements indorsed by the mortgagor purporting to describe the nature of such security."

It remains to consider the question of damages. We see no reason why the ordinary rule adopted in this State and Massachusetts should be departed from, viz., the difference between the value of the bonds in question at time of purchase and their value if they had been as represented. *Wright* v. *Roach*, 57 Maine, 600; *Thoms* v. *Dingley*, 70 Maine, 100; *Whiting* v. *Price*, 172 Mass. 240.

The first element is fixed. They were worthless because void. What does the evidence show they would have been worth at that time if as represented? The price at which they sold has probative force. *Norton* v. *Willis*, 73 Maine, 580. The plaintiff paid par for her bonds and Mr. Cassidy the president of the company took six of them aggregating $3000 at the same figure, assuming that they were valid. This is strong evidence of what the bonds were worth at that time. Moreover interest continued to be paid upon them for five years after their purchase, tending to show that the financial condition of the company continued sound for a considerable period at least.

The only evidence tending to diminish the value is the fact that finally the company became insolvent and had the bonds been valid and had the plaintiff seen fit to keep them she would have received on receivership settlement only fifty-eight per cent of the face value. Subsequent events may be introduced as throwing light back upon a previous condition but their value depends upon their nearness to the principal event, and the fact that a manufacturing corporation, whose success is so largely a matter of personal management and of general business conditions, is obliged seven years after bonds are issued to pass into the hands of a receiver, ought not to outweigh the estimate put upon the value of those bonds at the time or shortly after their issue, by shrewd business men who should have been acquainted with the exact situation. Upon the evidence in this case we think it fair to conclude that in November 1901, when

these bonds were purchased the valid five per cent bonds of the Woolen Company were worth par, and as those belonging to the plaintiff were worthless, the entry should be,

Judgment for plaintiff for $1000 and interest from January 1, 1907.

HATTIE F. BARD *vs.* FIREMAN'S INSURANCE COMPANY.

Aroostook. Opinion December 5, 1911.

Insurance. Cancellation of Policy. Notice. Waiver. Proof of Loss. Statute, 1905, chapter 158. Revised Statutes, chapter 49, section 4, paragraph VII.

In the absence of consent or of waiver on the part of the insured, an agent has no power to cancel a policy of fire insurance except in the manner provided therein.

Where a policy provided for cancellation by the company after ten days from written notice, a verbal request by the agent for immediate cancellation and surrender is of no effect.

Tender of return of unearned premium under a fire policy after a loss cannot be relied upon under a provision entitling the insurer to cancel the policy on written notice and return of unearned premium.

A "waiver in pais" is a voluntary relinquishment of a known right.

Insured did not waive provision requiring insurer to give notice and tender return of unearned premium before cancelling the policy through having surrendered the policy where she did not know of such provision, and made the surrender on insured's agent's assurance that the insurance was already canceled, and that other insurance would be substituted.

Under Public Laws 1905, chapter 158, requiring proof of a fire loss to be made within a reasonable time, in determining whether a delay from November 24th to December 28th was reasonable, the conditions surrounding insured could be considered, including the facts that she had been led to believe by insurer's agent that the insurance had been validly canceled.

On motion and exceptions by defendant. Overruled.

Assumpsit on a policy of fire insurance issued to the plaintiff for a term of two months on certain starch owned by the plaintiff and

which was destroyed by fire within the two months. Plea, the general issue with a brief statement alleging that "the insurance policy described and declared upon in the plaintiffs writ was cancelled and surrendered by mutual agreement long before the fire mentioned in said writ and causing the loss complained, occurred." Verdict for plaintiff for $628.18. The defendant filed a general motion for a new trial and also excepted to several rulings made during the trial.

The case is stated in the opinion.

Powers & Guild, for plaintiff.

Madigan & Madigan, and Leonard A. Pierce, for defendant.

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

CORNISH, J. This is an action of assumpsit on a policy of insurance dated October 4, 1909, and issued to the plaintiff for a term of two months. The premium was paid on October 26, 1909. The property insured was destroyed by fire November 24, 1909, and proof of loss, dated December 20, 1909, was filed with the defendant December 28, 1909. The plea was the general issue with a brief statement that the policy was cancelled before the fire.

The presiding Justice ruled as a matter of law upon the evidence that the policy had not been cancelled and he submitted to the jury the determination of the single issue whether under all the circumstances of the case the plaintiff had furnished to the defendant a proof of loss within a reasonable time after the fire. The case is before this court on defendant's exceptions to the ruling of the presiding Justice on the question of cancellation, to certain instructions in regard to the proof of loss and also on a general motion for new trial on the ground that the verdict is against the evidence.

The evidence on cancellation is briefly this. The plaintiff testified that not long after receiving the policy, Mr. Perry, the defendant's agent through whom she had placed the insurance, telephoned her that he had received instructions to cancel the policy immediately and requested her to forward it to him. She replied that it did not

seem to her that he had a right to do this, and after some argument she refused to comply with his request. This conversation Perry does not deny.

On October 26th, Perry called at the plaintiff's home and asked to see four other policies that had been issued, and then took the policy in question and said that the plaintiff might as well sign it as he had cancelled it. She demurred and expressed a doubt as to his right to do this and asked, "Can you cancel that if I do not sign it?" to which he replied, "I certainly can. It is already cancelled. It is merely a matter between you and the company about this paper. I have done my duty; I have cancelled it." He then took the policy into his possession and the plaintiff asked if he could procure other insurance for her and he said he saw no reason why he could not, but that he was unable to write any policy that day because he had no blanks. It is admitted that he procured no other insurance.

Perry's version of the interview of October 26, differs somewhat though not on vital points from the plaintiff's. He says that she was not willing to have this policy cancelled unless he gave her another but he told her that he was obliged to cancel it and she finally said, "well if you have got to cancel it, why I don't suppose I can help it." He admits that he said nothing to her about her right to have ten days' written notice of cancellation, that she did not mention it, and that so far as he knew, she had no actual knowledge of that right although he himself was aware of it, and she positively and as we think truthfully, asserts that this was her first experience in matters of insurance, as her husband prior to his death had always attended to it and that she did not know that Perry did not have the power that he claimed to exercise. This brief summary gives a fair picture of the situation.

1. CANCELLATION.

The burden of proving a legal cancellation in one of three ways rested upon the defendant.

First. It could be effected by mutual agreement, like the rescission of any other contract. That is not this case.

Second. It could be brought about at any time at the request of the insured, R. S., ch. 49, sec. 4. That was not done here.

Third. It could be effected by the company against the wish of the insured, and that was the action taken here, by only one method and that is the method prescribed in the policy itself. "The company also reserves the right after giving written notice to the assured . . . . and tendering to the insured a ratable proportion of the premium, to cancel the policy as to all risks subsequent to the expiration of ten days from such notice."

Two conditions precedent must be complied with, ten days' notice in writing and payment or tender of the unearned premium. The reason of these conditions is self evident; the former is designed to give the assured a reasonable time in which to procure other insurance, and the latter to place the parties in statu quo as in all other cases of rescission of contract. Neither of these requirements was met here. The only request by the agent was verbal and that for immediate cancellation and surrender, and although the assured protested against the proposition and begged the agent to procure other insurance, the protest and the request were both ignored and the agent arbitrarily cancelled the policy on the next day after he received it. The failure to comply with this condition is fatal. *Clark* v. *Insurance Co.*, 89 Maine, 26, 32.

So far as repayment or tender of the unearned premium was concerned, that was not even mentioned by the agent when the attempted cancellation took place. After the fire, however, in settling a loss under another policy the company added twelve dollars for return premium on the policy in question, which amount the insured subsequently tendered back to the agent but he refused to accept it. This return of premium by the company in itself less than was due, came too late. The fire had already occurred and as this condition had not been complied with, the policy was still in force. The tender is precedent to the right of cancellation. *Insurance Co.* v. *Botto*, 47 Ill. 516; *Insurance Co.* v. *Cameron*, 18 Tex. Co. App. 237, 45 S. W. 158; *Mohr Distilling Co.* v. *Insurance Company*, 13 Fed. Rep. 74; *White* v. *Insurance Co.*, 120 Mass. 330.

2. WAIVER.

The defense of waiver of these conditions by the plaintiff is not available to the defendant.

It is familiar law that a waiver in pais is the voluntary relinquishment of a known right. This was the involuntary surrender of an unknown right. Even from the agent's own testimony the policy was returned to him under protest, a protest that began when the subject was first broached by telephone and continued until the very end of the personal interview. It was in effect an enforced surrender. The agent gave the plaintiff to understand that he had already cancelled the policy and that she was obliged to turn it over. To permit this would be to allow what the standard policy of Maine and the statute positively forbid, viz., to arbitrarily and immediately put an end to the protection which the assured has against loss by fire. The agent was familiar with the requirements of the statute but he studiously avoided mentioning to the assured either her right to a ten days' written notice or the return of the premium, and that she was ignorant of these rights is apparent. It is true that she had the policy of insurance in her possession for about three weeks and parties may ordinarily be presumptively held to know the contents of a written contract into which they have entered. But this is not a conclusive presumption. If it were, the requirement as to ten days' notice would be nugatory in a large majority of cases. The presumption is merely one of fact and the evidence here is overwhelming that the assured was in fact ignorant of the provision. It must be remembered that as the issue arises in this case, the plaintiff is not basing a right of action upon her want of knowledge, but the defendant is basing its defense upon her knowledge, and that knowledge it has utterly failed to prove. The mere possession of the policy cannot overcome the positive testimony and the surrounding circumstances.

On the question of waiver, the case of *Rosen* v. *Insurance Co.*, 106 Maine, 229, is decisive of the case at bar. The legal principles there announced are equally applicable here.

3. Instructions Upon Furnishing the Proof of Loss.

As originally enacted the Maine Standard policy required the assured to render his proof of loss "forthwith." R. S., ch. 49, sec. 4, par. VII.

By chap. 158 of the Pub. Laws of 1905, "within a reasonable time" was substituted for "forthwith." Evidently the Legislature intended that somewhat greater latitude should be allowed to the assured than would be naturally inferred from the more restricted word "forthwith" and that a reasonable time, considering all the circumstances of the case should constitute the true rule. The reason given here by the plaintiff for not furnishing the proof until December 20, was the fact that she had been led by the defendant's agent to suppose that the policy was cancelled and void at the time of the fire, and that she had no other idea until on December 19, she read in some newspaper the rescript of this court in the case of *Rosen* v. *Ins. Co.*, supra, that she at once consulted counsel and on the next day her proof of loss was made and executed. The presiding Justice instructed the jury that they might take these circumstances into consideration together with all the other circumstances of the case in reaching their conclusion. In this there was no error. It was a question of fact for the jury to determine and in deciding it they were at liberty to consider all the conditions surrounding the assured at the time when she was bound to act.

It is the opinion of the court that both the instructions and the verdict were correct.

Motion and exceptions overruled.

In Equity.

MOSES GIDDINGS et al., Trustees,

vs.

ELIZABETH GILLINGHAM, Admx., et als.

Penobscot. Opinion December 5, 1911.

Wills. Construction. Contingent Remainder. Vested Remainder. Bequests. Lapsed Legacies. Identity of Beneficiary.

Vested and contingent remainders are distinguishable, in that in the first there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate on expiration of the particular estate, and whose right to such remainder no contingency can defeat; while a contingent remainder depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all.

A will, after providing for the testator's widow during her life, directed that his property be placed in the hands of trustees, and that on the death of the widow the residue of the estate should be disposed of according to several clauses, specifying persons and institutions to whom payment should be made, and the respective amounts thereof. *Held*, that such clauses created contingent and not vested remainders.

A bequest, to be paid over as directed by testator's wife lapsed through her failure to exercise the power of disposition.

Legacies, payable on termination of a life estate, lapsed on death of the beneficiaries before termination of the life estate; the bequests being contingent.

A bequest to the "Baptist Theological Seminary situate in Newton" is good as a bequest to the "Newton Theological Institution;" that appearing to be the institution intended.

A bequest to the "Baptist Missionary Union of Foreign Missions" is good as a bequest to the "American Baptist Foreign Mission Society;" that appearing to be the society intended as beneficiary.

In equity. On report. Decree according to opinion.

Bill in equity brought by Moses Giddings and Franklin A. Wilson, surviving trustees under the will of Chapin Humphrey, late of Bangor, Maine, deceased testate, against Elizabeth B. Gillingham,

administratrix de bonis non with the will annexed of the estate of Marcia Humphrey, David G. F. Ward, Mabel T. Ward Saltus, John B. Ward, Ralph L. Ward, George F. Maxfield, James L. Gillingham surviving executors under the Will of Dana B. Humphrey, Dana B. Pratt, Elizabeth B. Gillingham, Elliott W. Crowell, administrator of the estate of Harriet Crowell, the Children's Home of Bangor, the First Baptist Church of Bangor, the Newton Theological Institution, the American Baptist Foreign Mission Society, the Maine Baptist Missionary Convention, the Maine Baptist Education Society and Arthur H. Isbell, to obtain a judicial construction of the will of the said Chapin Humphrey. Answers were filed by several of the defendants. The cause was heard by the Justice of the first instance, on bill, answers and proofs, and at the conclusion of the evidence the case was reported to the Law Court for determination.

The case is stated in the opinion.

John Wilson, for plaintiffs.

Charles H. Bartlett, for the Children's Home of Bangor.

Allen E. Rogers, for Newton Theological Institution, American Baptist Foreign Mission Society, Maine Baptist Missionary Convention, Maine Baptist Education Society, The First Baptist Church of Bangor.

James L. Gillingham, for Elizabeth B. Gillingham, administratrix, and James L. Gillingham, surviving executor.

Hugh R. Chaplin, for George F. Maxfield, Mabel T. Ward Saltus and Ralph L. Ward.

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

CORNISH, J. This is a bill in equity brought by surviving trustees to obtain a judicial construction of the will of Chapin Humphrey, who died in Bangor, November 30, 1874, leaving a widow, Lucy L. Humphrey and certain collateral kindred but no children. The will, which is voluminous and apparently drawn with great care, is dated May 21, 1870, and was duly probated in December, 1874.

Seven questions are propounded to the court but the answer to five involves a single issue, namely, whether the clauses giving rise to those questions created vested or contingent remainders. In order to comprehend the situation more intelligently, it is necessary to give a brief abstract of the provisions of the entire will, because the true construction must depend upon the intention of the testator and that must be gathered not from single or scattered paragraphs but from the whole instrument.

In the first paragraph the wife was given a life estate in the homestead with the income from an adjoining tenement and in case she desired to move to some other place, the trustees were authorized and instructed either to purchase for her another house at a cost not exceeding $20,000, or at her option to lease one at a rental not exceeding sixteen hundred dollars per year.

In the second paragraph the wife was given all the household furnishings and equipment of every kind.

By the third paragraph all the residue of the estate both real and personal was bequeathed and devised to Lucy L. Humphrey, Moses Giddings and Samuel Garnsey, trustees, to have and to hold the same in trust for the following uses and purposes, stated in an abbreviated form.

First. To pay to the First Baptist Society of Bangor, the sum of one hundred dollars per year during the lifetime of his wife, for the rent of the family pew.

Second. To pay to his unmarried sister Marcia Humphrey, an annuity of five hundred dollars during the lifetime of his wife.

Third. To pay to his wife an annuity of three thousand dollars.

Fourth. To pay at the decease of his wife and after the probate of her will the sum of twenty thousand dollars to such persons or institutions, if any, as she might designate in her will.

Then follow these words: "The main object of this will is to provide, first, for the maintenance and support of my wife in the same style and manner that she may be living in at the time of my decease."

This marks the end of what might be appropriately designated as the first division of the will. It relates to what is to be done by the

trustees during the lifetime of the wife and is concerned almost wholly with provisions for the comfort and maintenance of her who was, as he himself states, the immediate object of his solicitude and the recipient of his bounty.

Then begins the second division of the will, prescribing what shall be done with his estate when the life estate is ended, and introduced by these words:

"On the decease of my wife Lucy L. Humphrey, I direct the following disposition of the residue of my estate by my executors or administrators and the trustees under this will."

Then follow thirteen clauses marked A to M inclusive, specifying various persons and institutions to whom payments shall be made and the amount to each.

It is the construction of certain of these clauses, which will be considered seriatim hereafter, that the court is called upon to determine. Did they create a vested or contingent estate in the several remaindermen? In other words, did these remaindermen take an interest which vested at the death of the testator, the right of enjoyment being simply postponed, or was the vesting of the title itself postponed until the termination of the prior estate subsisting in the trustees during the life of the wife.

A careful examination of the entire instrument leads to the conclusion that it was clearly the intention of the testator to create by his will contingent and not vested remainders and the language was appropriate for this purpose both upon principle and authority. In reaching this conclusion we have not overlooked the familiar and oft quoted rule that remainders shall be deemed to be vested rather than contingent, if they can properly be so construed. *Woodman* v. *Woodman*, 89 Maine, 128. But this rule like all others evolved for the construction of wills is plastic and is designed to aid rather than to hinder in the correct determination of the one controlling factor, the intent of the testator. The general scope and purpose as well as the particular language of each instrument, viewed in the light of the circumstances known to the testator, are superior to all arbitrary rules. *Weston* v. *Weston*, 125 Mass. 268, 270; *Heard* v. *Reed*, 169 Mass. 216, 223; *Webber* v. *Jones*, 94 Maine, 429, 432.

It would be unprofitable to quote from or even to cite an ever increasing line of authorities stating in varying language the distinction between vested and contingent remainders. It is sufficient to restate the comprehensive, definition found in *Woodman* v. *Woodman*, 89 Maine, 128, adopting the language in Washburn Real Prop. Vol. 2, ch. 4, sec. 1, viz:

"The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect."

With this definition in mind, the reasons that have led the court to find the several bequests in the will under consideration to be contingent rather than vested, are based both upon the general scope and purpose of the will and also upon the particular language of the several bequests.

In considering the general scope and purpose of the instrument it will be found:

1. That the clear purpose of the testator was to have his estate converted into a single trust fund and that it should continue a unit during the life of his wife. Not only does he bequeath and devise the full legal estate both of real and personal property into the hands of his trustees, but he specifically provides for the segregation of his varied interests in these words:

"I direct that all my real estate, excepting said homestead and tenement adjoining, shall be sold at as early a day as is consistent with the interest of my estate, and that all my personal estate shall be sold at its market value, and all notes and other evidences of debt due me, shall be converted into money, and the proceeds thereof, together with all other receipts of money and incomes be invested in good dividend paying securities until the decease of my said wife Lucy L. Humphrey."

In his general scheme for the disposition of his property, which he had worked out carefully, the first step consisted in its reasonably prompt conversion by his trustees into a fund composed of safe dividend paying securities.

2. That during the life of his wife, this entire fund with the exception of the annuity of one hundred dollars to his church and of five hundred dollars to his sister Marcia, was to be so managed as to yield an income of three thousand dollars per year for her support, and in another clause it is expressly provided that in case the net income is not sufficient to pay all these annuities in full, the trustees shall sell such of his effects and property as they deem necessary to pay the same. The prime motive existing in his mind was an ample provision for his wife's comfort, and both principal and income could be devoted to that purpose. That was the second step in his general plan, and as he himself says, that was the main and primary object of his will.

3. That at the decease of his wife, this trust fund with all its accumulations and deductions was to be broken up and was to be disposed of by the trustees as specified in items A to M, inclusive. The language is significant.

"On the decease of my wife, Lucy L. Humphrey, I direct the following disposition of the residue of my estate by my executors or administrators and the trustees under this will," and then follow the payments to be made by them. The "disposition" is not made by the testator at the time of his death, but is to be made by his legal representatives after the decease of his wife. Nowhere in the will is there a gift or bequest to these legatees independent of the direction to his executors or trustees to pay them at a future time. The gift, therefore, implied from the direction to pay, speaks as of the time of payment and not as of the date of the testator's death. The courts have always held that the fact that there are no words of present gift has great weight in indicating that the testator intended that the title should not vest until the period of distribution should arrive, and that the bequest should be contingent until that time. *Peck* v. *Carlton*, 154 Mass. 231; *Eager* v. *Whitney*, 163 Mass. 463; *Hale* v. *Hobson*, 167 Mass. 397; *Crapo* v. *Price*, 190 Mass. 317;

30 Am. & Eng. Ency. of Law, 2nd Ed. page 771. "One of the subordinate rules is that when the only gift is found in the direction to pay or distribute at a future time, the gift is future and not immediate, contingent but not vested. Its reason is plain. The direction has no reference to the present and can be executed only in the future, and if in the meantime the donee shall die the direction cannot be exercised at all." *Dougherty* v. *Thompson*, 167 N. Y. 472, 60 N. E. 760.

4. That some of the legatees in remainder could not be ascertained until after the termination of the life estate, as for instance, under items A, D and E, and this fact has been regarded by the courts as having a tendency to show that all the remaindermen must be ascertained at that time and that the testator regarded all the remainders in the same category and as contingent. *Smith* v. *Rice*, 130 Mass. 441, *Crapo* v. *Price*, 190 Mass. 317, 322.

5. That the amount to be paid to four of the legatees was made contingent upon the total of the estate at the time of payment, because the will provides that if the estate is insufficient at that time for the payment of all the items A to M then the trustees are directed to pay the first nine in full and to distribute the balance among the last four pro rata.

6. That in case the estate should "prove to exceed" that is, on the final reckoning, the amount disposed of under the provisions of the will, such excess was bequeathed under the residuary clause. So that if any of the contingent legacies lapsed they fall into this residuum and need not be administered upon as intestate property.

These various reasons lead the court in this case to the conclusion before stated as the same or similar reasons have led to the same conclusion in prior cases. *Hunt* v. *Hall*, 37 Maine, 363; *Reed* v. *Fogg*, 60 Maine, 479; *Spear* v. *Fogg*, 87 Maine, 132; *Hopkins* v. *Keazer*, 89 Maine, 347; *Robinson* v. *Palmer*, 90 Maine, 246; *Webber* v. *Jones*, 94 Maine, 429; *Storrs* v. *Burgess*, 101 Maine, 26.

Passing now from general considerations, and taking up the separate items, we find that the reasons for holding the remainders to be contingent are strengthened.

"A. Said sum of Twenty Thousand Dollars ($20,000) shall be paid over as directed by my said wife, Lucy as directed in clause "Fourth" on the 3rd page of this Will."

This bequest was contingent upon the wife's exercising the power to dispose of the same by will. This she failed to do, and therefore this bequest, admittedly contingent, lapsed.

"B. The sum of Ten Thousand Dollars ($10,000) shall be paid to my sister, the aforesaid Marcia Humphrey."

This sister died after the death of the testator and before that of his wife. If her interest in that sum was vested it passed to her estate, otherwise it lapsed. In the opinion of the court for the reasons before given in considering the will as a whole, the interest was contingent upon her surviving the widow. It should further be borne in mind that this sister was provided for during the lifetime of the wife by an annuity of five hundred dollars. At the widow's decease or at her own decease, during the lifetime of the widow, that annuity stopped. This bequest was evidently made to take the place of the annuity in case the sister survived the wife. Interest at five per cent on the ten thousand dollars would be substituted for the annuity of equal amount. If living at the wife's decease, she would receive the legacy. If not, it would lapse, and the bequest means exactly what it says, the amount is to be paid to the sister personally, the same as if the words "If living" were added, and not to her heirs or legatees. Had the testator wished it paid to others he easily could and doubtless would have so provided. The answer to the first question must therefore be, that this legacy should not be paid to the administratrix of Marcia Humphrey, but forms a part of the estate to be disposed of under the last six items, H to M inclusive, and, if there is an excess, then to be disposed of under the residuary clause.

"C. The sum of Five Thousand Dollars ($5,000) shall be paid to Cordelia, wife of my brother, Isaac B. Humphrey."

Cordelia died subsequent to the death of the testator and before that of his wife. For reasons already stated, we hold this to have been a contingent estate. It might be added that this also was evidently to be a personal gift to Cordelia if living, but with no

intention that if she had deceased it should pass to her children because they are specifically provided for in the next item. The answer to the second question must therefore be that this legacy is not payable to the grandchildren of Cordelia, but must be disposed of in the same manner as the lapsed legacy to Marcia, under Item B.

"D. The sum of One Thousand Dollars ($1000) shall be paid to each of the children of my brother, Isaac B. and his wife, Cordelia Humphrey."

This comes directly under the decision of this court in *Storrs* v. *Burgess*, 101 Maine, 26, and cases cited, holding that where there are no words in a will importing a gift to a class, as children or grandchildren, except in the direction to make a division among them at a period subsequent to the testator's death, the interest is contingent and the members of that class are to be ascertained as of the time fixed for the division. The payment to each child means to each child surviving at time of payment. There is no mention of their heirs or descendants, and the only persons entitled to take would be the surviving children. It is a legacy to them as of the time of distribution. Here all the children had died prior to the termination of the life estate and there is no one to take the legacy. The answer to the third question therefore is that the sum mentioned in this item is payable neither to the lineal descendants nor heirs of the deceased children, but must be disposed of in the same manner as the lapsed legacy in Item B.

"E. The sum of One Thousand Dollars ($1,000) shall be paid to each of the children of my late sister, Angelia Pratt."

The children surviving at the termination of the life estate were Elizabeth B. Gillingham and Dana B. Pratt and to them payment should be made. Concerning this no question is raised.

"F. Five Thousand Dollars ($5,000) shall be paid to my brother, Dana B. Humphrey."

This legatee having died, the legacy lapsed for reasons already stated and payment should be made as specified under Item B. This is in answer to question number four.

"G. One Thousand Dollars ($1,000) shall be paid to my niece, Mrs. Harriet Crowell."

The record shows the fact but not the date of the death of Harriet Crowell. If this occurred subsequent to the termination of the life estate, payment should be made to the administrator of her estate, otherwise the legacy lapsed and payment should be made as specified under Item B. This is in answer to question number five.

Two questions remain, which involve simply the sufficiency of designation of the legatee, viz:

"J. Ten Thousand Dollars ($10,000) shall be paid to the Baptist Theological Seminary situate in Newton, in the Commonwealth of Massachusetts, for the endowment of a Professorship of Elocution."

The correct corporate name of the legatee is the Newton Theological Institution. Although the name is not stated in the will with precision, it is not claimed that any other institution was intended, and therefore payment should be made as intended. *Preachers Aid Soc.* v. *Rich*, 45 Maine, 552.

"K. Ten Thousand Dollars ($10,000) shall be paid to the Baptist Missionary Union of Foreign Missions."

The correct corporate name of this legatee is the American Baptist Foreign Mission Society, and for the reasons stated above, payment should be made to that corporation.

The legatees in their answers unite with the trustees in asking for a judicial construction of the will. The questions raised might well give rise to doubts. It is therefore proper that costs, including reasonable counsel fees, should be allowed the parties, paid by the trustees and charged in their probate account.

Decree accordingly.

JOSEPH F. WEBSTER, Petitioner for Mandamus,

vs.

JOHN W. BALLOU, Sheriff of Sagadahoc County.

Sagadahoc. Opinion December 11, 1911.

Mandamus. Sheriffs and Constables. Revised Statutes, chapter 104, section 18; chapter 106, section 9.

Mandamus is an appropriate and necessary proceeding where a petitioner shows that his right to have the act done, which is sought by the writ, has been legally established; that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion exists; that the writ will be availing; and that there is no other adequate remedy.

Mandamus lies to compel a sheriff to execute a writ of possession; proceedings against the sheriff for contempt, or an action for damages, being inadequate remedies.

A sheriff could not excuse refusal to execute a writ, directing him to place plaintiff in possession of lands, because he was notified that defendant occupied them as tenant of one who was not a party to the suit, and who was in possession under claim of right.

On exceptions by defendants. Overruled. Peremptory writ to issue.

The bill of exceptions states as follows:

"This was a petition for mandamus to compel the respondent to serve a writ of possession issuing out of the Supreme Judicial Court for Sagadahoc County, in a real action wherein the petitioner, Joseph F. Webster was plaintiff, and Francis Holmes defendant.

"The petition for mandamus is dated September 12, 1911, and was made returnable before Mr. Justice HALEY, on September 14th. On that date the alternative writ, was, by agreement of parties, ordered to issue, and was issued; the return of the respondent Ballou thereto was filed, and also the petitioner's answer to the return. At the same time the motion of Clara A. Holmes for leave to intervene was presented to the Justice.

"A hearing was had thereon and on the petition, at the conclusion of which the presiding Justice denied the motion to intervene, and ordered that the peremptory writ issue.

"To the denial of the motion and the ordering of the peremptory writ the respondent and the said Clara A. Holmes, by their attorney, seasonably excepted, and pray that their exceptions may be allowed."

The exceptions were allowed and certified to the Chief Justice for decision as provided by Revised Statutes, chapter 104, section 18.

The case is stated in the opinion.

Foster & Foster, and E. C. Plummer, for plaintiff.

Frank L. Staples, for John W. Ballou and Clara A. Holmes.

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

KING, J. Petition for a writ of mandamus. At the August term 1910 of the Supreme Judicial Court for Sagadahoc County, the petitioner, Joseph F. Webster, recovered judgment against Francis Holmes for the possession of certain real estate in Bath in that county. A writ of possession issued upon said judgment and was placed in the hands of the respondent, John W. Ballou, Sheriff of Sagadahoc County, commanding him "that without delay you cause the said Joseph F. Webster to have possession of and in the said premises." The sheriff did not execute the writ of possession, whereupon these proceedings for a writ of mandamus against him were commenced. In answer to the alternative writ he made return that he had not executed the mandate of the writ of possession because he was notified "that Francis Holmes, the defendant in said writ of possession, was occupying a part or all of said premises as the tenant of one Clara A. Holmes, who, as he is informed and believes, and therefore avers, is the legal owner of a part or all of said described premises, and is, therefore, tenant in common with the Petitioner of said premises; that he was notified that said Clara A. Holmes was in actual possession of said premises and that any attempt to oust her from possession would result in legal proceedings against him; that, being in doubt what course to pursue, he con-

sulted the Attorneys of both the Petitioner and of said Clara, and urged them to come to some adjustment of the matter, . . . and by reason of his doubt as to his legal right to actually evict the said Francis Holmes, and to oust said Clara A. Holmes from her possession, he has up to this time forborne to do so."

The said Clara A. Holmes presented a motion to the Justice before whom the proceedings were pending in which she set forth grounds on which she claims to be an owner of an undivided portion of the premises described in the writ of possession, and that the execution of the writ will be prejudicial to her rights and interests in the property, and praying that she might be permitted to intervene as a party defendant in the proceedings. Her motion to intervene was denied and, after hearing, a decree was made that the peremptory writ be granted. To that ruling and decree exceptions were filed and allowed, and certified to the Chief Justice for decision, under the provisions of sec. 18, chap. 104, R. S.

Mandamus is an appropriate and necessary proceeding where a petitioner shows: (1) that his right to have the act done, which is sought by the writ, has been legally established; (2) that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion may be exercised; (3) that the writ will be availing, and that the petitioner has no other sufficient and adequate remedy. *Dennett* v. *Mfg. Co.*, 106 Maine, 476, 478.

In the case at bar the petitioner's right to have immediate possession of the real estate in question as against Francis Holmes has been established by a judgment of the Supreme Judicial Court of this State, which judgment has not been modified or reversed, but remains in full force and effect.

Further, that court has issued its mandate, the writ of possession, to the sheriff commanding him to cause the petitioner "forthwith" to have the possession of the real estate in accordance with its judgment. The duty of the sheriff to do the act which is sought by the writ is plain, unequivocal and ministerial, in the discharge of which no discretion on his part is required.

The writ of mandamus will be availing. The execution of its mandate will give the petitioner immediately the benefit of his judgment. And it cannot be reasonably contended that he has any other sufficient and adequate remedy. If for such a neglect the sheriff would be subject to proceedings for contempt in not obeying the mandate of the writ of possession, such proceedings would not give the petitioner the benefit of his judgment—possession of the property. Neither should he be required to rely upon a suit for damages against the sheriff. Such a right of action, with its attendant delays, expenses and uncertainties, is not a sufficient and adequate remedy. It is not a remedy commensurate with the petitioner's right. "To supersede the remedy by mandamus, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application." *Fremont* v. *Crippen*, 10 Cal. 212, 215. In the case at bar the relief to be afforded is the putting of the petitioner in possession of the premises in pursuance of the judgment and order of the court.

The matter set forth in the sheriff's return to the alternative writ is immaterial, and does not justify his delay and forbearance to execute the writ of possession. He points out no defect in his precept. It was "fair on its face" and issued by a court having complete jurisdiction of the suit and the parties, and he was fully protected in following its mandate. The fact that he was informed that Clara A. Holmes claimed to own an undivided portion of the premises described in the writ of possession, and that she claimed that Francis Holmes was in possession of the property by her authority, should not have deterred him from serving the precept as commanded.

The writ of possession was issued against Francis Holmes alone. It was binding only upon him and anyone claiming possession under him since the beginning of the lis pendens. Clara A. Holmes was not a party to it. If she has title to an undivided portion of the premises (which claim the petitioner disputes) her title is in no way affected by the judgment in the action of Webster against Francis Holmes, under which the writ of possession was issued, since she

was not a party to that suit. The execution of the writ of possession will not take away any of her rights of possession to the premises.

If it were permissible in these proceedings to consider the claims made by Clara A. Holmes, and in her behalf, we do not perceive how they could affect the merits of the issuance of the judgment for possession in favor of Webster against Francis Holmes. The latter was admittedly in possession of the property at the time the real action was commenced against him. It cannot be said that he was then occupying the property as agent for his sister Clara, because she alleges in her motion to intervene that on the 7th day of October 1910 she gave him "authority to occupy said premises as her agent." But the action was commenced July 7th, 1910. He made no claim in the action that he was in occupation by right of anybody. He was there as a stranger to the title. One tenant in common may bring an action against a stranger for the recovery of possession of the property without joinder of his co-tenant. Sec. 9, chap. 106, R. S.

If it be a fact, as Clara alleges, that she made some use of the property herself while Francis and his family lived there, that fact could not prevent Webster, even if a co-tenant with Clara, from proceeding to recover possession against Francis. Having so proceeded to final judgment, and obtained from the court the writ of possession against Francis, no sufficient cause is shown why that judgment should not be made effective by the prompt execution of the mandate of the writ of possession. To hold otherwise in such case would tend to impair the certainty and efficiency of judicial proceedings.

It is therefore the opinion of the court that the motion of Clara A. Holmes to intervene was properly denied, and the peremptory writ properly ordered.

Exceptions overruled.
Peremptory writ to issue as ordered.

NICHOLAS KARAHALIES *vs.* PETER DUKAIS.

Androscoggin. Opinion December, 1911.

Statutes. Pleading. Landlord and Tenant. Forcible Entry and Detainer. Revised Statutes, chapter 17, section 1; chapter 90, sections 1, 2, 3.

Where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within the statute.

It is not necessary in a civil action under a statute to set out the statute or to make any reference to it in the declaration, but the case must be brought within its provisions by alleging the requisite facts.

A statute authorizing summary proceedings must be strictly construed, and strict conformity to the statute, in the exercise of the jurisdiction it confers, is essential to the regularity and validity of the proceeding.

A complaint for forcible entry and detainer must disclose enough upon its face to give the court jurisdiction without resort to parol testimony.

Forcible entry and detainer is a proper remedy against a tenant at will whose tenancy has been terminated by alienation by the landlord for a term of years.

In the case at bar, *held* that the plaintiff's declaration did not state a case within the terms of the statute authorizing forcible entry and detainer.

On exceptions by defendant. Sustained.

Forcible entry and detainer brought in the Municipal Court for the city of Lewiston. Plea, the general issue with a brief statement alleging that the tenancy of the defendant had not been legally terminated, etc. An agreed statement of facts was filed and the case heard thereon. The judge of said court rendered judgment for the plaintiff for possession and costs and the defendant excepted and the case was then certified to the Chief Justice of the Supreme Judicial Court in accordance with the provisions of Private and Special Laws, 1871, chapter 636, entitled "An Act to establish a Municipal Court for the City of Lewiston."

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Herbert E. Holmes, for defendant.

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

HANSON, J. This is an action of forcible entry and detainer and comes before the court on exceptions by defendant.

The declaration is as follows: "In a plea of Forcible Entry and Detainer, for that the said defendant at said Lewiston on the 28th day of September A. D. 1910, having before that time had lawful and peaceful entry into the lands and tenements of the plaintiff situated in Lewiston aforesaid and described as follows: The bakery and bakershop at 187 and 189 Lincoln Street Lewiston, and whose estate in the premises was determined on the twenty-seventh day of September A. D. 1910, then did and still does forcibly and unlawfully refuse to quit the same, although the plaintiff avers that he gave legal notice in writing to the said Peter Dukais before the 28th day of September aforesaid to terminate his estate in the premises."

The plea was the general issue, with the following brief statement.

"And for a brief statement of special matter of defense to be used under the general issue above pleaded the defendant further says: That he was a tenant at will in the premises described in the plaintiff's writ under one Maurice Alpren as landlord and that his tenancy was never terminated by said Alpren by thirty days' written notice to quit as required by Revised Statutes, but that he, the defendant, quit and vacated the premises of his own accord before the plaintiff's writ was entered in this court, and is not now in possession of the premises or any part thereof."

The following facts were agreed upon by the parties: The defendant was a tenant at will holding the premises described in the plaintiff's declaration under one Morris Alpren as his landlord. His tenancy was not terminated by Alpren by thirty days' notice to quit in writing, but on September 24, 1910, the said Alpren made a lease in writing of the premises to the plaintiff, Karahalies, for the term of two years from September 24, 1910. The plaintiff gave the defendant a written notice of the fact that he had taken a lease

of the premises from Alpren and that he demanded the possession of the premises. The defendant did not vacate, and on the 28th day of September, 1910, the plaintiff began his action of forcible entry and detainer against him. Before the writ was entered in court the defendant vacated the premises.

The defendant claimed that the declaration was the kind of declaration authorized only when the suit of forcible entry and detainer is against a tenant at will whose tenancy has been terminated as provided in section 2 of chapter 96, Revised Statutes, and that the agreed statement of facts proved that the defendant was a disseizor who had not acquired any claim by possession and improvement, and that consequently there was a variance between the allegations and the proof.

The plaintiff claimed that the declaration was sufficient to maintain the action under the facts stated in the agreed statement.

Upon the pleadings and statement of facts, the Judge ruled that the plaintiff's declaration was sufficient to entitle him to maintain the action, and further ruled that the fact that the defendant vacated the premises before the writ was entered in court, constituted no defense to the suit. To which ruling the defendant excepted.

The certified statement shows the whole case. The declaration followed the form in general use in this State to the clause relating to the termination of the tenancy by notice, and then concludes with the following words: "although the plaintiff avers that he gave legal notice in writing to the said Peter Dukais before the 28th day of September aforesaid to terminate his estate in the premises." The defendant raises the question of sufficiency of the declaration, and urges that the plaintiff has not stated a case within the terms of the statute, and that the proof of the termination of the tenancy submitted is a fatal variance from the allegations in the declaration before us. The plaintiff contends that the declaration is sufficient to maintain the action under the facts stated in the agreed statement.

Was there a case stated within the terms of the statute? If so, has the plaintiff proved his case? R. S., chap. 96, sect. 1, author-

izes the process of forcible entry and detainer against a disseizor who has not acquired any claim by possession and improvement, against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice, if commenced within seven days from the expiration or forfeiture of the term; and against a tenant at will, whose tenancy has been terminated as provided in sect. 2, of the same chapter, which is by thirty days' notice in writing for that purpose, given to the other party. Section 4, of the same chapter provides, that "The process of forcible entry and detainer shall be commenced by inserting the substance of the complaint as a declaration, in a writ of attachment to be indorsed and served like other writs."

It is well settled that where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it. 36 Cyclopedia of Law and Procedure, 1237; *Peru* v. *Barrett*, 100 Maine, 213; 109 Am. St. Rep. 494; 70 L. R. A. 567.

Again, it is not necessary in a civil action to set out the statute or to make any reference to it in the declaration, but the case must be brought within its provisions by alleging the requisite facts. *Peru* v. *Barrett*, supra. It is equally well settled that all statutes authorizing summary proceedings must be strictly construed, and strict conformity to the statute, in the exercise of the jurisdiction it confers, is essential to the regularity and validity of the proceeding. 36 Cyc. of Law and Procedure, 1189; *Woodman* v. *Ranger*, 30 Maine, 180.

It is not denied that forcible entry and detainer was the proper form of action, inasmuch as the defendant was a tenant at will whose tenancy had been terminated by alienation by the landlord for a term of years. *Seavey* v. *Cloudman*, 90 Maine, 540; *Howard* v. *Merriam*, 5 Cushing, 563.

R. S., chap. 96, sections 1 and 2, authorizes the action of forcible entry and detainer. Section 4, prescribes that the action "shall be commenced by inserting the substance of the complaint as a declaration, in a writ of attachment to be indorsed and served like other writs." The plaintiff resorted to the process of forcible entry

and detainer, and having done so, he must, "insert the substance of the complaint as a declaration, in a writ of attachment;" in other words, he must state a case within the terms of the statute. The agreed statement of facts discloses that the complaint or cause of action was that the defendant was a tenant at will whose tenancy had been terminated by the alienation of the premises by the landlord for a term of years. It further appears that the plaintiff proceeded upon the theory that the defendant was a disseizor, within the meaning of R. S., chap. 96, sect. 1, but he does not so state in his declaration; nor does he allege in substance any complaint or cause of action within the meaning of the statutes as interpreted by this court since the creation of the remedy of forcible entry and detainer.

A complaint for forcible entry and detainer must disclose enough upon its face to give the court jurisdiction without resort to parol testimony. *Treat et als.* v. *Bent*, 51 Maine, 478.

In the recent case of *Eveleth* v. *Gill*, 97 Maine, 315, the plaintiff proceeded under section 1 of chap. 17, R. S. (the Nuisance Act). The declaration, so far as it relates to the "substance of the complaint," is identical with the case at bar. The evidence adduced was that on the day named, (the day of the alleged termination of the tenancy) the defendant was using the building or tenement, or some part thereof, for one of the purposes forbidden by the Act above mentioned. The declaration in that case, like the case at bar, contained no specific allegation or complaint against the defendant as contemplated by the statute, except that "his estate was determined" on a certain day. Among other things the court held, that, "granting her (the plaintiff's) contention as to her rights under section 3, chap. 17, we think it clear that in resorting to the legal process, authorized only by the statute, she must state, as well as prove, a case within the terms of the statute, and this she has not done. . . . "it follows that under the general law of pleading, the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used." Thus it was said by this court in *Treat* v. *Bent*, 51 Maine, 478,—"this process of forcible entry and detainer is one created and regulated by the statutes, and, in order to be

maintained, must come clearly within their provisions. . . . In that case the process was quashed because it did not "disclose enough upon its face to give the court jurisdiction," and finally, and controlling in the case at bar; "the statutory case should be fully and clearly stated. Want of allegations necessary to show a case within the terms of the statute are as fatal as want of evidence in such a case."

It is unnecessary to consider the question of variance. There was not a case stated within the terms of the statute, and the entry must be,

Exceptions sustained.

WILLIAM H. POWELL, Appellant, *vs.* CITY OF OLD TOWN.

Penobscot. Opinion December 13, 1911.

Taxation. Money at Interest. Assessment. Abatement. Estoppel. "Reasonable Time." Statute, 1862, chapter 138. Revised Statutes, chapter 9, sections 73-75.

To entitle one to apply for an abatement of taxes under Revised Statutes, chapter 9, sections 73-75, it must affirmatively appear:

(1) That he made and brought in to the assessors, as required by their written notice, a true and perfect list of all his property not by law exempt from taxation of which he was possessed on April 1st of the same year, or can make it appear that he was unable to do so.

(2) That he made oath to this list, if required so to do by the assessors or any of them.

(3) That he answered all proper inquiries that were asked him by any of the assessors as to the nature, situation, and valuation of his taxable property, and that he also reduced his answers to writing and subscribed the same, if so requested.

A tax payer should not be taxed for money at interest if he is owing debts in excess of the amount at interest, but if so taxed he will be barred from the right to apply for an abatement if he has refused to answer the questions asked him by the assessors concerning his money at interest.

Under Revised Statutes, chapter 9, sections 73-75, relating to taxation for money at interest April 1st, an inquiry was made by assessors on June 10th, concerning money which the plaintiff had at interest, *held* that the inquiry must be deemed predicated on what money the plaintiff had at interest on April 1 of the same year.

Under Revised Statutes, chapter 9, sections 73-75, relating to taxation for money at interest April 1st, inquiries made by assessors of plaintiff on June 10th were not too late to charge him with such taxes; it appearing that the current tax lists had not been completed and committed to the collector, and that the assessors had proceeded with due diligence in making up the lists.

"Reasonable time," to which assessors are entitled in making inquiries as a basis for assessment for money at interest April 1st, under Revised Statutes, chapter 9, sections 73-75, is such period as may be properly allowed, having regard to the nature of the act and to the attending circumstances; the quoted term being flexible.

On report. Appeal dismissed.

The assessors of the City of Old Town for the year 1910, assessed the plaintiff for $1000 money at interest. The plaintiff then made written application to the assessors for an abatement of the tax on the money at interest and the abatement was refused. The plaintiff then appealed to the Supreme Judicial Court under the provisions of Revised Statutes, chapter 9, section 79. When the case came on for trial, an agreed statement of facts was filed and the case reported to the Law Court for determination.

The case is stated in the opinion.

NOTE. Under the provisions of Public Laws, 1911, chapter 179, "All loans of money made by any individual or corporation and secured by mortgage on real estate situated in this state," are exempt from taxation.

W. H. Powell, pro se.

F. J. Whiting, for defendant.

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

CORNISH, J. In order to entitle a person to apply to the county commissioners or to the Supreme Judicial Court for relief from assessment of taxes, by abatement under R. S., ch. 9, secs. 73-75, it must affirmatively appear,

1. That he made and brought in to the assessors as required by their written notice, a true and perfect list of all his property not by law exempt from taxation, of which he was possessed on April first of the same year, or can make it appear that he was unable to do so.

2. That he made oath to this list, if required so to do by the assessors or any of them.

3. That he answered all proper inquiries that were asked him by any of the assessors as to the nature, situation and valuation of his taxable property and that he also reduced his answers to writing and subscribed the same, if so requested.

In this case the agreed statement of facts shows that the appellant complied with the first requirement as to bringing in the list, and that the second requirement was not violated because he was not required by the assessors to make oath to the list. The controversy arises over the third requirement.

On this question it is admitted that at the time the list was filed the appellant answered all questions asked him by the assessors respecting the property comprised in his list, but the list did not contain any statement of money at interest and no questions were asked respecting that class of property.

About June tenth of the same year, the assessors called upon the appellant, stated that they "were going to assess money at interest" and asked him if he cared to make any statement to them in relation to how much money he had at interest. The appellant refused to make any statement. Thereupon the Board assessed him for one thousand dollars at interest. It is admitted that on April 1, 1910, he had that sum at interest but that he was owing debts in excess of that amount. He should not therefore have been taxed for money at interest, *Taylor* v. *Caribou*, 102 Maine, 401, and this appeal should be sustained unless he is barred by his refusal to make any statement when the assessors made their additional inquiries of him on June 10, 1910.

The appellant does not contend that the inquiries put by the assessors should have been reduced to writing. R. S., ch. 9, sec. 75, provides that the assessors and "either of them may require

him to answer all proper inquiries in writing as to the nature, situation and valuation of his taxable property" etc. This more accurately should read "either of them may require him to answer in writing all proper inquiries as to the nature," etc., because this section is a condensation of the original act,—chap. 138 of the Public Laws of 1862, which reads: "and such lists being exhibited on oath shall be taken as true, unless such person shall refuse to answer all proper inquiries in relation to the nature and situation of his property, and if required subscribe and make oath to the same, to be taken in writing before a majority of the assessors who may act by themselves or counsel in taking the same."

The language of the court in *Levant* v. *Co. Comms.*, 67 Maine, 429, would seem to indicate that the questions should also be in writing, but that question was not raised in the case, as both the questions and the answers had been reduced to writing and the court sent the petition for certiorari back for further hearing at nisi prius because there was a conflict of testimony as to whether the applicant for abatement had in fact refused to answer certain questions. The true construction is stated in *Lambard* v. *Co. Comms.*, 53 Maine, 505, and the appellant in the case at bar does not attack it.

But the appellant while conceding the general rule that refusal to answer proper inquiries made at a proper time bars the right of appeal, contends that he is not barred in this case for two reasons: First, because the assessors predicated their inquiry on what money at interest the appellant had on June 10, 1910, not on April 1, 1910.

This construction of the interview is too narrow. What took place is to be viewed in the light of the surrounding circumstances. The assessors called upon him in their official capacity and he well knew the general purpose of their visit. They stated in effect that they had concluded to assess money at interest, not simply his, but all money at interest, that is, that class of property, for that current year, and that necessarily meant property held on April first. They then asked him if he cared to make any statement to them in relation to how much money he had at interest. This could not have meant either to the assessors or to the appellant who is a

lawyer, how much he had on the day when the question was asked, but how much he was assessable for that year, which would relate back to April first. Both sides knew that that was the subject of conversation and the object of the visit, and although the question was asked on June tenth, it was understood to relate to property taxable in 1910 and to nothing else. An inquiry as to the property which appellant owned on April first was an act of official duty; an inquiry as to the property which he owned on June tenth would have been an act of unofficial impertinence, and all the parties knew this. Such is the reasonable construction of the whole interview. No precise formula need be used by the assessors. No stereotyped language need be employed. They must of course, make the individual understand the nature and purpose of their inquiry, and that this was accomplished in this case, there can be no room for reasonable doubt.

The question put by the assessors was certainly a proper one within the requirement of the statute, and the appellant's absolute refusal to make any statement whatever precluded the necessity of making the further inquiry as to how much he was taxable for on April first. He did not object to the form and say that he would answer proper inquiries, but he declined to answer any. His attitude rendered further questioning futile and he cannot now complain because the assessors took him at his word and closed the interview, without going through a useless formality. *Milliken* v. *Skillings*, 89 Maine, 180; *Bowden* v. *Dugan*, 91 Maine, 141; *Pitcher* v. *Webber*, 103 Maine, 101; *Hall* v. *Trust Company*, 106 Maine, 465-474.

The second objection raised by the appellant is that the inquiry if proper in itself, was made long after the list was furnished, and he was therefore not obliged to answer it.

The Statute, R. S., ch. 9, sec. 75, fixes no time within which such inquiries must be made. This court has held, in *Freedom* v. *County Commissioners*, 66 Maine, 172, that the authority of the assessors is not limited to the time and place designated in their written notice, but continues for a reasonable time thereafter. It is

often impracticable to make all the examinations in one day, and time should be given the assessors to make careful investigations of the furnished lists which are not conclusive.

The tax lists for the year had not been completed and committed to the collector on June tenth, and the agreed statement shows that the assessors had proceeded with all due diligence in making up the lists and had not used more time than was usually required by the assessors of Old Town for a proper performance of their duties. Under these circumstances it is clear that the reasonable time granted to the assessors had not expired. Reasonable time is a flexible term and as used in this connection is such a period as may be properly allowed having regard to the nature of the act and to the attending circumstances.

Applying this rule it would seem that the assessors would continue to have the right of proper inquiry at least until, working with reasonable speed, the assessment lists are finished and committed to the collector. Especially is this true in the case at bar where, as the agreed statement shows, the assessors had started on the track of a class of property which was not embraced in the appellant's original list and concerning which they had not interrogated him.

The conclusion therefore is that the appellant's peremptory refusal to make any statement whatever barred his right of appeal. *Lambard* v. *Co. Commissioners*, 53 Maine, 505.

Appeal dismissed with costs.

CYRUS F. EDGECOMB *vs.* GEORGE H. JENNEY, and certain hay.

Androscoggin. Opinion December 13, 1911.

Agriculture. Hay Lien. Revised Statutes, chapter 93, section 54.

The right to a lien under Revised Statutes, chapter 93, section 54, for cutting or harvesting hay rests upon a contract, express or implied, with the owner of the hay, and if there is no such contract then there is no lien.

The plaintiff made a contract with the defendant to cut certain hay on a farm not owned by the defendant. The owner of the hay then notified the plaintiff that the defendant had no right to hire the hay cut or do anything else on the place and that if he, the plaintiff, cut the hay he would be a trespasser. The plaintiff disregarded the notice, cut and harvested the hay, and then undertook to enforce the lien provided by Revised Statutes, chapter 93, section 54. *Held:* That the plaintiff had no lien on the hay.

It is apparent that Revised Statutes, chapter 93, section 54, if construed precisely as it reads, would authorize the taking of property without due process of law. If A without a contract express or implied could, in invitum, enter the field of B, harvest his hay and appropriate to his own use so much of it as was necessary to pay for his services, it would constitute a direct violation of B's constitutional right that no person shall be deprived of his life, liberty, property, or privileges, but by judgment of his peers, or by the law of the land.

On report. Lien denied. Judgment against defendant, Jenney.

Assumpsit on account annexed to recover the sum of $51.75 for the services of the plaintiff and his team in cutting and harvesting certain hay on which the plaintiff claimed a lien under the provisions of Revised Statutes, chapter 93, section 54. The defendant Jenney was defaulted, notice was ordered to the owners of the hay, and Oscar Storer appeared and claimed the hay. An agreed statement of facts was filed and the case was reported to the Law Court for determination.

The case is stated in the opinion.

B. Emery Pratt, for plaintiff.

Isaac B. Clary, for claimant.

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

SPEAR, J. This is a case in which the plaintiff seeks to enforce a lien against George H. Jenney and certain hay cut upon a farm, the legal title of which was in the name of Frank W. Dutten, trustee, the beneficiary interest being in Mrs. Lamertine Taylor Jenney. As the case is presented it seems to be immaterial whether the title was in Dutten or Mrs. Jenney so far as the rights of the plaintiff are concerned, as the correspondence shows that the plaintiff knew that the title of the farm was not in George H. Jenney. On the 13th of July the plaintiff wrote F. W. Dutten as follows: "George Jenney has hired me to cut the hay on the Jenney farm, but I have been told that the farm belongs to you, now I want to know if George Jenney has a right to hire the hay cut, please let me know by return mail as the hay needs cutting." To this letter on the same day Dutten replied: "I am in receipt of your letter of the 13th and in reply would say that the farm in Livermore Falls stands in my name but is leased under agreement to Mrs. Jenney. Consequently I do not know who has authority regarding the management." On July 19th, Oscar Storer, an attorney in Boston, representing Mrs. Jenney's interests, to whom had been forwarded the above letter of the plaintiff for answer, wrote as follows: "In reply to this letter I will state that the title stands in Mr. Dutten's name, but the property is Mrs. Jenney's and Mr. Jenney has no right to hire the hay cut or do anything else on the place. If you cut the hay under his hiring you will be a trespasser and liable to her for damages. Mr. Jenney has no authority to act for Mrs. Jenney in any way, shape or manner." The plaintiff had been working two days when he received this letter. He, however, ignored the letter and proceeded to cut the rest of the hay. The records show that as early as July 2nd, 1909, Mrs. Jenney had revoked all authority which George H. Jenney prior to that time might have had in the management of the farm. It is obvious, therefore, that on July 13 when the plaintiff wrote to Dutten with reference to the right of George H. Jenney to "hire him to cut the hay," George H. Jenney had no authority whatever to make such

contract. Consequently the plaintiff was in no way misled as to the authority of George H. Jenney from the fact that the latter was apparently occupying the farm.

But notwithstanding this knowledge on the part of the plaintiff and the letter forbidding him to cut the hay and warning him against trespass, he invokes R. S., chap. 93, sec. 54, as a peremptory statute giving him a lien upon the hay for his services. Section 54 is as follows: "Whoever labors in cutting or harvesting hay has a lien on all the hay cut or harvested by him and his co-laborers for the amount due for his personal services and the services performed by his team."

This contention cannot prevail. The theory of the lien law is based upon the assumption of a contract expressed or implied with the owner of the property against which the lien is sought to be enforced, as stated by Chief Justice Shaw in *Hollingsworth* v. *Dow*, 19 Pick. 228. "Again, a lien is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner, or by some person by him authorized." See also *Small* v. *Robinson*, 69 Maine, 425, which is analogous in principle. Innholders and a few others are excepted from the general rule. The above statute although peremptory in its language must be construed with reference to common law rules. *Williams* v. *Vanderbilt*, 145 Ill. 238, 36 Am. St. R., 486. It is apparent that section 54, if construed precisely as it reads, would authorize the taking of property without due process of law. If A without a contract express or implied could, in invitum, enter the field of B, harvest his hay and appropriate to his own use so much of it as was necessary to pay for his services, it would constitute a direct violation of B's constitutional right that no person shall be deprived of his life, liberty, property or privileges, but by judgment of his peers, or by the law of the land. But this seems to be precisely what the plaintiff has undertaken to do. We find ourselves unable to assist him.

Lien claim denied.

Personal judgment for plaintiff against George H. Jenney for $51.75, and interest from the date of the writ.

FANNIE B. McGOWN *vs.* INHABITANTS OF WASHINGTON.

Knox. Opinion December 13, 1911.

Highways. Defective Culvert. Notice. Evidence. Statutes, 1903, chapter 108. Revised Statutes, chapter 23, section 76.

In an action against a town to recover damages for injuries caused by a defective culvert or causeway, *held* that the case upon the evidence should be submitted to the jury to determine whether the road commissioner, when he inspected the causeway, was charged with notice of the conditions which caused the plaintiff's injury, and whether these conditions constituted a defect.

If a road commissioner, being notified of a defective culvert, delegated to another performance of his duty to repair, under Revised Statutes, chapter 23, section 76, as amended by Laws 1903, chapter 108, and such person failed to make the culvert safe, his knowledge of the defect and failure to repair were the knowledge and failure of the commissioner, the same as if the latter had performed the work himself; and no further notice was necessary to charge the town with liability for a resulting injury.

Notice to a road commissioner of a defect in a culvert continues until the defect is repaired.

On exceptions by plaintiff. Sustained.

Action on the case to recover damages for personal injuries alleged to have been received by the plaintiff while travelling with a horse and wagon along a highway in the defendant town, and caused by an alleged defect in a culvert or causeway in said highway. Plea, the general issue. At the conclusion of the plaintiff's evidence, and on motion of the defendants, "the presiding Justice ruled pro forma ordering a nonsuit," and the plaintiff excepted.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiffs.

Lindley M. Staples, for defendants.

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

SPEAR, J. This was an action against the defendant town to recover for injuries alleged to have been received by the plaintiff by

reason of a defect in a culvert or causeway located in the defendant town, which it is admitted it was the duty of the town to keep in repair so that it should be safe and convenient for travelers. At the conclusion of the plaintiff's evidence the presiding Justice ordered a nonsuit and the case is here upon exceptions to the order. The only question involved in the exceptions which contain a full report of the testimony is whether the defendant had twenty-four hours actual notice of the alleged defect as required by statute as a prerequisite to the maintenance of her action.

There are two grounds upon which the plaintiff contends the defendant had the notice required. First, she claims that, having had notice of the defective condition of this causeway some months before, and having authorized and directed one Hubbard to repair it, the road commissioner, William W. Light, in person, in June, about two months before the accident and after Hubbard had repaired it, inspected the causeway as repaired, had an opportunity to discover the conditions constituting the alleged defect, and therefore had notice of the actual condition of the causeway which the plaintiff claims was a defect. It is the opinion of the court that the evidence in the case might warrant a jury in finding all these facts in favor of the plaintiff. Therefore inasmuch as it is not for the road commissioner to determine whether the actual condition which he saw or ought to have seen was a defect, but a question of fact for the jury, we feel clear that the case upon the evidence should be submitted to the jury to determine whether the road commissioner in June when he inspected the causeway was charged with notice of the conditions which caused the plaintiff's injury, and whether those conditions constituted a defect. If upon this question the jury's finding should be in the affirmative, the plaintiff would not be barred for want of notice.

Second, the plaintiff contends that the road commissioner having personally received notice of a defect in the culvert in question and having authorized George Hubbard "to fix that causeway," George Hubbard was appointed "to act as a substitute for" the commissioner in making the repairs, under R. S., ch. 23, sec. 76, as amended in 1903, ch. 108. Section 76, with the amendment in brackets

provides that a notice is sufficient "if the commissioners of such county or the municipal officers or road commissioners of such town, (or any person authorized by any commissioner of such county or any municipal officer, or road commissioner of such town, to act as a substitute for either of them) had twenty-four hours actual notice of the defect or want of repair." It is the opinion of the court that independent of the amendment Hubbard represented the commissioner upon the question of notice, as hereafter discussed. It is contended, however, that this question must be declared res adjudicata under the decisions of the court in *Rich* v. *Rockland*, 87 Maine, 188, and *Emery* v. *Waterville*, 90 Maine, 487. After these decisions the statute was amended, laws of 1903, ch. 108, by inserting the above quotation. Whether the amendment of the statute authorizing notice to a substitute would affect the conclusion of the opinions in the cases cited, it is unnecessary to determine as these cases have no application whatever to the facts in the case at bar. In both the Rockland and Waterville cases there was no defect which the employees or agents were sent to repair. In each case they were directed to do a safe thing by way of constructive work and did just the contrary. Each was ordered to construct a safe and convenient place but instead created a defect, of which the commissioner had no actual notice. In the Waterville case the court say, "a crosswalk in itself is not a defect. To know of a crosswalk is not to know of a defect."

Not so, however, in the case at bar. The case starts with an alleged defect. The road commissioner had notice of it. Under the statute he was charged in the premises with an obligation to the public. It was his positive and imperative duty after twenty-four hour's notice to know that the defect was repaired. The statute must be regarded as mandatory upon the strict performance of this duty, for upon its full and complete execution may depend the life or limb of a lawful traveler. In case of the defect in question the road commissioner did not direct Hubbard to construct anything new, as was done in the Waterville and Rockland cases, but to repair what had become unsafe and dangerous. He did not send Hubbard to build a new piece of work which he might assume would

be constructed in accordance with his orders; he sent him without specifications to make the repairs necessary to overcome the danger. He left the efficiency of the work to be done entirely to the judgment of Hubbard. It was the performance of a duty which the statute imposed upon the commissioner. When he delegated that duty to the discretion and judgment of Hubbard he made him his agent to do the work. If, therefore, the commissioner was notified of this alleged defect and relied upon the judgment of Hubbard to repair it, and Hubbard failed to make it safe and convenient, as required by statute, then the knowledge and act of Hubbard was, independent of the amended statute, the knowledge and act of the commissioner precisely as if the latter had performed the work himself, and no further notice was necessary. *Holmes* v. *Paris*, 75 Maine, 559; *Buck* v. *Biddeford*, 82 Maine, 433.

There is another phase of the case which requires that it should be submitted to the jury. Some eight or nine months before the date of the accident complained of, the commissioner admits he received notice of an alleged defect in the identical causeway upon which the plaintiff was injured. It also appears that Hubbard was directed to repair it. It is claimed that what he did, whatever it was, failed to accomplish the purpose; that the identical defect of which the commissioner was notified continued unabated; and was the one upon which the plaintiff was injured. If the jury should find affirmatively upon these questions then the notice to the commissioner would continue to be valid until it was shown that the defect was so repaired that the causeway was safe and convenient.

Exceptions sustained.

QUESTIONS AND ANSWERS

QUESTION SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, AUGUST 5, 1911, WITH THE ANSWERS OF THE JUSTICES THEREON.

States. Contracts with State. Pecuniary Interest of State Officeholder. Statutes. Construction. Statute, 1905, chapter 151, section 1. Revised Statutes, chapter 2, section 46; chapter 4, section 29; chapter 121, section 11.

Revised Statutes, chapter 121, section 11, among other things, provides as follows: "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the state, shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the state or of the institution in which he holds such place of trust, and any contract made in violation hereof is void."

The State of Maine awarded a contract for doing certain printing for the State to the Waterville Sentinel Publishing Company, a corporation. The work was awarded to the said company after competitive bids had been submitted, it being the lowest bidder. The Secretary of State was a stockholder in the said company and the treasurer of the said company at the time the contract was awarded, although he had nothing to do with the awarding of the contract or with the auditing of the bills presented on account thereof or approval or payment of the same.

Held: That under the provisions of Revised Statutes, chapter 121, section 11, the contract was void.

When the language of a statute is susceptible to only one meaning, the courts cannot give it any other construction.

STATE OF MAINE.

Executive Department,
Augusta, Maine, Aug. 5, 1911.

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 being

advised, and believing, that the questions of law are important, and that it is upon a solemn occasion, I, Frederick W. Plaisted, the Governor, respectfully submit the following statement of facts, and question and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT.

Section 1, of chapter 155 of the Public Laws of 1905, reads as follows:

"The Governor and Council are hereby authorized to contract in behalf of the State, on the basis of competitive bids for the printing of the reports, catalogues, compilations, bulletins, and circulars, authorized to be printed under sections twenty-four, twenty-five and twenty-six of Chapter three of the Revised Statutes, and for all other miscellaneous printing, now or hereafter authorized by law for each department of the State government, including the legislative printing, but excepting the printing of reports of decisions. They may, in their discretion, call for bids, and contract separately, for distinct portions of the State printing but may reject any and all bids which they do not deem it in the interest of the State to accept, and may take such security as they deem necessary, if any, for the faithful performance of any contract hereunder. No such contract shall be for a longer time than two years."

Under the authority of this act the Governor and Council have awarded a contract for doing certain printing for the State to the Waterville Sentinel Publishing Company, a corporation organized under the laws of Maine. This work was awarded to the above named corporation after competitive bids had been submitted, it being the lowest bidder.

Hon. Cyrus W. Davis, the present Secretary of State is a stockholder in and Treasurer of the above named corporation. The Secretary of State had nothing to do with the awarding of the contract. The prices for the work done under it are fixed in detail in said contract and it is entirely out of the control of the Secretary of State to alter the same in any way. All bills presented by said cor-

poration against the State on account of said contract must be audited by the State Auditor and approved by the Governor and Council before being paid. The Secretary of State has nothing whatever to do with the auditing of said bills or approval or payment of the same.

Section 11 of chapter 121 of the Revised Statutes provides as follows:

"No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place or trust, and any contract made in violation hereof is void; and if such officer or person receives any drawbacks, presents, gratuities or secret discounts to his own use on account of such contracts, or from the profits in any materials, supplies, or labor, furnished or done for the State or such institution he shall be punished by imprisonment for not more than a year, or by a fine not exceeding five hundred dollars."

QUESTION.

Do the provisions of section 11 of chapter 121 of the Revised Statutes, in the light of the foregoing facts and in view of the provisions of chapter 155 of the Public Laws of 1905, make void the before mentioned contract between the State and the Waterville Sentinel Publishing Company?

Very respectfully,

FREDERICK W. PLAISTED,
Governor.

To the Honorable Frederick W. Plaisted,
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 answer to the question proposed.

It appears from the statement of facts accompanying the question that in accordance with the authority conferred upon them by section 1, of chapter 155 of the Public Laws of 1905, the Governor and Council awarded a contract for doing certain printing for the State to the Waterville Sentinel Publishing Company, that corporation being the lowest bidder therefor among those submitting competitive bids. It also appears from the statement of facts that "the present Secretary of State is a stockholder in and Treasurer of the Waterville Sentinel Publishing Company."

Section 11 of chapter 121 of the Revised Statutes declares that "no . . . . . person holding a place of trust in any state office . . . . . shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the state. . . . and any contract made in violation hereof is void."

The general terms employed in the foregoing statement of facts, that the Secretary of State "is a stockholder in, and treasurer of" the Publishing Company, raise a clear implication and warrant the conclusion that the Secretary's financial interest in the company is an appreciable and substantial one. If it were otherwise it is reasonable to infer that the statement of facts would have contained a specification of the number and value of the shares of stock actually held and owned by the Secretary and the amount and terms of payment, of his salary as treasurer. The question submitted must therefore be examined upon the assumption that the Secretary of State has a direct and substantial pecuniary interest in the contract for certain State printing which the Governor and Council awarded to the Waterville Sentinel Publishing Company.

When the language of a statute is capable of only one meaning, the legislature must be presumed to have intended what it has plainly

expressed, and there is consequently no room for construction. It is not allowable to interpret what has no need of interpretation. *Davis* v. *Randall*, 97 Maine, 36. It has accordingly been distinctly stated from early times down to the present day, that "judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity. . . . and are not to alter plain words though the Legislature may not have contemplated the consequences of using them." Endlich on Interpretation of Statutes, section 4.

It does not need to be formally asserted that the Secretary of State is necessarily "a person holding a place of trust in a state office."

Analogous legislation is found in section 29 of chapter 4 of the Revised Statutes, which provides that "No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government, while he is a member thereof, and contracts made in violation hereof are void."

This statute was brought in question in *O'Neil* v. *Flannigan and City of Portland, Trustee, and Johnson, claimant*, 98 Maine, 426.

The plaintiff had a contract to perform work for the city. The plaintiff Johnson was surety on the plaintiff's bond to a surety company to protect it from loss as surety on the plaintiff's bond to the city for the performance of his contract. The plaintiff failed to perform and Johnson by arrangement of all parties completed the contract and claimed the amount due from the city on the contract, for work done by him, under an assignment from the plaintiff. During this time Johnson was an alderman of Portland.

It was held by the court that the plaintiff's contract was tainted and rendered void by Johnson's illegal connection with it. In the opinion by Mr. Justice STROUT, the court said: "It is clearly within the inhibition of the recited statute. The provision is a wise one, and tends to honest dealing, and exclusion of motive for improper practices harmful to the community. It should be applied without evasion to all contracts falling within its provisions. So applying it, the result necessarily follows that the city's contract with Flannigan was absolutely void. *Goodrich* v. *Waterville*, 88 Maine, 39."

In *Consolidated Coal Co.* v. *Board of Trustees of Institute for the Blind*, 129 N. W. 193, (Mich. 1910) a member of the defendant Board of Trustees, was a stockholder in the plaintiff corporation which sold coal to the State Institution for the Blind. Such member had no control of the corporation and received no benefit other than the dividend on his stock, and had nothing to do with securing the contract, but it was held by the Supreme Court of Michigan that the sale was within the prohibition of the statute which provided that no trustee of any Board having control of any public institution in the State should be interested in any contract for the sale of supplies to such institution, and that the contract was therefore void. In the opinion of the court it is said: "We do not regard the statute as merely putting in form of positive law a rule developed by the courts, but as a legislative rule founded in public policy, the plain effect of which the courts are not at liberty to deny or amend. There can be but one answer to the question."

In *City of Northport* v. *Northport Town site Company*, 68 Pac. 204 (27 Wash. 503) it was held that where a member of the City Council was a stockholder and business manager of a Lumber Company, and the Lumber Company sold to the contractor materials for improvements on the streets of the plaintiff city, such member was within the statute prohibiting any such officer to be directly interested in any contract with the city.

In *Commonwealth* v. *DeCamp*, 177 Pa. St. 112 (35 Atl. 601) it was held that the Secretary who was also a stockholder of a corporation having a contract for the lighting of the city, is within the statute prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract.

In *Foster et al.* v. *City of Cape May*, 36 Atl. 1089, (N. J. 1897) it was held that under a charter providing that no member of the city council shall be interested in any contract, the expense of which shall be paid by the city, a member who held as collateral security a share of the stock of the Electric Light Company, was disqualified to vote to authorize a contract with said Company, to light the city. The member testified that he never put any value

on the stock and that the Company had not been prosperous, but in the opinion the court said: "It is probable that a company which theretofore had not been prosperous may become prosperous and this stock which was valueless may become of value by means of this contract which Johnson's vote awarded to the Company. The interest of Johnson may be small but the statute makes no discrimination with respect to the interest which should disqualify."

In *Drake* v. *City of Elizabeth*, 54 Atl. 248 (N. J. 1903) the city council of the defendant city awarded a contract for state printing to the Times Publishing Company and it appearing that several members of the council were stockholders in the Publishing Company, it was held that this "infection" was sufficient ground for avoiding the action of the entire Board; and in the analogous case of *Traction Company* v. *Board of Public Works*, 56 N. J. L. 431, (29 Atl. 163) it appeared that the vote of the disqualified member was not necessary to the result, but the court said: "The fact that there was a sufficient number of votes apart from his vote, to pass the ordinance, is no answer to the objection taken upon the vote. The "infection" of the concurrence of the interested person spreads so that the action of the whole board is voidable."

In *Milford* v. *Milford Water Company*, 17 Atl. 185, (Pa. 1889, 3 L. R. A. page 122), a majority of the city council made a contract for the supply of water with a Water Company, in which they were directors, but the contract was held void under the statute prohibiting any member of any corporation or public institution or any officer or agent thereof to be in anywise interested in any contract for supplies to said corporation or municipality. "This act," said the court, "is another and valuable safe guard thrown around municipalities. It was passed to protect people from the frauds of their own servants and agents. It may be there was no fraud actual or intended in the present case, but the court will not allow it to be made an entering wedge to destroy the act."

But the facts in *Mullaly* v. *City of New York*, 3 Hun. 661, (N. Y. Supreme 1875) are strikingly similar to those in the case at bar. In that case it was held that the law of 1870 prohibiting officers from being interested in any contract with the city, is not

repealed by the law of 1871 authorizing the Mayor and controller to designate newspapers in which to publish the common council proceedings, and that where a newspaper owned by one of the health commissioners of the city was designated, the latter was incapable of taking the contract and that a performance by him created no valid claim against the City for compensation. See also *Commonwealth* v. *Whitman*, 217 Pa. 411, (66 Atl. 986); *City of Brazil* v. *McBride*, 69 Ind. 244; *Harrison* v. *City of Elizabeth*, 70 N. J. Law, 591, (57 Atl. 132).

It is true that with respect to the question submitted, it appears from the statement of facts that the "Secretary of State had nothing to do with the awarding of the contract," and "has nothing whatever to do with the auditing of the bills presented against the state on account of the contract." But the Publishing Company in which he held an important office and of which he is presumably an active member, necessarily participated as a party in the making of the contract and the department of which he is the official head, will necessarily be affected to a considerable extent in the performance of the same. It is not difficult to discover not merely an apparent but a real conflict of interests, *Whitney* v. *Slayton*, 40 Maine, 224. Furthermore, the statute was not intended as simply an affirmation of a principle of the common law, but as a more comprehensive legislative rule founded in public policy. The legislature must be presumed to have had in contemplation all of the contracts which might have been made by the different State officers, and to have enacted the statute for the purpose of removing any temptation on their part to bestow reciprocal benefits upon each other, and of preventing favoritism, extravagance and fraudulent collusion among them under any circumstances which might be reasonably anticipated as likely to arise under different State governments in the years to follow. Under the statute authorizing the Governor and Council to make contracts in behalf of the State for certain State printing, they are not compelled to award any contract to the lowest bidder, but "may reject any and all bids which they do not deem it for the interest of the state to accept." The Secretary of State is made by the Constitution the recording officer

of the Governor and Council, and by section 46 of chapter 2 of the Revised Statutes, it is made his duty to purchase all stationery required for the use of the several departments. If a member of the Executive Council should be a bookseller and stationer, and the Secretary of State be a printer and publisher, one of the situations probably contemplated by the legislature, would exist, affording an opportunity for mutual favoritism. But it was obviously impracticable to anticipate and specify in the statute the great variety of situations that might arise, and in order to accomplish the purpose of the statute and prevent the mischief designed to be remedied, the legislature was compelled to declare in general terms that no State officer should have a pecuniary interest in "any contract" made in behalf of the state."

It is a satisfaction to observe that there is nothing in the statement of facts accompanying the question now before us, to warrant he inference that any wrong was intended in this instance, and it may be true that the contract in question was an advantageous one for the State; but it is the opinion of the undersigned Justices that it clearly falls within the prohibition of the Statute, and that the question proposed must accordingly be answered in the affirmative.

WILLIAM PENN WHITEHOUSE.
ALBERT R. SAVAGE.
ALBERT M. SPEAR.
LESLIE C. CORNISH.
ARNO W. KING.
GEO. E. BIRD.
GEORGE F. HALEY.
GEORGE M. HANSON.

October 30, 1911.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

CHARLES B. SAMPSON *vs.* W. H. SPRINGER.

Waldo County. Decided July 3, 1911. Assumpsit on a contract for the sale of hay. Plea, the general issue with a brief statement invoking the statute of frauds. Verdict for defendant. Plaintiff moved for a new trial and also took exceptions. Exceptions not considered. The rescript states as follows:

"This case involves a question of fact only based upon the following memorandum, admitted to have been executed by the defendant, to wit:

" 'Freedom, Maine, Oct. 7, 1909.

Sold to Chas. B. Sampson, about 9 tons of hay at $13 per ton. Said hay to be delivered as loaded on car at Danforth Station.'

"The time of delivery was omitted and has now become the only issue in the case depending upon a collateral agreement as to the time when the hay was to be delivered. The defendant testified that the plaintiff was to accept delivery of the hay within three weeks from the date of the contract, and contends that at most he was entitled only to a reasonable time in which to demand a delivery at the cars. The evidence does not show that the plaintiff ever furnished a car at the Danforth Station for the shipping of the hay. It also affirmatively appears that he did not call for the hay until about the 13th of January, 1910.

"In view of all the circumstances surrounding the case and the positive testimony of the defendant as to the time agreed upon for

delivery and the further question of fact whether the plaintiff called for the hay within a reasonable time, all questions for the jury, and found in favor of the defendant, the court does not feel authorized to disturb the verdict. Motion overruled." *H. E. Bangs, and H. C. Buzzell*, for plaintiff. *Thompson & Blanchard*, for defendant.

AUGUSTINE F. HAHN, Executor, *vs.* LESLIE C. DEAN.

Waldo County. Decided July 5, 1911. The rescript is as follows: "This is an action of replevin brought by the executor of the last will and testament of Maria D. Dean, late of Lincolnville, to recover various bonds of the par value of twelve thousand dollars found after her death in the possession of the defendant, a nephew of said testatrix, and claimed by the defendant under a gift inter vivos.

"At the conclusion of the evidence, the presiding Justice directed a verdict in favor of the plaintiff, and the case is before the law court on defendant's exceptions to this ruling, and also to the admission and exclusion of certain evidence.

"Maria D. Dean died on August 17, 1909. She was a widow without children, her heirs being a brother and a large number of nephews and nieces. She had had a safety deposit box in one of the banks in Belfast for many years in which she kept her securities. At some time, prior to December, 1903, she procured an envelope from the Treasurer of the Belfast Savings Bank, and on the back of it she wrote these words: 'What is in this envelope belongs to Leslie C. Dean of Northport, Maine.' Just what she deposited in this envelope is not clear; but it is fair to infer that some of her bonds were placed in it and it was then restored to her box and

continued in her exclusive possession and control. On August 2nd, 1909, she gave the defendant an order on the cashier of the City National Bank of Belfast, in which her box was then kept, in these words: 'Please send me my safe deposit box by Leslie C. Dean and oblige.' The box was delivered to the defendant on this order, and it is conceded that all the bonds described in the writ were in the box at that time and were the property of Mrs. Dean. On Tuesday, August 17th, after the death of Mrs. Dean, the defendant took the box back to the City National Bank, but deposited the bonds in question in the Waldo Trust Company in his own name.

Held:

"1. That the mere marking of the envelope, as aforesaid, while it and its contents remained in Mrs. Dean's possession and control, was insufficient to transfer title to any property therein contained.

"2. That the title to the contents of the safety deposit box is not proven to have passed from her. There is no legal evidence of delivery, and the defendant's mere possession after his aunt's death falls far short of what the law requires. He was in possession under her authority when he took the box from the bank, and his possession was her possession; and that possession is presumed to continue until the contrary is proved, that has not been proved, and therefore, the title remained unchanged, and at her decease passed to her estate or to the plaintiff as the executor of the will.

"3. To constitute a valid gift inter vivos delivery is essential. No intention, however clear, nor declarations, however strong, can take its place.

"4. As a verdict for the defendant could not have been sustained in this court, the direction of a verdict for the plaintiff by the presiding Justice was without error.

"5. The defendant was not made a competent witness by the fact that two heirs at law of the testatrix testified at the instance of the plaintiff, and his testimony was properly excluded. It is provided in Revised Statutes, chapter 84, section 112, par. V. that 'In actions where an executor, administrator or other legal representative is a party, and the opposite party is an heir of the deceased,

said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator or other legal representative.'

The defendant not being an heir of the deceased does not come within this exception.

"6. The ruling of the presiding Justice permitting a niece of the testatrix to testify in behalf of the plaintiff to declarations of the testatrix tending to disprove a gift of the bonds, would be inadmissible so far as they can be regarded as merely self-serving; but the decision of the court in this case entirely disregards these declarations and is based upon the clearly admissible evidence. The error, if any, was harmless and should not be allowed to disturb the verdict. Exceptions overruled." *R. W. Rogers, and Arthur S. Littlefield*, for plaintiff, *Dunton & Morse*, for defendant.

GOLDER & MCCARTHY *vs.* A. B. BUTLER.

Androscoggin County. Decided July 14, 1911. Assumpsit on an account annexed to recover for groceries delivered to the family of Charles Butler, the son of the defendant. Plea, the general issue. Verdict for plaintiffs for $76.49. Defendant moved for a new trial. The issue involved in this case was one of fact only. The rescript says: "The facts and testimony, as well as the circumstances, so strongly negative the plaintiffs' claim of an original promise that the verdict should not be allowed to stand." Motion sustained. Verdict set aside. *McGillicuddy & Morey*, for plaintiffs. *W. H. Judkins*, for defendant.

ORRIN P. WEYMOUTH *vs.* JOHN W. DUNN et als.

Cumberland County. Decided July 14, 1911. Verdict for plaintiff. The rescript says: "This is an action upon a promissory note. The vital question was whether the signature purporting to be that of one of the defendants, James Rowe, was genuine. He denied it. A careful comparison of his admitted signature with that upon the note so strongly corroborates his denial, that, in the opinion of the court, a new trial should be granted. Motion sustained." *E. H. Wilson*, for plaintiff. *M. T. O'Brien*, for Peter W., Annie R. and James Rowe. *Henry W. Swasey*, for Patrick Wade.

GEORGE W. SAFFORD *vs.* GEORGE A. FULLER COMPANY.

Kennebec County. Decided July 21, 1911. Action on the case to recover damages for personal injuries caused by the alleged negligence of the defendant. Plea, the general issue. Verdict for plaintiff for $510. Defendant moved for a new trial. The rescript says: "A careful examination of the record discloses sufficient evidence, if believed by the jury, to warrant their finding upon the question of liability, but upon the assessment of damages they are clearly excessive. While the verdict is not large, in itself, it is, nevertheless, double the amount warranted by the testimony, and upon this feature of the case the defendant is as much entitled to a judicial judgment as the plaintiff is upon the question of liability. It is the opinion of the court that so much of the verdict as in excess of $300 should be remitted." Motion sustained, unless within thirty

days from the date of the certification of this decision, the plaintiff file a remittitur of all of the verdict in excess of three hundred dollars. *Williamson, Burleigh & McLean*, for plaintiff. *Heath & Andrews*, for defendant.

ISIDORÉ, alias GEORGE DROUIN

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY COMPANY.

Androscoggin County. Decided July 25, 1911. Action on the case to recover damages for personal injuries sustained by the plaintiff while working in and upon a gravel car of the defendant. Plea, the general issue. At the close of the evidence the presiding Justice ordered a verdict for the defendant, and the plaintiff excepted. The rescript says: "The plaintiff, a laborer employed by the City of Auburn, seeks to recover damages for an injury sustained by him while removing gravel from a dump car belonging to defendant. The gravel was in process of delivery under a contract between the city and the defendant. Whether, under the terms of the contract, the gravel was to be delivered to the city upon the cars or along the track was sharply controverted. It seems clear, however, that delivery was to be made along the track by defendant and not upon the cars to be removed therefrom by the city.

"There is evidence tending to show that the foreman in charge of the employees of the city directed them to clean out the cars which had been dumped by the employees of the defendant and that plaintiff was among those who undertook to do so. There is no evidence, however, showing, or tending to show, that the action either of the foreman or of the plaintiff was at the request or by consent of the defendant or its employee. The plaintiff was a volunteer and cannot recover." Exceptions overruled. *McGillicuddy & Morey*, for plaintiff. *Newell & Skelton*, for defendant.

ELMER LENFEST *vs.* JASON M. ROBBINS.

Knox County. Decided November 13, 1911. Action on the case to recover damages for the destruction of the plaintiff's home and domestic happiness as the result of the alienation of his wife's affections by reason of the defendant's illicit relations with her. Plea, the general issue. Verdict for plaintiff for $1250. The defendant filed a general motion for a new trial. The rescript says: "It was not in controversy that the plaintiff's wife deserted him and took up her abode in a tenement owned by the defendant; that the defendant frequently visited her in that house, and that before and after her desertion of her husband she worked for the defendant at his home and frequently remained there during the night as well as during the day time, with no other persons in the house. As is usual in a majority of this class of cases, the evidence tending to prove illicit relations between the parties was circumstantial; but after a careful examination of all the testimony in connection with the situations and circumstances disclosed, it is the opinion of the court that it fully justified the conclusion reached by the jury, and that the damages cannot be deemed excessive." Motion overruled. *Charles W. Lovett, and Rodney I. Thompson*, for plaintiff. *Lindley M. Staples, and C. M. Walker*, for defendant.

LESLIE R. CURTIS, pro ami, *vs.* AUBURN PAPER BOX COMPANY.

Androscoggin County. Decided November 17, 1911. Action on the case brought by the plaintiff, a boy 19 years of age, to recover damages to his left hand while in the employment of the defendant. This case has been before the Law Court once before. (See 107 Maine, 528.) At the conclusion of the evidence in the second trial the presiding Justice ordered a verdict for the defendant and the plaintiff excepted. Exceptions overruled. *McGillicuddy & Morey*, for plaintiff. *Oakes, Pulsifer & Ludden*, for defendant.

CARL C. WHITEHOUSE *vs.* GRANVILLE A. DURRELL.

Knox County. Decided November 20, 1911. Action of assumpsit to recover the consideration for one undivided half of a farm. Plea, the general issue. Verdict for plaintiff for $600. Defendant filed a general motion for a new trial also a motion for a new trial on the ground of newly discovered evidence. Motions overruled. *C. T. Smalley*, for plaintiff. *Reuel Robinson*, for defendant.

JONAS EDWARDS *vs.* GEORGE R. LEWIS.

Androscoggin County. Decided November 22, 1911. Action to recover damages for an alleged breach of a contract to purchase the stock of an undertaker's establishment in Auburn. The plaintiff claimed that the defendant agreed to purchase the stock for $2500 and paid him $100 "in earnest to bind the bargain," the balance to be paid in one week. The defendant contended that he made no contract to purchase the stock but that the $100 paid by him to the plaintiff was for the purpose of obtaining an option to purchase the stock within one week for $2500, and that he exercised his right not to purchase the stock and forfeited the $100 paid. Verdict for defendant. The plaintiff moved for a new trial. Motion overruled. *Oakes, Pulsifer & Ludden*, for plaintiff. *Harry Manser*, for defendant.

STATE OF MAINE *vs.* FRANK LUMBERT.

Penobscot County. Decided November 27, 1911. The defendant was indicted for an alleged rape of a girl fifteen years of age, the alleged offense being committed March 4, 1910. Tried at

August term, Supreme Judicial Court. Verdict guilty. The defendant moved for a new trial. In relation to his being a married man the defendant, on direct examination, testified as follows: Q. "Whether or not you have a wife?" A. "I have." Q. "Have you a wife living?" A. "No sir." Q. "When did your wife die?" A. "Two years ago the 12th of last January." And on cross-examination, in relation to the same matter, he testified as follows: Q. "You say, Mr. Lumbert, that you are 33 years old?" A. "I do." Q. "You have been a married man?" A. "I have." The rescript says: "In this case the respondent was indicted for rape and convicted. He admitted his improper relations with the complainant. From the evidence, however, the only reasonable conclusion to be drawn is that, being a married man, he was guilty of adultery." Motion sustained. New trial granted. *George E. Thompson*, County Attorney, for the State. *Henry Hudson*, for defendant.

JEMAL HAMET *vs.* PEPPERELL MANUFACTURING COMPANY.

York County. Decided November 27, 1911. Action on the case to recover damages for personal injuries received by the plaintiff while operating in the defendant's mill certain carding machines. The plaintiff alleged that "the defendant, although well knowing the perils and dangers of the employment, utterly failed to give the said plaintiff any instructions or notice of the dangers and perils incident to said employment as aforesaid. Whereby and solely by reason of such failure on the part of the defendant to give the notice," etc., etc., the plaintiff "was injured and suffered great pain," etc., etc. Verdict for plaintiff for $895.83. The defendant moved for a new trial. The rescript, among other things, says: "The only question here presented is, was he (the plaintiff) entitled to instructions as to how to operate the machine in which he was at work, or, from his own knowledge and experience must he be deemed

to have known the dangers, and especially the danger by which he was injured. The court is of the opinion from the evidence that the plaintiff should be charged with the knowledge of the dangers connected with the operation of these machines and particularly with the knowledge of the danger liable to be incurred by inserting his hand into a space occupied by a cylinder which he knew to be revolving and the particular location of which in the hidden space he did not know." . . . . . "The plaintiff's own evidence, fully warrants the conclusion that he thoroughly understood every method of starting and stopping the whole or any part of the machine and cylinders; that he knew, or with the exercise of due care ought to have known, at the time of the accident that the big cylinder was revolving; that when revolving it was dangerous; hence, when he thrust his hand into the space occupied by this revolving cylinder he was either so thoughtless that he took no note of his act, or knowing the danger voluntarily took the chance of injury. In either case he was guilty of contributory negligence and cannot recover." Motion sustained. New trial granted. *John P. Deering*, for plaintiff. *N. B. Walker & T. B. Walker*, for defendant.

ROBERT C. BURNETT, petitioner for writ of habeas corpus,

vs.

A. S. BARRETT.

Cumberland County. Decided December 13, 1911. (No record received by the reporter.) The rescript says: "The entries made in this case at the law court held in Portland on the 4th Tuesday of June, 1911 were as follows:

"Case and plaintiff's brief in. 30 days for respondent to file brief. 15 days for plaintiff's reply or petition dismissed. As no brief has been filed by the respondent, and the time in which his brief and the reply were to have been filed, having long since elapsed, the entry must be, dismissed for want of prosecution."

CLARENCE LEE PIERCE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided March 1, 1912. Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. The plaintiff was injured while in the employ of the Borden Condensed Milk Company, in a freight car of the defendant, which was standing on a side track next to the factory of the milk company, and while he was in the act of removing cases of condensed milk from a truck which had been run into the car. The accident was caused by the defendant running other cars against the car in which the plaintiff was working with such force that he was thrown down and the cases of milk overturned upon him. In his writ he alleges that his right leg was crushed betwixt said cases and the floor leaving no chance for escape, dislocating the ligaments, breaking the arch of the ankle, bruising the sinews, and lacerating the tissues. At the trial the plaintiff claimed that he was more or less bruised on different parts of his body, and that occasionally he had "dizzy spells" which he attributed to the accident, but the chief injury on account of which he claimed substantial damages was a hurt to his right foot or ankle. The only issue at the trial was the amount of damages. Verdict for plaintiff for $3000. Defendant moved for a new trial on the ground that the damages awarded were excessive. The rescript says: "After a careful examination and critical study of all the evidence in the case the court is clearly of the opinion that the sum of $3000, which the jury awarded the plaintiff as damages is manifestly excessive, and that for that reason the defendant is entitled to a new trial. If the plaintiff within thirty days after the filing of the rescript in this case shall remit all of the damages, awarded in the verdict, in excess of $1500, the entry will be: Motion overruled. Otherwise, motion sustained and verdict set aside." *F. W. Halliday*, for plaintiff. *Forrest Goodwin, and John Wilson*, for defendant.

HENRY LORD, Executor, *vs.* MARY W. PEARSON et als.

Penobscot County. Decided March 1, 1912. Bill in equity for the construction of the last will and testament of Sarah C. Barker, late of Bangor. Reported to the Law Court for determination. The rescript says: "1. Where a testator makes an unlimited bequest and devise of property to one, with an unqualified and unrestricted power of disposal thereof in the donee, an absolute estate passes to the donee, and any attempted limitation over of such portion thereof as may remain unexpended at the donee's death, is repugnant and void. *Bradley* v. *Warren*, 104 Maine, 423.

"2. The will of Sarah C. Barker, after appropriating $300 for the perpetual care of certain cemetery lots, contained this clause:

" 'All the rest of my property, I give, bequeath and devise to my beloved nephew, Paul Amory Battles, of Bangor, and I desire that he use as much of it as he needs or wishes to, even if he spends the whole of it. I do not wish to restrict him, in any way, in the use of it, but if, at the time of his decease, the principal remains unexpended, I wish it to be distributed in the following manner.

'To Miss Nancy W. Stacey, $1000.00'

"(Then follows the names of various persons and against each name a specified amount of money in figures.)

" 'There may be some remainder after these bequests are paid, if so I desire it to be given in trust to Mrs. Geo. H. Fox and her daughter, Miss Madeline S. Fox, to be used in the ways I have indicated to them.'

"The will was duly approved and allowed March 15, 1911. Paul A. Battles died March 29, 1911.

"Held: That under the provisions of the clause of the will quoted an absolute estate passed to Paul A. Battles in and to all the 'rest' of the property of the testatrix as therein referred to. Decree accordingly." *E. C. Ryder*, for plaintiff. *Hugh R. Chaplin*, for Clarissa A. Battles and for himself as executor of the last will of Paul A. Battles. *Matthew Laughlin*, for all other defendants.

JAMES O. STEWART

vs.

LEWISTON, AUGUSTA AND WATERVILLE STREET RAILWAY.

Kennebec County. Decided March 12, 1912. Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant in operating one of its cars upon its right of way where it crosses a public highway. The plaintiff was riding in a team driven by a Mr. Martin, and upon passing the railroad crossing a collision took place between the team and one of the defendant's cars, and the plaintiff was injured. The defendant admitted the negligence of its servants in operating its car but contended that it was relieved from liability by reason of the alleged contributory negligence of the plaintiff. Verdict for plaintiff for $1054.17. The defendant moved for a new trial. Motion overruled. *E. M. Thompson, and H. E. Foster*, for plaintiff. *Heath & Andrews*, for defendant.

HORACE E. KIMBALL *vs.* WILLIAM BARTLETT.

York County. Decided March 18, 1912. Set screw case. Verdict for plaintiff for $1000. Defendant moved for a new trial. The rescript says: "Action on the case wherein plaintiff seeks the recovery of damages from his employer for injuries received by reason of his clothing catching upon a set screw upon a revolving shaft about three feet from the shaft which he had been directed to repair and upon which he was at work at the time of the accident. The evidence is uncontradicted that during part of the time plaintiff was at work he shut down the mill to enable him to do his work in safety but again started it up and that the injury was sustained after he

had a second time started up the mill. It would seem that he assumed the risk in selecting a dangerous instead of a safe way, both known to him, of doing his work. Be this as it may, it is the clear and unanimous opinion of the court that plaintiff was guilty of contributory negligence which prevents his recovery. It is uncontradicted that he was a man of mature years and long experience, that he was one of the employees who installed the shaft that caused the injury, that this shaft was of usual construction, that he neither looked nor in any other manner endeavored to ascertain if there was anything upon the shaft causing the injury, which might injure him, and that the idea of taking such precautions did not enter his mind. Such conduct under the circumstances was thoughtless inattention that is inexcusable. *Cunningham* v. *Bath Iron Works*, 92 Maine, 501, 507; See also *Podvin* v. *Man'fg. Co.*, 104 Maine, 561, 564-565. Verdict set aside." *Frank H. Purinton*, for plaintiff. *Cleaves, Waterhouse & Emery*, for defendant.

E. P. CLARK *vs.* WALTER B. CLARKE.

Cumberland County. Decided March 18, 1912, The rescript says: "This is an action of replevin wherein the plaintiff seeks to recover certain goods and chattels to the value of $407.50. The plea is the general issue with a brief statement claiming title in the defendant.

"The jury by their verdict gave to the plaintiff seventeen of the items claimed, aggregating in value $361.50, and to the defendant five items, aggregating in value $46.

"The case is before the law court on both motion and exceptions by the defendant. The exceptions however, were waived in argument and the only question is whether the verdict of the jury is manifestly wrong.

"The evidence is voluminous, covering one hundred and eighty-three printed pages. There was a sharp conflict over nearly every

one of the twenty-two articles in the schedule, but the questions involved were purely those of fact, which the jury, after seeing the witnesses and listening to the detailed evidence, were fully competent to decide. It was peculiarly a case for that tribunal, and while the evidence on some single item or items might seem from the cold type to preponderate in favor of the other party, yet after careful study of the entire case, we are unable to say that the findings of the jury were clearly wrong. We are the more inclined to this view because it is doubtful if on the whole, a more satisfactory result, considering the nature of the case and of the conflicting evidence, would be reached if it were submitted to another jury. Motion and exceptions overruled. Judgment on the verdict." *Eaton, Keene & Gardner*, for plaintiff. *Charles E. Gurney*, for defendant.

JOSEPH J. WELCH *vs.* PORTLAND LIGHTING AND POWER COMPANY.

Cumberland County. Decided March 26, 1912. Action on the case to recover damages for personal injuries caused by the alleged negligence of the defendant in allowing one of its heavy wire cables to fall upon him as he was traveling along a cross walk on York Street in Portland. Plea, the general issue. Verdict for plaintiff for $500. Defendant moved for a new trial on the ground that the verdict was against evidence and that the damages awarded were excessive. Motion overruled. *Connellan & Connellan*, for plaintiff. *Strout & Strout*, for defendant.

DANIEL L. SHAW *vs.* BOSTON AND MAINE RAILROAD COMPANY.

York County. Decided March 27, 1912. The rescript says: "This is an action brought in the name of the plaintiff for the benefit

of the Dirigo Mutual Fire Insurance Company, to recover the sum of $1000 paid by it to the plaintiff for the loss of his buildings in Sanford alleged to have been destroyed by fire communicated by sparks escaping from the defendant's locomotive engine on the 9th day of September, 1908. At the close of the testimony introduced at the trial, the presiding Justice ordered a verdict for the defendant. The case comes before this court on exceptions, first, to the ruling of the presiding Justice excluding the following question asked by plaintiff's counsel: — 'After the buildings were burned after the loss, what if any sum did the Boston and Maine Railroad pay to you;' and second, to the order of the presiding Justice directing a verdict for the defendant.

"1. It appears that there was no controversy in relation to the amount of damages if the defendant should be held liable. There was no offer to prove an admission of any material fact on the part of the defendant. The evidence excluded had no necessary tendency to prove it. The defendant might have been willing to buy its peace by paying a sum less than the amount required to defend the suit. The evidence offered had no legitimate bearing upon the issue before the court. *Finn* v. *N. E. Tel. & Tel. Co.*, 101 Maine, 279; *Beaudette* v. *Gagne*, 87 Maine, 534.

"2. After a careful examination of all the evidence in the case, it is the opinion of the court that the ruling of the presiding Justice ordering a verdict for the defendant was also unquestionably correct." Exceptions overruled. *Cleaves, Waterhouse & Emery*, for plaintiff. *Symonds, Snow, Cook & Hutchinson*, for defendant.

BOSTON ART METAL COMPANY *vs.* F. W. CUNNINGHAM & SONS.

Cumberland County. Decided April 1, 1912. (See same case 107 Maine, 534.) Assumpsit on an account annexed to recover the sum of $5,437.42 for metal ceiling lights claimed by the plaintiff to

have been sold by it to the defendant corporation. There was no question as to the delivery of the lights to the defendant, but it was alleged by the defendant that the lights were furnished under a written contract between the parties and that there was nothing due thereon. The plaintiff claimed that the lights were furnished to the defendant without any reference to the contract and that they were "extras." These lights were used in the construction of the Cumberland County Court House in Portland. At the conclusion of the evidence the case was reported to the Law Court for determination. Judgment for defendant. *Symonds, Snow, Cook & Hutchinson*, for plaintiff. *William C. Eaton, and Charles G. Keene*, for defendant.

RICHARD W. STAFFORD *vs.* JOHN A. BURNS.

Somerset County. Decided April 9, 1912. The rescript is as follows: "This is an action of assumpsit to recover the sum of $325, balance of commissions alleged to be due on the sale of a lot of timber land owned by the defendant. The lot was situated in Hartland, near the home of the plaintiff, while the defendant lived in Bangor. The original agreement between the parties was as follows:

'Bangor, Maine, Feb. 17, 1910.

I hereby agree to give Mr. R. W. Stafford $250. commission if he sells timber lot in Hartland for $8000.

JOHN A. BURNS.'

"It is admitted that immediately after this agreement was signed, it was orally modified so that the plaintiff was to receive whatever might be obtained in excess of $8000, and that later on there was another oral modification by which such excess should be shared equally.

"In an action brought by the plaintiff to recover his commission under the modified agreement when the sale was made for $8500, to parties who first applied to the defendant and by him were given an option of purchase at that figure, and then were sent by him to the plaintiff to show the lot, the jury having found a verdict for the plaintiff for $325 and interest; upon defendant's motion to set aside the verdict as against the evidence it is *Held:*

"1. That the modified agreement was never cancelled but was in full force at the time of the sale.

"2. That while the evidence was somewhat conflicting, it is the opinion of the court that the jury were warranted in finding from the personal interviews, the correspondence and the course of dealings between the parties from the beginning of their business transactions to the end, that the plaintiff did in this instance all that he was expected to do in promoting a sale, and that he fulfilled his obligation under the agreement.

"3. That the plaintiff was entitled to the sum of $250 and one half of the excess over $8000, or $250 more, making a total of $500, and having received $175, the verdict for $325. and interest should stand." Motion overruled. *Walton & Walton*, for plaintiff. *James D. Rice, and Merrill & Merrill*, for defendant.

MELLEN A. RANDALL *vs.* WILLIAM H. SULLIVAN.

Penobscot County. Decided April 8, 1912. The rescript is as follows: "This is an action of replevin for a horse. In his brief statement the defendant denies title in the plaintiff and alleges title in himself. At the close of the testimony the presiding Justice ordered a verdict for the defendant. The case comes to this court on exceptions to that ruling and also upon a motion for a new trial, on the ground of newly discovered evidence.

"May 30, 1910, the plaintiff being then the owner, sold the horse in question to one Erald Smith and received a Holmes note for $175, payable in six months, in which Smith agreed that the title to the horse should remain in the plaintiff until paid for. This instrument was duly recorded in the town clerk's office in Wellington June 1, 1910, at eight o'clock P. M. But it is not in controversy that Smith sold the horse to John R. Bean, and that Bean sold her to the defendant. It is contended in behalf of the defendant that Smith sold the horse to Bean about ten o'clock in the forenoon of May 30, 1910, the same day that he purchased her of the plaintiff, and two days before the bill of sale was recorded, and that Bean had no knowledge of the mortgage at the time of his purchase and was not informed of it until the controversy arose at the maturity of the Smith note.

"Smith left the State before his note became due and was not a witness at the trial. Bean testifies that he held a note against Smith for $350, and at Smith's request purchased this horse for $175, and another one for $160, and gave Smith a receipt for $335, to be endorsed on the note. Refreshing his recollection by the stub in his receipt book he states that the transaction was closed May 30, 1910, at about ten o'clock in the forenoon at his house in Detroit, but that Smith, being pressed for the payment of the note, came to him the evening before, which was Sunday, and made the proposition to sell him the two horses.

"After a careful examination of the testimony, it is the opinion of the court that a jury would not have been authorized by any evidence in the case, to reject the positive testimony of Mr. Bean, supported by his receipt book; that he bought the horse on the 30th day of May. It is of course immaterial whether it was in the forenoon or afternoon. In either case it was two days before the mortgage was recorded. The 'newly discovered evidence' of the plaintiff's wife that Smith did not leave their house until after dinner on May 30, was known to her at the time of the trial and in any event, would not have changed the result. Smith was obviously seeking to dispose of the horse to an innocent purchaser before the mortgage was recorded, and it is not probable that there was any

unnecessary delay on his part in completing the transaction with Bean. The verdict for the defendant was properly ordered. Exceptions and motion overruled." *L. B. Waldron*, for plaintiff. *Martin & Cook, and George H. Morse*, for defendant.

GEORGE S. MEHAYLO, Admr.,

vs.

THE GREAT NORTHERN PAPER COMPANY.

Androscoggin County. Decided April 16, 1912. 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. In the first trial of this action the verdict was for the plaintiff for $4,750. This verdict was set aside by the Law Court. See *Mehaylo, Admr.*, v. *The Great Northern Paper Company*, 107 Maine, 521. At the second trial of the action the verdict was for the plaintiff for $6,958.33. The defendant excepted to several rulings and also filed a general motion for a new trial. Exceptions not considered. Motion sustained and verdict set aside. *McGillicuddy & Morey*, for plaintiff. *Oakes, Pulsifer & Ludden*, for defendant.

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

Knox County. Decided April 20, 1912. Trespass quare clausum. (See *Cilley* v. *Railroad Company*, 107 Maine, 117.) The rescript says: "The acts complained of are alleged to be the building and maintaining a railroad upon and across the plaintiff's

close. At the conclusion of the plaintiff's evidence the defendant informed the presiding Justice that it would offer no further evidence, and moved that a verdict for the defendant be directed which was done. The case comes up on an exception to that ruling, and another exception to the exclusion of certain testimony relating to the value of the locus.

"We think the ruling directing a verdict for the defendant was correct. It was incumbent upon the plaintiff to show, (1) that he had either the actual or constructive possession of the premises described in his writ, (2) that the defendant committed the alleged acts of trespass on the premises, and (3) the damages resulting to him on account thereof.

"The plaintiff did show that he had a title to one hundred and twenty-six one hundred and thirty-eights of the premises described in his writ, containing one fourth of an acre, and mentioned in the evidence as the 'Cook quarry.' The exact location, however, of the Cook quarry upon the face of the earth was in issue and if the decision of the question now before us depended upon whether or not the plaintiff had sufficiently established its location, we should be in much doubt and uncertainty about it. But our decision does not depend upon the determination of that question, for the plaintiff wholly neglected and omitted to prove the alleged acts of trespass. No evidence whatever was introduced tending to show that any of the acts complained of were committed by the defendant or by any one else. This was undoubtedly an inadvertent omission on the plaintiff's part, but it is nevertheless fatal to his case.

"Accordingly the ruling directing a verdict for the defendant was right. Inasmuch as the plaintiff failed to prove the acts of alleged trespass, a consideration of the other exception (to the exclusion of testimony relating to the value of the locus) is immaterial. The entry must therefore be: Exceptions to the ruling directing a verdict for the defendant overruled. Judgment on the verdict." *Jonathan P. Cilley*, pro se. *Arthur S. Littlefield*, for defendant.

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"A law book without an index would cause anathematization."

Kiriathiarius.

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Edgecomb v. *Jenney*, 538.

It is apparent that Revised Statutes, chapter 93, section 54, if construed precisely as it reads, would authorize the taking of property without due process of law. If A without a contract express or implied could, in invitum, enter the field of B, harvest his hay and appropriate to his own use so much of it as was necessary to pay for his services, it would constitute a direct violation of B's constitutional right that no person shall be deprived of his life, liberty, property or privileges, but by judgment of his peers, or by the law of the land. *Edgecomb* v. *Jenney*, 538.

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EVIDENCE.

See Bills and Notes. Cases on Report. Contracts. Divorce. Execution. Fish and Fisheries. Forcible Entry and Detainer. Husband and Wife. Insurance (Accident). Insurance. Landlord and Tenant. Liens. Master and Servant. Money Had and Received. Mortgages. Nonsuit. Property. Real Actions. Trespass. Trial. Vendor and Purchaser. Witnesses.

Admissions made for the purposes of one trial are not conclusive upon the party making them in another trial, when such party, before the beginning of the trial, has given notice of his intention to withdraw the admissions and demand proof of the formerly admitted items. *Currie* v. *Cleveland*, 103.

Whatever the parties agree upon in the presence of the court and the jury as to the terms and purposes of admissions, or whatever either counsel asserts, if undisputed, becomes a binding statement of fact.
Currie v. *Cleveland*, 103.

Admissions on former trials by a plaintiff's counsel concerning a set-off pleaded must be confined to the trials in which they were used, where defendant's counsel stated that they were made for the purposes of the trial, the plaintiff being hostile to any admission, and there was no proof that the admissions were general. *Currie* v. *Cleveland*, 103.

Where admissions by counsel are made for a specific purpose they are to be confined to that purpose. *Currie* v. *Cleveland*, 103.

EXCEPTIONS.

See Cases on Report. Divorce. Law Court. Nonsuit. Trial.

Exceptions to rulings which are not prejudicial will not be sustained.
Hotchkiss v. *Coal & Iron Company*, 34.

EXECUTION.

See Election of Remedies. Money Had and Received. Scire Facias.

To support a sheriff's sale of land upon an execution, it is necessary to show, among other things, a valid judgment, upon which the execution issued. In this case, to support the plaintiff's title under an execution sale, formal proof of a judgment was not offered. But inasmuch as it appears that when the plaintiff was proceeding to prove a judgment, the defendant's counsel interrupted saying, "I don't make any objection to that, the certificate on the back of the execution is to be the legal proof," and the plaintiff thereupon forebore to ask further questions, it is held that formal proof of a judgment was waived. *Bank* v. *Nickerson*, 341.

EXECUTORS AND ADMINISTRATORS.

See COURTS. DESCENT AND DISTRIBUTION. WILLS.

EXEMPTIONS.

See ATTACHMENT. TAXATION.

EXPRESS COMPANIES.

See COMMERCE. COMMON CARRIERS.

EXPROPRIATION.

See EMINENT DOMAIN.

FALSE PRETENSES.

See MINES AND MINERALS. MONEY HAD AND RECEIVED. VENDOR AND PURCHASER.

FALSE REPRESENTATIONS.

See MINES AND MINERALS. TRIAL. VENDOR AND PURCHASER.

FELLOW SERVANT.

See MASTER AND SERVANT.

FINES.

A fine illegally imposed, but voluntarily paid under mistake of law, is not recoverable. *Houlehan* v. *Kennebec County*, 397.

The plaintiff was convicted of offenses and sentences of fines and imprisonment were imposed in two of the cases. Subsequently after final adjournment of the term, and in vacation, and without the knowledge of the county attorney, the Justice of the court "amended the sentences" and in one of the cases imposed a sentence of $1000 fine or thirty days in jail and ordered the other cases to be placed "on file." The plaintiff paid the $1000 to the defendant county. Subsequently the plaintiff brought an action to recover back the $1000. *Held:* 1. That the whole transaction whereby the Justice undertook to amend the sentences was improper, illegal and in defiance of law. 2. That the plaintiff having voluntarily paid the $1000 pursuant to an unlawful arrangement could not recover the same back.
Houlehan v. *Kennebec County*, 397.

FIRES.

See INSURANCE.

FISH AND FISHERIES.

Evidence held to show that defendant threw refuse into a river so near plaintiff's fish weir that the refuse was carried into the weir by the tides, preventing fish from entering, and that such result might have been foreseen by reasonably prudent men. *Lamond* v. *Canning Company*, 155.

FLOWAGE.

See WATERS AND WATERCOURSES.

FORCIBLE ENTRY AND DETAINER.

See LANDLORD AND TENANT. STATUTES.

FORECLOSURE.

See MORTGAGES.

FRANCHISES.

See CORPORATIONS.

FRAUD.

See DECEIT. DIVORCE. INSURANCE. MORTGAGES. STATUTE OF FRAUDS. TRIAL. VENDOR AND PURCHASER.

When a representation is capable of being understood, either as an expression of opinion, or as a statement of a positive fact, whether it is to be regarded as the one or the other may depend upon the surrounding circumstances, and the question must be submitted to the jury with appropriate instructions.
Hotchkiss v. *Coal & Iron Company*, 34.

GAME.

See FISH AND FISHERIES.

GENERAL ISSUE.

See BILLS AND NOTES. INTOXICATING LIQUORS. PLEADING. REAL ACTIONS. TAXATION.

GIFTS.

See DESCENT AND DISTRIBUTION. TRUSTS. WILLS.

GRAVEYARDS.

See EMINENT DOMAIN.

GUARANTY.

See BANKS AND BANKING.

A savings bank owned a summer hotel, and on February 16, 1907, issued to one Davis, who was in some way interested in the management of the hotel, the following letter of credit: "You are authorized to contract for material and supplies for Summit Spring Hotel at Poland and the same will be paid for by us." In July, in the same year, the bank contracted to sell the hotel to Davis, who was to manage it on his own account, the bank agreeing to furnish fixtures, furniture and supplies to limited amount "to get the hotel opened and in running order." The sums paid on these accounts were to be added to the purchase price. Davis operated the hotel during the seasons of 1907 and 1908 under this agreement. Davis showed the letter of credit to the plaintiff's selling agent in 1907, but purchased no goods of the plaintiff that year. In 1908 the plaintiff sold, on the order of Davis, the goods to recover the price

HAY LIEN.

See AGRICULTURE.

HIGHWAYS.

See EASEMENTS. TOWNS. WAYS.

HUSBAND AND WIFE.

See DESCENT AND DISTRIBUTION. DIVORCE.

Where a husband and wife are living on a farm which the husband is carrying on, the fact that the title to the farm is in the wife does not show that he was carrying on the farm as her agent and does not make her liable for articles purchased by him for use on the farm. *Steward* v. *Church*, 83.

Where in such case the husband did not represent himself to be the agent of his wife in making the purchase, she cannot be held liable upon the ground of after-ratification. The doctrine of ratification applies only in cases where a person without authority assumes to have authority to act for another. *Steward* v. *Church*, 83.

A promise by the wife to pay the vendor for articles purchased by the husband, cannot be logically inferred from the circumstance that the articles ultimately came into her hands. *Steward* v. *Church*, 83.

The fact that the wife authorized her husband to let a farm owned by her does not justify an inference that he was her agent in carrying on the farm. *Steward* v. *Church*, 83.

The fact that in making a lease of the farm and farming plant six months after the purchase of a farming implement by her husband the wife included the implement in the lease, does not justify the inference that she authorized it to be purchased on her credit. *Steward* v. *Church*, 83.

INDICTMENT.

See OBSTRUCTING OFFICERS.

INFANTS.

See MASTER AND SERVANT.

INJUNCTION.

See CONTRACTS.

Where the defendant sold his trucking business in a city and agreed in writing not to "engage in any similar business" in the same city for a term of five years, and afterwards, within the five years, entered the employment of another person who was engaged in the trucking business in the same city, the defendant being employed as a "lumper," *held* that this was a violation of his agreement and he be enjoined. *Flaherty* v. *Libby*, 377.

INNKEEPERS.

See BANKS AND BANKING.

INSTRUCTIONS.

See TRIAL.

INSURANCE.

See INSURANCE (ACCIDENT.)

The defendant issued to the plaintiff a policy of insurance on "his one story frame, steel roof building situated on the north side of Bridge Street, and known on the map as Thurston's Planing and Saw Mill, in Livermore Falls, privileged to be occupied as a Planing Mill and Job Shop." The map referred to was "Sanborn's Map," so called, made for the use of fire insurance companies and their agents. The plaintiff had two "one story frame, steel roof buildings" north of Bridge Street in Livermore Falls. In one logs were sawed and boards and dimension lumber were planed, and there was evidence that it was known at one time as Thurston's Planing and Saw Mill. The other building was used more especially as a fitting and job shop, and contained a planer, band saw and other machinery. The latter building was delineated on the map referred to, with the legend "C. H. Thurston, Saw and Planing Mill." The former building was not on the map at all. *Held*, that the description in the policy, "building . . . known on the map as

INSURANCE (ACCIDENT).

INTEREST.

See TAXATION.

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

See COMMERCE.

LACHES.

See EQUITY.

LANDLORD AND TENANT.

See FORCIBLE ENTRY AND DETAINER. STATUTES. VENDOR AND PURCHASER.

A landlord is presumed to have understood a lease signed by her, in the absence of fraud or deception practiced upon her. *Kelleher* v. *Fong*, 181.

Evidence *held* to show that a landlord signed a lease, and that it was previously read to her. *Kelleher* v *Fong*, 181.

A lease to "Eng Fong and his brother," signed by "Charlie Fong" and "Charley Sam," held sufficient as a lease to Charlie Fong, on a showing of his identity as Eng Fong. *Kelleher* v. *Fong*, 181.

A lease until a specified time at a fixed rental, with a higher rental after that time, giving occupation as long as the lessee "may want it," gives the right to renew indefinitely. *Kelleher* v. *Fong*, 181.

By continuing in possession on lapse of a particular term, and paying stipulated rent, a tenant sufficiently elected to avail himself of an option to renew. *Kelleher* v. *Fong*, 181.

To determine a tenancy at will by a notice in writing, the notice must be "given the other party." A written notice left at the residence of the other party not on the demised premises and so left in his absence without explanation of its contents and purpose made to some adult member of his family and not seasonably coming to his own knowledge or that of his business agent, is not the notice required by the statute. *Gilbert* v. *Gerrity*, 258.

The day of the termination of a tenancy at will by notice must be stated in the written notice, and if the notice be not given to the other party thirty days prior to that day, it will not terminate the tenancy on that or any subsequent day. *Gilbert* v. *Gerrity*, 258.

If the defendant be in possession under a written lease and the plaintiff desires to remove him by the process of forcible entry and detainer because of expiration or forfeiture of the lease, such case must be stated in the declaration. Proof only of such a case will not support a declaration in which is stated only a case of a tenancy at will terminated by written notice. *Gilbert* v. *Gerrity*, 258.

LAW COURT.

LEASE.

See LANDLORD AND TENANT.

LIENS.

See AGRICULTURE. MORTGAGES. TAXATION. VENDOR AND PURCHASER.

LIFE ESTATES.

See DEEDS. WILLS.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LORD'S DAY.

See CRIMINAL LAW.

Revised Statutes, chapter 125, section 25, making it an offense for any person to keep open his shop, workhouse, warehouse or place of business on the Lord's Day, to wit, Sunday, does not prohibit a druggist from going into his shop or store on that day to prepare or compound a prescription in case of sickness, or from entering for the purpose of doing any act of necessity or charity. The statute means that one shall not keep open his shop, workhouse, warehouse or place of business for the purpose of inviting trade, or inviting people to enter to transact business, or to work therein.

State v. *Morin*, 303.

MANDAMUS.

Mandamus is an appropriate and necessary proceeding where a petitioner shows that his right to have the act done, which is sought by the writ has been legally established; that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion exists; that the writ will be availing; and that there is no other adequate remedy.

Webster v. *Ballou*, 522.

Mandamus lies to compel a sheriff to execute a writ of possession; proceedings against the sheriff for contempt, or an action for damages, being inadequate remedies. *Webster* v. *Ballou*, 522.

MARRIAGE.

See DIVORCE. HUSBAND AND WIFE.

MASTER AND SERVANT.

The master is liable for injuries suffered by his servant arising from the former's own negligence, although the negligence of fellow servants of the latter may have contributed in causing the injury. *Haynes* v. *Railroad Co.*, 243.

A train dispatcher and the enginemen over whose movements he has direction are not fellow servants; he being a vice-principal to such employees.

Haynes v. *Railroad Co.*, 243.

MECHANICS' LIENS.

See LIENS. MORTGAGES.

MINES AND MINERALS.

See CONTRACTS. FRAUD. VENDOR AND PURCHASER.

A negotiable note expressing value received may be given in evidence in support of counts for money had and received and money paid between the immediate parties to the note. *Titcomb* v. *Powers*, 347.

Although the legal property in a note may pass to the holder, it is competent under a count for money had and received by indorser against indorsee to show by parol testimony that such note was held in trust to be accounted for in a particular manner, but in such case the possession of the note is prima facie evidence that it is the property of the holder.
Titcomb v. *Powers*, 347.

To establish such trust the evidence must be full and clear. Vagueness and indefiniteness of proof are as much an objection to sustaining a count for money had and received as in other actions. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative. *Titcomb* v. *Powers*, 347.

Assumpsit for money had and received is comprehensive in its reach and scope, and though the form of procedure is in law it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored by the court. *Dresser* v. *Kronberg*, 423.

There need be no privity of contract between the parties, in order to support an action for money had and received, except that which results from one man's having another's money which he has not a right conscientiously to retain. The law then creates both the privity and the contract.
Dresser v. *Kronberg*, 423.

MONEY PAID.

See Fines. Payment. Vendor and Purchaser.

MORTGAGES.

See Chattel Mortgages. Deeds. Executors and Administrators. Property. Real Actions. Trespass.

A deed by a mortgagee out of possession without a transfer of the debt conveys no legal title. *Wyman* v. *Porter*, 110.

A deed by a mortgagee's assignee under invalid foreclosure proceedings conveys no legal title. *Wyman* v. *Porter*, 110.

4. That, it appearing that the certificate was false in fact and that the plaintiff relied upon the certificate in purchasing the bond, she is entitled to recover.

5. That the measure of damages is the difference between the value of the bonds in question at the time of purchase and their value if they had been as represented. Being one of ten unauthorized and overissued bonds they were invalid and worthless. *Mullen* v. *Banking Co.*, 498.

MOTIONS.

See CRIMINAL LAW.

MUNICIPAL CORPORATIONS.

See PAUPERS. TAXATION. TOWNS.

MUNICIPAL OFFICERS.

See TOWNS.

NAMES.

See LIENS. TRUSTS. WILLS.

NEGLIGENCE.

See MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW TRIAL.

See TRIAL.

NON-RESIDENTS.

See ATTACHMENT.

NONSUIT.

See CASES ON REPORT.

Where the declaration describes a note signed by four and the note put in evidence is signed by only three, the variance is cured by a discontinuance as to the defendant who did not sign the note, and then is not cause for a nonsuit.
Bank v. *Arsenault*, 241.

In an action upon a several contract against three, the fact that the evidence against one of the three does not show him to be liable is not cause for a nonsuit. The plaintiff might still be entitled to a verdict against the others under Revised Statutes, chapter 84, section 98. *Bank* v. *Arsenault*, 241.

As a general rule, variances that are remediable by allowable amendments or discontinuances are not grounds for nonsuit. *Bank* v. *Arsenault*, 241.

When a nonsuit is ordered, or a verdict is directed, and exceptions are taken, all of the evidence necessarily becomes a part of the case on exceptions, whether it is mentioned in the bill of exceptions or not.
Bank v. *Nickerson*, 341.

The burden is on the party who excepts to an order of nonsuit or the direction of a verdict to show that it was erroneous, and that it was erroneous cannot be determined without an examination of all of the evidence.
Bank v. *Nickerson*, 341.

If the party excepting to an order of nonsuit, or the direction of a verdict, fails to present a transcript of all the evidence to the Law Court his exceptions must be overruled, unless the omission is otherwise supplied.
Bank v. *Nickerson*, 341.

NOTES.

See BILLS AND NOTES.

NOTICE.

See AGRICULTURE. BANKS AND BANKING. BILLS AND NOTES. CHATTEL MORTGAGES. EMINENT DOMAIN. EXECUTION. INSURANCE. LANDLORD AND TENANT. MORTGAGES. PAYMENT. VENDOR AND PURCHASER. WAYS.

OBSTRUCTING OFFICERS.

Section 21 of chapter 123, Revised Statutes against obstructing officers is limited to cases of obstructing officers in the service of some process and does not support an indictment not containing an allegation that the officer was obstructed in the service of some process. *State* v. *Simmons*, 239.

Section 22 of chapter 123, Revised Statutes, is limited to the particular officers therein named and does not include fish wardens, and hence does not support an indictment for obstructing a fish warden. *State* v. *Simmons*, 239.

An indictment at common law for obstructing a fish warden in the execution of his duty is invalid if it contain no description or specifications of the acts relied upon as constituting an obstructing, opposing or hindering him. *State* v. *Simmons*, 239.

OFFICERS.

See ATTACHMENT. EXECUTION. LIENS. OBSTRUCTING OFFICERS. SHERIFFS AND CONSTABLES. STATES. TAXATION. TOWNS. VENDOR AND PURCHASER.

OPTIONS.

See PAYMENT.

PARTIES.

See PLEADING.

PARTNERSHIP.

See CORPORATIONS.

PAUPERS.

The phrase "town to which he belongs" within Revised Statutes, chapter 18, section 51, providing for the furnishing of nurses, etc., to a quarantined person at the charge of the town to which he belongs, means the town in which he has his pauper settlement. *Eden* v. *Southwest Harbor*, 489.

PAYMENT.

See FINES. INSURANCE (ACCIDENT).

PLEADING.

See BILLS AND NOTES. DIVORCE. FORCIBLE ENTRY AND DETAINER. INTOXICATING LIQUORS. LANDLORD AND TENANT. LIENS. MONEY HAD AND RECEIVED. REAL ACTIONS. SCIRE FACIAS. TAXATION. WATERS AND WATERCOURSES.

Under Revised Statutes, chapter 84, section 34, authorizing pleading of the general issue, and the filing of a brief statement of special matter of defense, or a special plea, and providing that the plaintiff must join a general issue and may file a counter brief statement, where the defendant in a writ of entry filed a plea of the general issue and a brief statement and the plaintiff filed a replication, *held* it was not error to refuse to direct the defendant to join issue thereon. *Lancaster* v. *Water District*, 137.

Under Supreme Judicial Court Rule V, *held* it was discretionary to permit the defendant, in writ of entry, at the close of the plaintiff's opening statement, to amend by substituting for its claim to the premises a claim of easement. *Lancaster* v. *Water District*, 137.

A declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits, in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court that is to give judgment. *Ferguson* v. *National Shoemakers*, 189.

A declaration for an injury to an employee charged to have resulted from dullness of circular saw teeth, irregularity in the set of the teeth, and failure to instruct, is bad for duplicity; each breach of duty being properly the subject of a separate count. *Ferguson* v. *National Shoemakers*, 189.

The rule that pleadings must not be double means that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. *Ferguson* v. *National Shoemakers*, 189.

Statements that land is so situated as to make its condemnation so manifest a perversion of power as to be null and void, being conclusions of law from facts not stated, are not admitted by demurrer. *Brown* v. *Water District*, 227.

Where after demurrer was filed to the original bill for improper joinder of the defendants, an amendment to the bill was filed by consent, to which the defendants did not demur, but answered by a denial, exceptions to overruling the demurrer to the original bill will not be considered, though the objections urged are open to the defendants on appeal. *Witham* v. *Wing*, 364.

POWERS.

See WILLS.

PRESCRIPTION.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS. TRESPASS.

PRESUMPTIONS.

See ADVERSE POSSESSION. INSURANCE (ACCIDENT). MASTER AND SERVANT. PROPERTY. TRESPASS. WATERS AND WATERCOURSES.

PRINCIPAL AND AGENT.

See AGENCY. HUSBAND AND WIFE. INSURANCE (ACCIDENT). MORTGAGES.

PRINCIPAL AND SURETY.

See CHATTEL MORTGAGES. GUARANTY.

Where some of the debts secured by a mortgage are also secured by sureties, the latter cannot require the application of the mortgaged property to such debts in preference to those debts secured only by the mortgage.

Banking Co. v. *Mfg. Co.*, 206.

The sureties upon debts also secured by a mortgage cannot require the creditor to foreclose the mortgage upon condition broken, nor, to follow up the foreclosure if begun. The creditor may without their consent allow the debtor more then the statutory time for redemption after foreclosure is begun; and in such case he will be held to account only for the value of the property at the end of the extended time. *Banking Co.* v. *Mfg. Co.*, 206.

PROBATE COURTS.

See COURTS.

PROCESS.

See ATTACHMENT. OBSTRUCTING OFFICERS. PROHIBITION.

PROHIBITION.

See INTOXICATING LIQUORS.

The writ of prohibition is an extraordinary judicial writ, directed to an inferior tribunal to prevent use or usurpation of judicial functions.

Norton v. *Emery*, 472.

As Revised Statutes, chapter 79, section 6, paragraph XI, gives the Supreme Judicial Court equity jurisdiction on petition of not less than ten taxable inhabitants of a town to restrain an attempted exemption of property from taxation, *held* that a writ of prohibition under section 5, of the same chapter should not be issued to prohibit the assessors of a town from abating taxes pursuant to a vote of the town where the town had voted to instruct the assessors to abate the taxes on certain property for ten years.

Norton v. *Emery*, 472.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROPERTY.

See EMINENT DOMAIN. TRESPASS.

A quitclaim deed, or a deed of a "right, title and interest" in land, is not prima facie evidence of title. *Thurston* v. *McMillan*, 67.

A warranty deed, or a deed of conveyance, acknowledged and recorded, itself raises a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee. It is prima facie evidence of title. And the same rule applies to a mortgage in the usual form. *Thurston* v. *McMillan*, 67.

The presumption of seizin arising from a deed of conveyance is only a presumption, and may be rebutted by showing that the grantor had no title. *Thurston* v. *McMillan*, 67.

PROVERBS.

"The hit bird flutters." *American.*

"A dead dog has no teeth." *German.*

"A criminal shuns the daylight." *Spanish.*

"When wolf eats wolf there is famine in the forest." *Russian.*

PUBLIC SERVICE CORPORATIONS.

See COMMON CARRIERS.

PUNCTUATION.

See EXECUTION.

RAILROADS.

See MASTER AND SERVANT.

REAL ACTIONS.

See FORCIBLE ENTRY AND DETAINER. MORTGAGES. NONSUIT. PLEADING. PROPERTY. TRESPASS.

The general issue in a writ of entry puts the plaintiff's title in issue, and permits the defendant to rebut the plaintiff's proof, set up title in himself or merely show that the plaintiff has no title. *Wyman* v. *Porter*, 110.

"RECALL."

See FINES.

RECEIPTOR.

See ATTACHMENT.

RECEIVERS.

REVIEW.

See CASES ON REPORT. NONSUIT.

ROADS.

See EASEMENTS. TOWNS. WAYS.

RULES OF COURT.

SALES.

See BANKS AND BANKING. CONTRACTS. ELECTION OF REMEDIES. EXECUTION. HUSBAND AND WIFE. INJUNCTION. LORD'S DAY. MORTGAGES. SCIRE FACIAS. VENDOR AND PURCHASER.

At common law, there may be a complete delivery of chattels sold without receipt or acceptance under the statute.
Beedy v. *Brayman W. W. Company*, 200.

Receipt and acceptance by the buyer of chattels is essential to passing of title.
Beedy v. *Brayman W. W. Company*, 200.

To pass title under a sale, receipt and acceptance by the buyer need not be contemporaneous with the contracts, if made pursuant to it; nor need they be simultaneous. *Beedy* v. *Brayman W. W. Company*, 200.

SCIRE FACIAS.

See ELECTION OF REMEDIES.

Scire facias on a judgment to obtain an alias execution does not lie under Revised Statutes, chapter 78, section 19, where upon the original execution real property has been sold and not levied upon by appraisement and set-off.
Marsh Bros. & Co. v. *Bellefleur*, 354.

A writ of scire facias is amendable in the same manner as declarations in other cases. *Marsh Bros. & Co.* v. *Bellefleur*, 354.

SEARCH AND SEIZURE.

See COMMERCE.

SECRETARY OF STATE.

See STATES.

SEIZIN.

See PROPERTY.

SELECTMEN.

See TOWNS.

SENTENCE.

See CRIMINAL LAW. FINES.

SERVICE OF WRITS.

See ATTACHMENT.

SHERIFFS AND CONSTABLES.

See ATTACHMENT. EXECUTION. MANDAMUS. OBSTRUCTING OFFICERS. TAXATION. TOWNS.

A sheriff could not excuse refusal to execute a writ, directing him to place plaintiff in possession of lands, because he was notified that defendant occupied them as tenant of one who was not a party to the suit, and who was in possession under claim of right. *Webster* v. *Ballou*, 522.

SHERIFF'S DEED.

See EXECUTION.

SIGNATURES.

See BILLS AND NOTES. JUDGES. TOWNS.

STATE OFFICEHOLDER.

See STATES.

STATES.

See STATUTES. TRESPASS.

Revised Statutes, chapter 121, section 11, among other things, provides as follows: "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State, shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void."

Opinions of the Justices, 545.

The State of Maine awarded a contract for doing certain printing for the State to the Waterville Sentinel Publishing Company, a corporation. The work was awarded to the said company after competitive bids had been submitted, it being the lowest bidder. The Secretary of State was a stockholder in the said company and the treasurer of the said company at the time the contract was awarded, although he had nothing to do with the awarding of the contract or with the auditing of the bills presented on account thereof or approval or payment of the same.

Held: That under the provisions of Revised Statutes, chapter 121, section 11, the contract was void. *Opinions of the Justices*, 545.

STATUTE OF FRAUDS.

No act of a seller of chattels can constitute delivery, taking the contract out of the statute of frauds, without receipt and acceptance by the buyer.

Beedy v. *Brayman W. W. Company*, 200.

Acts by an oral contract buyer of chattels, such as offer to resell all or part of the goods, shows receipt and acceptance by him, taking the contract out of the statute of frauds. *Beedy* v. *Brayman W. W. Company*, 200.

STATUTE OF LIMITATIONS.

Under Revised Statutes, chapter 83, section 103, an indorsement by the payee of a payment on a note is insufficient proof of payment to take the case out of the statute of limitations. *Banking Company* v. *Riley*, 17.

Where a trustee of a corporation had indorsed at its inception a note payable to the order of a corporation and he negligently failed to attempt collection of the note before the same was barred by the statute of limitations, and the other officers of the corporation relied on his indorsement, *held* in a suit on the note by the corporation against the trustee that he was estopped to plead the statute of limitations. *Banking Company* v. *Riley*, 17.

STATUTES.

TAXATION.

See CORPORATIONS. EXECUTORS AND ADMINISTRATORS. PROHIBITION. TOWNS.

Municipalities in this State are creatures of the legislature and cannot enlarge their boundaries or taxing jurisdiction by mere user, however long continued. The inconveniences or losses, however great, resulting from boundaries established by the legislature, must be borne until the legislature shall correct them. *Eden* v. *Pineo*, 73.

Though all the real estate upon Bar or Rodick Island has for seventy years or more been taxed in the town of Eden as situated in that town, and the taxes so assessed have been paid to Eden without objection, the owners are not thereby barred or estopped from denying the authority of the tax assessors of Eden to tax such real estate. *Eden* v. *Pineo*, 73.

In a suit by the town of Eden to recover taxes assessed upon the real estate on Bar or Rodick Island, *held* that the town failed to show that the island was within the limits of the town and that it could not recover. *Eden* v. *Pineo*, 73.

A collector of taxes, suing under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3, must show that the tax was legally assessed, legally committed for collection, and that defendant owned or was in possession of the property described in the writ. *Bresnahan* v. *Soap Company*, 124.

In a suit under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3, proof that the tax was legally assessed was eliminated by an admission that the warrant was in proper form, bond filed, and the tax sued for included in the commitment to the collector. *Bresnahan* v. *Soap Company*, 124.

The defense of non-ownership and non-possession was not open, in a suit under Revised Statutes, chapter 10, section 28, to enforce the lien for taxes prescribed by chapter 9, section 3. *Bresnahan* v. *Soap Company*, 124.

Incapacity of a tax collector to sue to enforce a tax lien, on the ground that the vacancy to which he was elected did not legally exist, must be raised by plea in abatement, and cannot, under the general issue, be raised upon the question of proof. *Bresnahan* v. *Soap Company*, 124.

Plea of the general issue, in a suit by a tax collector to enforce a lien, admits his capacity to sue. *Bresnahan* v. *Soap Company*, 124.

(3) That he answered all proper inquiries that were asked him by any of the assessors as to the nature, situation, and valuation of his taxable property, and that he also reduced his answers to writing and subscribed the same, if so requested. *Powell* v. *Old Town*, 532.

A tax payer should not be taxed for money at interest if he is owing debts in excess of the amount at interest, but if so taxed he will be barred from the right to apply for an abatement if he has refused to answer the questions asked him by the assessors concerning his money at interest.
Powell v. *Old Town*, 532.

Under Revised Statutes, chapter 9, sections 73-75, relating to taxation for money at interest April 1st, an inquiry was made by assessors on June 10th, concerning money which the plaintiff had at interest, *held* that the inquiry must be deemed predicated on what money the plaintiff had at interest on April 1 of the same year. *Powell* v. *Old Town*, 532.

Under Revised Statutes, chapter 9, sections 73-75, relating to taxation for money at interest April 1st, inquiries made by assessors of plaintiff on June 10th were not too late to charge him with such taxes; it appearing that the current tax lists had not been completed and committed to the collector, and that the assessors had proceeded with due diligence in making up the lists.
Powell v. *Old Town*, 532.

'Reasonable time,'' to which assessors are entitled in making inquiries as a basis for assessment for money at interest April 1st, under Revised Statutes, chapter 9, sections 73-75, is such period as may be properly allowed, having regard to the nature of the act and to the attending circumstances; the quoted term being flexible. *Powell* v. *Old Town*, 532.

TENANCY AT WILL.

See LANDLORD AND TENANT.

TENDER.

See INSURANCE.

TIME.

See LANDLORD AND TENANT.

TITLE.

See ADVERSE POSSESSION. DEEDS. PRESUMPTIONS. PROPERTY. REAL ACTIONS. TRESPASS.

TORTS.

See DECEIT. TRESPASS.

TOWN MEETINGS.

See TOWNS.

TOWNS.

See CONSTITUTIONAL LAW. EASEMENTS. PAUPERS. PROHIBITION. TAXATION. WAYS.

Inhabitants of a town being vested with the fee to school lots can waive trespass in cutting timber thereon and sue in assumpsit; the right of action not resting in the special corporation created by Revised Statutes, chapter 16, sections 50-59, as trustees of the ministerial and school funds.

Millinocket v. *Mullen*, 29.

The body of upland of about seventy acres in extent known as Bar Island, or Rodick Island, in tidewaters in Frenchman's Bay, north of Bar Harbor, and something over one hundred rods distant therefrom, is a separate island and not a part of Mt. Desert Island, though there be a bar between the two which is left bare by the tide twelve hours out of every twenty-four.

Eden v. *Pineo*, 73.

The act of Feb. 17, 1789, incorporating the original town of Mt. Desert described the territory of the new town as "The plantation called Mt. Desert together with the islands called Cranberry Islands, Bartlett's Island, Robertson's Island and Beech Island," no mention being made of Bar or Rodick Island. In the absence of evidence that "the plantation called Mount Desert," included Bar or Rodick Island, it must be held that it was not included in that town, and hence not included in the town of Eden which was set off from the town Mount Desert without mention of the island in question.

Eden v. *Pineo*, 73.

A constable's return upon warrants for ward meetings is fatally defective, and cannot be made the basis of a legal town or city meeting, where it fails to state that they were posted in public and conspicuous places.

Bresnahan v. *Soap Company*, 124.

TRAIN DISPATCHER.

See MASTER AND SERVANT.

TRESPASS.

See ADVERSE POSSESSION. EASEMENTS. EXECUTION. PRESUMPTIONS. PROPERTY. REAL ACTIONS.

TRIAL.

See CRIMINAL LAW. DECEIT. EQUITY. EXCEPTIONS. FRAUD. MASTER AND SERVANT. VENDOR AND PURCHASER.

TRUST DEEDS.

See MORTGAGES. TRUSTS.

TRUSTEES.

See MORTGAGES.

TRUSTS.

See COURTS. DEEDS. DRUNKARDS. MORTGAGES. WILLS.

VENDOR AND PURCHASER.

See CONTRACTS. DRUNKARDS. EXECUTION. FRAUD. MINES AND MINERALS. SALES. TRIAL.

In an action to recover back money which a plaintiff claims he was induced to pay by the false representations of the defendant, it is incumbent on the plaintiff to show that the representations were made intentionally, with the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them; that they were false, and were known by the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that they were expressions of past or existing facts, and not expressions of opinion; that they were material; and that he relied upon them, was deceived, and was thereby induced to part with his money.

Hotchkiss v. *Coal & Iron Company*, 34.

There is no legal distinction between representations by an owner of the qualities of a thing which he proposes and agrees to sell at the option of a prospective purchaser, and similar representations made by him concerning the qualities of another thing which he agrees first to buy, and then to include in the sale to the same purchaser; and false representations respecting the qualities of the latter thing may be actionable.

Hotchkiss v. *Coal & Iron Company*, 34.

What is a reasonable time within which the right of rescission of a contract must be exercised, when the facts are undisputed, is a question of law; but when the facts are in dispute, the question of reasonable time must be submitted to the jury with appropriate instructions.

Hotchkiss v. *Coal & Iron Company*, 34.

In an action to recover back money paid for an option to buy land because of the alleged false representations of the vendor, *held* that the evidence was sufficient to support a verdict for the plaintiff.

Hotchkiss v. *Coal & Iron Company*, 34.

Under Revised Statutes, chapter 93, section 39, providing that, when any bill in which a materialman's lien is claimed is filed with the town clerk, he shall file in the registry of deeds a certificate stating the names of the parties and describing the property, etc., the town clerk's certificate, so filed, is notice to the world that the lienor asserts a lien upon the property described, so that one thereafter purchasing it does so at his risk.

Witham v. *Wing*, 364.

Where the plaintiff brought an action to recover damages for an alleged failure on the part of the defendant to convey to him certain real estate according to the terms of a written contract and a verdict was ordered for the plaintiff, *held* that the evidence was sufficient to support a finding that

WEIRS.

See FISH AND FISHERIES.

WILLS.

See DEEDS. DESCENT AND DISTRIBUTION. TRUSTS.

While in construing a will every clause and word should be considered, yet a clause which is unnecessary for its declared purpose and is repugnant to the other provisions of the will and unexplainable except upon the assumption that it results from an error of the scrivener, will be disregarded. *Moulton* v. *Chapman*, 417.

A testamentary remainder will not be construed to be contingent, if, consistently with testator's intention, it can be deemed vested.
Moulton v. *Chapman*, 417.

A will and codicil directed payment of income to the testatrix's brother during his life, and that, at his death, the principal be paid to a specified person, etc. *Held*, that the remainder was vested, and not contingent, entitling the remainderman's administrator to payment.
Moulton v. *Chapman*, 417.

A "reservation" in a will may be construed as an exception in order to effectuate the testator's intent. *McIntire* v. *Lauckner*, 443.

Where a testator reserved the burying ground on his farm "to be one quarter of an acre of land," . . . . . "the graveyard to be for the use of the family forever in common," *held* that the reservation should be construed as an exception, though no words of inheritance were contained in the reservation, and that the fee to the excepted lot descended to the testator's heirs. *McIntire* v. *Lauckner*, 443.

Where a testator by his will made in 1844, and proved and allowed in 1849, excepted a burying ground on his farm "to be one quarter of an acre" but boundaries were never set up except as to a lot 32 feet square, *held* that the exception was inoperative to give title in anything more than the lot actually marked. *McIntire* v. *Lauckner*, 443.

A letter or other document containing explicit directions for the disposition of property cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely described and referred to in the will as an existing document as to be readily identified as the particular paper intended by the testator.
Fitzsimmons v. *Harmon*, 456.

A testator made a will reading as follows:
"I Elizabeth Doherty, being in my right mind at this date (October 13th, 1909), wishing to dispose of property now in my name, give, devise and bequeath my property of whatever kind to Isabelle C. Harmon, to divide as seems to her best as I have told her my wishes in the matter, mentioning all relatives including my nephews. I name Isabelle C. Harmon as my executor."

WITNESSES.

WORDS AND PHRASES.

WRIT OF ENTRY.

See REAL ACTIONS.

WRITS.

See ATTACHMENT. EXECUTION. INJUNCTION. MANDAMUS. PROHIBITION. SCIRE FACIAS.

APPENDIX

"For the want of an appendix I lost my ship."
Jason.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF PENNSYLVANIA.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

STATUTES OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

1903, chapter 29, section 64, - - - - - - - - - - 338
1903, chapter 47, section 26, - - - - - - - - - - 272
1903, chapter 49, section 4, paragraph VII, - - - - - - 506
1903, chapter 49, section 93, - - - - - - - - - - 429
1903, chapter 62, section 4, - - - - - - - - - - 96
1903, chapter 65, sections 28-33, 34, - - - - - - - 350
1903, chapter 67, section 21, - - - - - - - - - 384
1903, chapter 76, section 1, - - - - - - - - - - 456
1903, chapter 76, section 16, - - - - - - - - - - 417
1903, chapter 78, section 19, - - - - - - - - - - 354
1903, chapter 78, sections 33, 36, - - - - - - - - - 341
1903, chapter 79, section 5, - - - - - - - - - - 472
1903, chapter 79, section 6, paragraph XI, - - - - - - 472
1903, chapter 79, section 17, - - - - - - - - - - 96
1903, chapter 79, section 21, - - - - - - - - - - 335
1903, chapter 79, section 30, - - - - - - - - - - 307
1903, chapter 83, section 21, - - - - - - - - - - 253
1903, chapter 83, section 64, paragraphs 6, 9, - - - - - - 263
1903, chapter 83, sections 100, 103, - - - - - - - 17, 381
1903, chapter 84, section 10, - - - - - - - - - - 354
1903, chapter 84, section 34, - - - - - - - - - - 137
1903, chapter 84, section 98, - - - - - - - - - - 241
1903, chapter 89, section 7, - - - - - - - - - - 350
1903, chapter 93, sections 29, 31, - - - - - - - - 221, 435
1903, chapter 93, sections 31, 39, 40, 41, - - - - - - - 364
1903, chapter 93, section 54, - - - - - - - - - - 538
1903, chapter 96, sections 1, 2, 3, - - - - - - - - 258, 527
1903, chapter 104, section 18, - - - - - - - - - - 522
1903, chapter 106, section 6, - - - - - - - - - - 137
1903, chapter 106, section 9, - - - - - - - - - - 522
1903, chapter 109, section 20, - - - - - - - - - - 34
1903, chapter 113, section 4, - - - - - - - - - - 200
1903, chapter 121, section 11, - - - - - - - - - - 545
1903, chapter 123, sections 21, 22, - - - - - - - - - 239
1903, chapter 125, section 25, - - - - - - - - - - 303

ERRATA.

Leathers v. *Stewart*, page 96, third head note, first line, strike out "amendment" and substitute therefor "annulment."

Bartlett v. *McIntire*, page 165, line 18 from top of page, strike out "1901" and substitute therefor "1891."

Ilium Fuit.